Sexual Consent and Disability

Jasmine E. Harris

Abstract

Our nation is engaged in deep debate over sexual consent. But to date the discussion has overlooked sexual consent's implications for a key demographic: people with mental disabilities, for whom the reported incidence of sexual violence is three times that of the nondisabled population. Even as popular debate overlooks the question of sexual consent for those with disabilities, contemporary legal scholars critique governmental overregulation of this area, arguing that it diminishes the agency and dignity of people with disabilities. Yet in defending their position, these scholars rely on empirical data from over twenty years ago, when disability and sexual assault laws and social norms looked quite different than those of today.

Current scholarly discussions about sexual consent and mental disability suffer from an outdated empirical baseline that masks critical information about the profile and experience of sexual violence. This Article creates a new empirical baseline for modern scholarship on sexual assault and disability. Based on an original survey of all fifty states and jurisprudence from the past twenty years of state sexual assault and rape appeals where the victim has a mental disability, this Article updates and critiques four major claims about sexual consent and disability in the current literature. First, through a review of statutes across the country, it complicates the traditional notion that statutes are unduly vague in their definition of disability, and as a result, either overor underemphasize

disability. The author advances a new organizing taxonomy for sexual assault statutes addressing consent for people with mental disabilities. Second, this dataset upends the prevailing claim by legal scholars that courts overemphasize standardized evidence such as intelligence quotient (IQ) or mental age when judging a person's functional capacity to consent to sex. Instead, this Article shows that courts frequently look at adaptive abilities to augment standardized evidence but, in doing so, overvalue certain kinds of adaptive evidence that have low probative value, to the detriment of persons with mental disabilities. Third, legislators and legal scholars focus on people in large institutional settings in their critiques of overregulation, but this new data shows that people in community-based settings are more often the complainants in rape and sexual assault cases. This raises important questions about the types of relation ships the state regulates (formal versus informal care relationships), the location of these relationships (community versus institutional settings), and issues of class that intersect with disability and sexual regulation. By not addressing the right issues and contexts, current law leaves people with mental disabilities simultaneously more susceptible to sexual violence and less empowered to exercise sexual agency. Finally, the Article more deeply examines the traditional assumption that people with disabilities rarely have access to testify by considering a rarely-mentioned risk: whether testimony by people with disabilities skews capacity determinations because factfinders cannot see beyond the existence of the disability—a phenomenon which the author terms "the aesthetics of disability." This Article calls upon scholars, courts, and policymakers to consider difficult questions of regulating sexual consent in ways that are

consistent with the current profile and experience of sexual violence for people with mental disabilities reflected in this study.

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Introduction

On June 9, 2017, a New Jersey appellate court reversed the conviction of a former Rutgers University Professor, Anna Stubblefield, for sexual assault of D.J., a man with significant developmental disa bilities found to be incapable of consent.[1] The appellate court held that the lower court committed reversible error[2] by denying Stubblefield the opportunity to proffer evidence of D.J.'s use of "facilitated communication," a form of assisted communication in which people who cannot communicate orally point or type their messages.[3] Stubblefield and D.J.'s

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1. State v. Stubblefield, 162 A.3d 1074 (N.J. Super. Ct. App. Div. 2017).

2. Id. at 1082–83 ("Unfortunately, the court, in its attempt to cleanse the record of controversial FC methodology, limited the evidence to the extent that defendant was not given a fair opportunity to present her defense.").

3. See, e.g., Donald N. Cardinal & Mary A. Falvey, The Maturing of Facilitated Communication: A Means Toward Independent Communication, 39 RES. & PRAC. FOR PEOPLE WITH SEVERE DISABILITIES 189, 190 (2014) ("[Facilitated Communication] involves both a person who needs support or facilitation to communicate and a communication partner. The communication partner provides support in a variety of ways. The communication partner might provide emotional support to encourage communication or might help the person to focus on the keyboard, array of pictures, letters, or words[,] . . . or physical support to stabilize . . . movement, inhibit impulsive typing, or to encourage the initiation of typing or pointing."). See also id. at 191–92 (discussing controversy in media and scholarship surrounding the method).

relationship began when D.J.'s brother Wesley, one of Stubblefield's students at Rutgers, approached the professor after hearing her lecture on facilitated communication. Wesley inquired about the possibility of using this method with his brother, who was nonverbal.[4]

After working with D.J., Stubblefield told Wesley and his mother that she believed D.J. had been misdiagnosed as intellectually disabled because of his inability to communicate and that his use of facil itated communication demonstrated his cognitive capabilities.[5] Two years after meeting, Stubblefield and D.J. approached D.J.'s family and revealed their romantic and sexual relationship and Stubblefield's plans to leave her husband to start a life with D.J.[6] Upon hearing this news, Wesley and his mother, believing that D.J. could not actually communicate in the ways described by Stubblefield, pursued criminal prosecution for sexual assault on D.J.'s behalf.[7]

The trial court determined that evidence that D.J. had engaged in "facilitated communication" with Stubblefield did not meet the rigorous

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4. Daniel Engber, The Strange Case of Anna Stubblefield, N.Y. TIMES (Oct. 20, 2015), https://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html.

5. Id.

6. Wesley and his mother served as co-plenary guardians for D.J. after a judge determined that D.J. lacked the general capacity for decision-making under New Jersey's guardianship law, N.J. STAT. ANN. § 3B:12-25. Stubblefield, 162 A.3d at 1076.

7. Id. at 1076–77.

evidentiary standards for admission as scientific evidence.[8] Evi dence of facilitated communication was central to Stubblefield's defense because it demonstrated both D.J.'s capacity[9] to consent and his affirmative consent to the sexual relationship with Stubblefield.[10] Without this evidence, Stubblefield's entire case turned on her charac terization of their relationship versus testimony from D.J.'s family and doctors that he was incapable of consent on the basis of severe disabil ities (such as his use of "diapers") and the jury's observation of D.J. (who was unable to walk, nonverbal,

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8. Id. at 1080–81. While the trial court did not exclude all mention of facilitated communication, it effectively excluded any meaningful opportunity for Stubblefield to offer expert testimony on its acceptance and use in her defense. Id.

9. This Article's use of the term legal "capacity," as opposed to legal "competency," is in line with the efforts of domestic and international disability rights law scholars to demonstrate the breadth of the former category. See, e.g., STEVEN B. BISBING, Competency and Capacity: A Primer, in LEGAL MEDICINE 325, 325 (Shafeek S. Sanbar ed., 7th ed. 2007); Jasmine E. Harris, The Role of Support in Sexual Decision-Making for People with Intellectual and Developmental Disabilities, 77 OHIO ST. L.J. FURTHERMORE 83, 86–95 (2016) (discussing definitions and international norms of legal capacity).

10. Stubblefield, 162 A.3d at 1081 ("The jury was left with no evidence that any other lay or expert person believed D.J. to have the intellectual capacity to consent to sexual activity.").

and prone to drool).[11] Without the use of facilitated communication, D.J. did not testify and only appeared once during the prosecutor's opening arguments, presumably only to show to the jury the physical manifestations of his disabilities.[12] The jury found D.J. incapable of consent and convicted Anna of two counts of sexual assault of a person "intellectually or mentally incapacitated" under New Jersey law.

Dubbed "The Strange Case of Anna Stubblefield" by the New York Times,[13] this case briefly brought the question of legal capacity to consent for people with disabilities front and center, despite the fact that sexual assault and affirmative consent for nondisabled people, particularly on college campuses, receives the lion's share of media attention and dominates the public discourse on sexual consent.[14] Power dynamics as well

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11. Id. at 1076, 1080–81.

12. See infra Section III.C (describing the prosecutor's use of D.J. as a demonstrative exhibit and advancing the "aesthetics of disability").

13. See Engber, supra note 4.

14. One news reporter has described this focus as "a public reckoning with rape." Amanda Hess, How Movies and TV Address Rape and Revenge, N.Y. TIMES (Jan. 12, 2017), https://www.nytimes.com/2017/01/12/arts/television/how-movies-and-tv-address-rape-and-revenge.html. From campus sexual assault cases like Stanford University's Brock Turner and Columbia University's Paul Nungesser to sports and celebrity icons like Bill Cosby and Kobe Bryant, rape occupies space on the daily news docket. See, e.g., Robin Abcarian, As We Celebrate Kobe Bryant's Career, We Should Remember Too Its Darkest Chapter, L.A. TIMES (Dec. 10,

2015, 4:00 AM), http://www.latimes.com/local/abcarian/la- me-1210-abcarian-kobe-bryant-20151210-column.html (discussing Kobe Bryant's rape trial and its aftermath); Graham Bowley, Judge in Cosby Case Sets Retrial for Nov. 6, N.Y. TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/arts/bill-cosby-retrial-date.html (discussing Cosby rape retrial); Kate Taylor, Columbia Settles with Student Cast as a Rapist in Mattress Art Project, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/ nyregion/columbia-settles-with-student-cast-as-a-rapist-in-mattress-art-project.html (discussing Columbia University's management of sexual assault allegations against Paul Nungesser by another student, Emma Sulkowicz, and their decision to carry a fifty-pound mattress with them to protest the university's response to her allegations); Daniel Victor, Judge in Stanford Sexual Assault Case Is Cleared of Misconduct, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/us/aaron-persky-stanford-rape-case.html (discussing Brock Turner case). A targeted search of New York Times news articles over the past year alone resulted in over 3400 unique news articles that discuss the issues of rape or sexual assault. Lexis Nexis search News/U.S. News/January 1, 2017 to December 31, 2017/New York Times = 3452 search results (Jan. 7, 2018). See also Melena Ryzick, Taylor Swift Spoke Up. Sexual Assault Survivors Were Listening, N.Y. TIMES (Aug. 16, 2017), https://www.nytimes.com/2017/08/15/arts/music/taylor-swift-sexual-assault.html (discussing impact of the pop star's successful countersuit against radio host on young women nationwide).

as differences in physical, mental, and communication abilities and race[15] generated intense public reactions; some characterized Stubblefield as "sick" and a "predator,"[16] while others viewed her and D.J. as victims of

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15. See Engber, supra note 4 ("Anna is white and D.J. is black."); see also Shelley Tremain, The Racialized Reception of the Verdict in the Trial of Anna Stubblefield, DISCRIMINATION & DISADVANTAGE (Oct. 14, 2015), http://philosophycommons.typepad. com/disability_and_disadvanta/2015/10/the-racialized-reception-of-the-verdict-in-the-trial-of-anna-stubblefield.html ("Virtually no mention has been made of the fact that Stubblefield is white and the victim is African American. [A]mong the questions that ought to be asked [are] How has race configured the reception of, and responses to, the verdict within the feminist philosophical community and within the disability studies community?").

16. Engber, supra note 4. See also Daniel Engber, A Second Chance for Anna Stubblefield, SLATE (June 14, 2017, 1:46 PM), http://www.slate.com/articles/ health_and_science/science/2017/06/the_conviction_in_the_anna_stubblefield_facil itated_communication_case_has.html ("[Stubblefield's] relationship with D.J. was, if not a predatory con, then a Ouija-board fantasy.").

classism, "ableism,"[17] and racism that deny them the opportunity for a loving, sexual relationship.[18]

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17. "Ableism" refers to a descriptive and normative concept in critical disability theory that social institutions are designed around a fictional, able-bodied individual without regard for those with different physical and mental abilities. See TOBIN SIEBERS, DISABILITY THEORY 7–9 (2011) (discussing the "ideology of ability" and social design choices); see also DAN GOODLEY, DIS/ABILITY STUDIES: THEORISING DISABLISM AND ABLEISM 21 (2014) (explaining that ableism "privileges able-bodiedness; promotes smooth forms of personhood and smooth health; creates space fit for normative citizens; encourages an institutional bias towards autonomous, independent bodies; and lends support to economic and material dependence on neoliberal and hyper-capitalist forms of production."); FIONA KUMARI CAMPBELL, CONTOURS OF ABLEISM: THE PRODUCTION OF DISABILITY AND ABLEDNESS 4 (2009) ("Disablism is a set of assumptions (conscious or unconscious) and practices that promote the differential or unequal treatment of people because of actual or presumed disabilities.").

18. See, e.g., Jeff McMahan & Peter Singer, Opinion, Who Is the Victim in the Anna Stubblefield Case?, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/ opinion/who-is-the-victim-in-the-anna-stubblefield-case.html (describing a very different reaction to the case than that held by the mainstream media and the jury in this case); Kevin Mintz, Ableism, Ambiguity, and the Anna Stubblefield Case, 32 DISABILITY & SOC'Y 1666, 1666–69 (2017) (discussing the abelist attitudes in the Stubblefield case, though critiquing Singer's and Jeff McMahan's conception

Whatever visceral reaction one might have to the facts or the out come of this particular case,[19] the Stubblefield example illustrates the high stakes of sexual regulation in the context of cognitive disability.[20] On the one

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of harm as problematic to dignity).

19. On March 23, 2018, Anna Stubblefield pled guilty to third degree aggravated criminal sexual contact as part of a plea deal with the Essex County prosecutor's office. Colleen Flaherty, Former Professor Admits to Assaulting Disabled Man, INSIDE HIGHER ED (Mar. 23, 2018), https://www.insidehighered.com/quicktakes/2018/03/23/former- professor-admits-assaulting-disabled-man. She was awaiting a new trial after the appellate court decision last year. The acceptance of a plea deal does not negate the demonstrative value of this case, the empirical data analyzed in this Article, or the take-away lessons. Similar stakes, difficult legal questions, and evidentiary ambiguities arise in any case where the victim has a cognitive impairment and/or non-verbal communication.

20. This Article refers to people with "cognitive disabilities" or "mental disabilities" as the broadest category that includes older adults with long-term cognitive impairments as well as people with developmental disabilities and those with intellectual disabilities. Intellectual disability is most often characterized by significant limitations in intellectual functioning based on standardized intelligence tests and the resulting intelligence quotient (IQ), usually a score below seventy-five; limitations in adaptive behavior (of three skill types: conceptual skills, social skills, and practical skills); and early onset of the disability before the age of eighteen years. RL SCHALOCK ET AL., AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION,

hand, if the trial court correctly held that D.J. lacked the capacity to consent, then the state has protected D.J. from predation. However, if D.J. actually had the mental capacity to consent and it was masked by communication impairments, as Stubblefield initially argued,[21] then the state has illegitimately (and unconstitutionally) denied the sexual agency of two

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INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010). According to the U.S. Census, 53.6 million people in the United States had some kind of disability in 2010. This represents approximately 19 percent of the total non-institutionalized U.S. population. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 4 (2012). Use of the umbrella term people with "mental disabilities" in this Article does not include people with psychiatric or psychosocial disabilities. For a discussion of the sexual rights and restrictions for this population, see generally Michael L. Perlin & Alison J. Lynch, "All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex, 89 WASH. L. REV. 257 (2014) (discussing the existence of a presumption of incompetence in the context of mental disability and sexuality and arguing against such a presumption); Michael L. Perlin, Everybody is Making Love/Or Else Expecting Rain: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia, 83 WASH. L. REV. 481, 509 (2008) ("[W]e must take our heads out of the sand and confront the fact that institutionalized psychiatric patients—like the rest of us—think about sex. It is a fatal error to think otherwise.").

21. See supra note 19.

consenting adults and sent a clear normative message about the ability of people with disabilities to enter into romantic and sexual relationships.[22]

The Stubblefield case highlights the critical role of evidence law in resolving legal and factual uncertainties in sexual assault cases involving people with cognitive disabilities. The New Jersey appellate court grounded its reversal on the lower court's misapplication of New Jersey's rules on expert testimony and not in any particular policy argument or concern. The lower court had excluded evidence of facil itated communication as unreliable and, consequently, had sought to "cleanse the record of controversial FC methodology" without due attention to potentially exculpatory evidence not rooted in FC (including potentially highly probative testimony from lay and expert witnesses on D.J.'s cognitive and functional capacities).[23]

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22. The Ninth Circuit recently recognized the potential application of the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), in cases of sexual assault where the victim has a mental disability. See Anderson v. Morrow, 371 F.3d 1027, 1033 (9th Cir. 2004) (Berzon, J., dissenting). Although the majority rejected Lawrence's applicability to the facts of the case before the court, Judge Berzon disagreed: "[The statute's] definition of 'mentally defective,' which ultimately determines whether or not [the victim with a disability] can legally consent to sex, implicates the sexual liberty interest fleshed out in Lawrence v. Texas, and therefore does impinge directly on constitutionally protected conduct." Id. at 1040. The Supreme Court has not yet addressed the question of state statutory definitions and the applicability of Lawrence v. Texas in the context of disability.

23. Stubblefield, 162 A.3d at 1083 ("The factual setting here was

Furthermore, the Stubblefield case also reveals peculiarities in the way in which legal institutions and scholars think about sexual reg-ulation and mental disability. A fundamental descriptive claim in disa bility scholarship is that states overregulate the sexual agency of people with cognitive disabilities through overly-broad sex offense statutes and risk-averse judicial interpretations of those laws (which assign criminal liability to sexual partners of certain people with mental disabilities).[24] However, even when these claims are made by scholars today, this core assertion and its related

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extraordinary, and it called for a liberal admission of evidence supporting defendant's defense The jury was not presumptively gullible . . . [and] did not have to be shielded from employing its common sense to fairly evaluate the testimony from both sides.").

[24] See, e.g., Alexander A. Boni-Saenz, Sexuality and Incapacity, 76 OHIO ST. L.J. 1201, 1213–23, 1253 (2015) (describing the current case law on incapacity and its effect as "unduly restrictive" and "contributing to pernicious social norms"); Joseph J. Fischel & Hilary R. O'Connell, Disabling Consent, or Reconstructing Sexual Autonomy, 30 COLUM. J. GENDER & L. 428, 430 (2015) ("We worry that . . . paternalist legislation may unjustifiably impede persons with disabilities' wanted sexual relations, reflect the phobic conjunction of disability with asexuality or pathological sexuality, and reiterate the common, careless equivalence of disabled adults and children."); Perlin & Lynch, supra note 20, at 297 (arguing that the case law "reflects the ongoing infantilization [and restriction of the sexuality] of women with mental disabilities").

prescriptions rely on empirical data that is now two decades old.[25] Though this data forms the foundation for much of the prevailing scholarly

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[25.] Deborah W. Denno, Sexuality, Rape, and Mental Retardation, 1997 U. ILL. L. REV. 315, 349 (surveying the legal landscape, noting that "all tests appear to judge mentally retarded victims under a higher consent standard than nonretarded victims;") see, e.g., Alexander A. Boni-Saenz, Sexual Advance Directives, 68 ALA. L. REV. 1, 8 n.35 (2016) (citing Professor Denno's survey of statutory tests for consent); id. at 27 n.146 (building on Professor Denno's work to support conclusion on default rules in sexual consent); Boni- Saenz, supra note 24, at 1221–22 (discussing Professor Denno's proposed legal test based on her survey); Russell L. Christopher & Kathryn H. Christopher, The Paradox of Statutory Rape, 87 IND. L.J. 505, 536–37 (2012) (relying on Professor Denno's survey to opine on rape in the context of intellectual disability); Elizabeth Emens, Intimate Discrimination: The State's Role in the Accidents of Sex and Love, 122 HARV. L. REV. 1307, 1313 n.9 (2009) (explicitly incorporating empirical and normative work of Professor Denno from 1997 study); Harris, supra note 9, at 84 (responding to Professor Boni-Saenz's prescription in comparison to Professor Denno's approach in her study); Elizabeth Nevins- Saunders, Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape, 85 N.Y.U. L. REV. 1067, 1101 n.162 (2010) (drawing upon Professor Denno's survey in discussion regarding defendants with intellectual disabilities in statutory rape cases); see also Fischel & O'Connell, supra note 24, at 485–86 (suggesting reforms to sexual assault law building off of Denno's work in her 1997 article).

assumptions that underscore claims of overregulation—in particular, over-reliance on standardized evidence and a focus on people with disabilities living in institutional settings as opposed to community-based settings—it is outdated and has not been reexamined since its publication twenty years ago. Since the last major empirical intervention twenty years ago by Professor Deborah Denno, rape and sexual assault law[26] and disability rights

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[26.] Most notably, consent has become the modern bedrock principle driving sexual assault legislation, a shift away from an earlier analytical and theoretical emphasis on force and resistance. See, e.g., Michelle J. Anderson, Campus Sexual Assault Adjudication and Resistance to Reform, 125 YALE L.J. 1940, 1943 (2016) (contextualizing the application of Title IX to campus sexual assault within a broader history of rape law reform and its backlash to advance argument that campus adjudication is a positive development); Allegra M. McLeod, Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform, 102 CALIF. L. REV. 1553, 1554–55 (2014) (discussing the regulatory landscape over time). See also John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1102–09 (2011) (discussing the requirement of resistance for rape under the current law of most states); Jed Rubenfeld, The Riddle of Rape-by- Deception and the Myth of Sexual Autonomy, 122 YALE L.J. 1372, 1375–81 (2013) (arguing that autonomy fails as the governing principle of modern rape law because it cannot be reconciled with the law's contempt for a crime of rape-by-deception); Deborah Tuerkheimer, Rape on

law[27] have ushered in new regulatory priorities and normative ideals that

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and off Campus, 65 EMORY L.J. 1, 40–43 (2015) (arguing that there is a problematic disconnect between cultural norms of sex and legal definitions of rape and proposing sexual agency as the theoretical thread); Deborah Tuerkheimer, Sex Without Consent, 123 YALE L.J. ONLINE 335, 335–41 (2013) [hereinafter Sex Without Consent] (contending with Rubenfeld's critique, agreeing with the need for a new governing norm, but arguing that sexual agency, not "autonomy," should be the central focus of regulation).

27. For example, twenty-seven years after the promulgation of the Americans with Disabilities Act, the federal declaration that disability rights are indeed civil rights, courts are only beginning to grapple with the notion of disaggregating legal capacity for people with disabilities—that is, how to develop and apply legal tests for decisional capacity that more accurately reflect recent research on the fluid and differentiated nature of mental capacity. Institutions such as plenary guardianship are being challenged as unduly restrictive of the rights of people with intellectual disabilities and developmental disabilities, and theoretical conceptions of supported decisionmaking are making their legislative debuts in statutes and doctrine in the U.S. See, e.g., Supported Decision-Making Agreement Act, TEX. EST. CODE ANN. § 1357 (West 2015) (recognizing supported decision-making agreements as legally recognized and enforceable alternatives to guardianship); Harris, supra note 9, at 92–93 (discussing international norms of supported decisionmaking in U.S. law); Jasmine E. Harris, Processing Disability, 64 AM. U. L. REV. 457, 511–14 (2015) [hereinafter

call into question the reliability of older data. Thus, the growing field of disability rights scholarship has an entrenched conventional wisdom that is premised on an obsolete understanding of case law and statutes. Reliance on such outdated data has led to a failure to appreciate how disability fits into these changing norms and ideals, and how the law has evolved to keep pace with them.

This Article creates a new empirical baseline for modern scholarship on sexual assault and disability and, in doing so, finds that claims of over-regulation—and the overapplication of related normative and prescriptive interventions—are overstated or in need of redirection.[28] This Article examines fifty state statutes plus the District of Columbia and 172 sexual assault and rape decisions (i.e., covering the waterfront of the last twenty years of publicly available case law) related to cog nitive disability and capacity to consent to sex. Based on this new empirical data, this Article examines and complicates four major descriptive elements of contemporary legal scholarship on sexual regulation and mental disability.[29]

Processing Disability] (discussing recent guardianship cases that seek to limit plenary guardianships).

28. The empirical assessment in this Article suggests that statutory construction in some states may actually leave people with mental disabilities more susceptible to abuse. See infra Section III.A. Thus, statutory reforms of existing case law are welcome and necessary, but are not the sine qua non path to greater recognition of sexual agency for people with mental disabilities.

29. See infra Section II.C.

First, this Article revises the claim in existing legal scholarship, which assumes that the definition of disability is unduly vague in state statutes without enough legislative guidance to ensure that courts are not substituting their own moralizing judgments for interpretative gaps.[30] States have moved in the direction of explicit definitions of disability in incapacity statutes; however, the move to clarify has gen erated other problems. Rather than offer much needed guidance on how to value and weigh functional incapacities such as self-care, employability, or education, the statutes offer medical definitions of disability. A danger in entrenching medical definitions in the statute is to make the existence of a mental disability more salient in the adjudicatory process rather than the more relevant inquiry as to the effects of the impairment on incapacity to consent.

Second, this new data upends the prevailing understanding that factfinders are overly reliant on traditional diagnostic sources, such as intelligence quotient (IQ) or mental age, to resolve questions of consent. Many scholars have claimed that courts overemphasize standard ized evidence and should increase reliance on evidence of adaptive capabilities.[31] Results from this Article's empirical study, however, show that courts regularly supplement IQ scores and mental age with evidence of adaptive capabilities, such as self-care, decisionmaking capabilities in other areas, and communication through assistive tech nology.[32] Though

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30. See infra Section II.A.

31. See infra Section II.C.

32. This type of adaptive evidence creates a more complex picture of a

the prevailing scholarship suggests that reliance on traditional diagnostic sources may obscure the nuance and variation in an individual's capacity to consent, courts that rely instead on adaptive capabilities may end up producing the same results. The critical issue here is the type and weight ascribed to evidence of different functional capacities (or the lack thereof) because overvaluing certain kinds of adaptive evidence that have low probative value can be detri mental to persons with mental disabilities. For example, what is the proper weight assigned to the fact vividly repeated to the jury that

D.J. used a "diaper" and could not independently use the restroom? How probative of sexual consent is his inability to make independent medical and financial decisions?

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person's capabilities beyond the standardized test scores and could produce a different substantive outcome in cases. An intelligence quotient (IQ) score measures an individual's intellectual functioning. John Matthew Fabian et al., Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability/Mental Retardation Cases, 59 CLEV. ST. L. REV. 399, 420–26 (2011) (discussing the assessment of adaptive functioning as potential evidence of intellectual functioning); Leigh D. Hagan et al., Assessing Adaptive Functioning in Death Penalty Cases After Hall and DSM-5, 44 J. AM. ACAD. PSYCHIATRY L. 96, 97–101 (2016) (recognizing three broad skill domains for assessment of adaptive functioning: conceptual, social, and practical adaptive, when analyzing an individual's intelligence).

Third, this Article exposes misplaced assumptions about the con text in which people with mental disabilities experience sexual violence. Among the cases reviewed, approximately 76% of victims in sexual assault and rape cases lived with family or independently in community settings.[33] Contemporary scholarship, however, focuses on people with mental disabilities living in institutional settings or group homes with more formal care relationships regulated by civil tort law.[34] Recently, several states have added separate criminal provisions to account for sexual violence within formal care relationships. The cases reviewed illustrate a disconnect between the state's perception of sexual violence in these more structured settings and the increasing violence occurring in more informal settings, including sexual assault perpetrated by people who sit

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33. See Jasmine E. Harris, Empirical Research on Case Law and State Statutes (Apr. 2, 2018) (unpublished Excel files) (on file with author).

34. Such relationships are regulated under institutional and caregiver liability under agency theories, malpractice, and professional liability under separate state licensing rules. See, e.g., Perlin & Lynch, supra note 19, at 287–88 (discussing obligations under tort law including professional licensing regulations). Sexual violence in institutional settings presents a host of empirical challenges regarding detection and measurement of incidence of violence. The point is not to deny the risks of violence, underreporting, and prosecution on behalf of those in institutional settings, but rather to reveal the underappreciated risks to those who live outside of institutions where the regulatory structures are more established and the incidence of violence is significant.

outside the law's regulatory reach (e.g., people who are not paid caregivers, blood relatives, teachers, or, like Stubblefield, treating therapists).[35] Expanding the diagnostic periphery in this way reveals unexplored, novel questions about the types of relationships regulated by the state, the scope of regulation, and the new realities of community integration, that, if unanswered, could expose people with disabilities to greater sexual violence with greater constraints on agency.

Finally, this Article argues that much of the scholarly focus on whether a person with a disability is competent to testify is missing a more fundamental question: Does a person with a disability's decision to testify bias capacity determinations because factfinders cannot see beyond the existence of a disability? In direct contradiction of prevailing assumptions, this new empirical data reveal that approximately 88% of persons with mental disabilities in sexual assault cases do tes tify.[36] Even more striking is that, of those cases, 87.2 % returned verdicts finding the victim incapable of consent on the basis of mental disability. The key question then becomes not whether persons with disability have access to testify, but rather how to explain the incredibly high percentage of lack of capacity findings when individuals with disabilities do testify. At least part of

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35. Stubblefield's relationship began within the context of treatment but at some point she stopped working with D.J. in an official or professional capacity and interacted with him personally. See supra text accompanying notes 4–6.

36. See infra Section II.C.

the explanation is what this Article terms the "aesthetics of disability."[37] The aesthetics of disability can be so powerful that actual testimony by the person with disability cannot overcome the biases arising from that person's mere presence. When the prosecution brought D.J. into the courtroom, the only possible intended effect could be that jurors would see his significant physical disabilities and draw inferences as to his mental capacity and the propriety of him engaging in sexual conduct. While D.J. did not take the stand, a particularly telling post-verdict interview with one of the jurors suggests that the contents of his testimony might not have mattered. The juror said, "I couldn't understand why she did it when I did see [D.J.] . . . . I was like 'You're going to leave yourhusband and your kids for someone like this?'"[38]

The findings of this Article regarding sex and disability, and the new empirical survey on which they are based, will advance a budding field of law that directly implicates the rights of a growing and underserved population. First, people with disabilities experience sexual assault or rape at a rate of more than three times that of people without disabilities.[39]

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37. See infra Section III.C.

38. Bill Wichert, Juror Explains Why Professor Was Convicted of Sexually Assaulting Disabled Man, NJ.COM (Oct. 3, 2015, 8:00 AM), http://www.nj.com/essex/index.ssf/2015/10/ why_was_professor_convicted_of_sexual_assaulting_d.html.

39. Rate of sexual assault/rape among people with disabilities is 1.7 per 1000 compared to 0.5 per 1000 people without disabilities. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME AGAINST

Second, an increasing aging population with temporary or permanent cognitive impairments and people with congenital intellectual or developmental disabilities reside in integrated community settings more often than large-scale institutions such as nursing homes.[40] This creates

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PERSONS WITH DISABILITIES, 2009-2014 – STATISTICAL TABLES 4 (2016), https://www.bjs.gov/content/pub/pdf/capd0914st.pdf. Most recently during an NPR interview, Erika Harrell, a leading BJS statistician and author of the 2016 report, stated that the disaggregated rate for sexual assaults committed against people with intellectual and developmental disabilities is much higher, at seven times the rate of nondisabled people. See The Sexual Assault Epidemic No One Talks About, NPR (Jan. 8, 2018), [hereinafter, NPR Interview] https://www.npr.org/templates/transcript/ transcript.php?storyId=570224090.

40. See ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2016, at 3 (2016) (stating that the population aged sixty-five and over has increased by thirty percent in the ten-year period from 2005-2015, approximately 47.8 million in 2015, and is projected to more than double by 2060); id. at 14 (reporting that thirty-five percent of people sixty-five and over reported some type of disability in 2015); SHERYL A. LARSON ET AL., NAT'L RESIDENTIAL INFO. SYS. PROJECT, UNIV. OF MINN., IN- HOME AND RESIDENTIAL LONG-TERM SUPPORTS AND SERVICES FOR PERSONS WITH INTELLECTUAL OR DEVELOPMENTAL DISABILITIES: STATUS AND TRENDS 2015, at 12 (2017) (noting that, of the people with Intellectual Disabilities (ID) and Developmental Disabilities (DD) known to or served

greater interaction with nondisabled individuals and highlights the need for the law to properly address these contexts of interaction.[41]

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by state departments for people with ID/DD, approximately seventy percent lived in the home of a family member or a home owned or leased by the individual with ID/DD); JANE TILLY, PROMOTING COMMUNITY LIVING FOR OLDER ADULTS WHO NEED LONG-TERM SERVICES AND SUPPORT 2–3 (2016) ("Most older adults who need long-term services and supports live in the community.").

41. 15.2 million people reported some form of cognitive disability in 2010. Note that Census tracking includes people with one or more mental, physical, or communicative disabilities. Comorbidity may complicate the data analysis. U.S. CENSUS BUREAU, supra note 20, at 9. Approximately 1.2 million people had an intellectual disability in 2010; 944,000 had some other developmental disability such as Cerebral Palsy or Autism. The Census estimates that approximately 2.4 million non-institutionalized persons have dementia, senility, or Alzheimer's, or other age-related cognitive disabilities and 3.9 million have some learning disability. Id. Although we do not have an exact measure of the incidence of non-congenital cognitive disabilities, estimates indicate that approximately 3.2 million–5.3 million persons in the United States are living with a TBI-related, non- congenital mental disability. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, REPORT TO CONGRESS: TRAUMATIC BRAIN INJURY IN THE UNITED STATES: EPIDEMIOLOGY AND REHABILITATION 2 (2015).

This survey and its findings can also help to inform the broader debate on rape and sexual assault, particularly on university and college campuses. The law of consent offers a unique window into legal status, sexual values, and social norms.[42] How courts judge sex and disability is part of a broader normative discussion of how courts should manage the substantive and procedural imperfections and ambiguities of consent, and discussions around this area of the law will directly impact the ongoing national discussion regarding campus sexual assault.[43] The requisite knowledge (and the quality of that information) to make a legally recognized sexual decision forms the central legal inquiry for courts in determining whether someone can consent to sex because of intoxication (a frequent question in the context of college sexual assault)[44] or the

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42. See William N. Eskridge, Jr., The Many Faces of Sexual Consent, 37 WM. & MARY L. REV. 47, 54–55 (1995) (arguing that consent is necessarily contextual and not a simple question of volition; it is intimately tied to social values with the effect of criminalizing the behavior that is socially disfavored; for example, sodomy laws criminalized consensual sex when performed by socially disfavored groups—same-sex partners—but not in the case of heterosexual partners).

43. See infra Section III.B. (discussing potential implications in the context of nondisabled individuals with temporary impairments due to drugs or alcohol use or physical helplessness).

44. See Michal Buchhandler-Raphael, The Conundrum of Voluntary Intoxication and Sex, 82 BROOK. L. REV. 1031, 1045–49 (2017) (discussing judges' and juries' misperceptions regarding voluntarily intoxicated

existence of a long-term disability.[45] In this way, a legal and/or factual inquiry such as "how drunk is too drunk" begins to look a lot like "how disabled is too disabled" for consent purposes. The scope of legal inquiry should be one of degree and not of categorical exclusion on the basis

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victims because they do not fit the "traditional script about victimhood and criminal perpetration"); Lori E. Shaw, Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should "Yes" Mean "No"?, 91 IND. L.J. 1363, 1414–21 (2016) (discussing varied approaches states have taken to address sexual conduct that may have been induced by either drug or alcohol use).

45. Some state statutes make no distinction between temporary or permanent mental impairment and consider intoxication and mental disability under the same incapacity to consent provisions. See, e.g., ARIZ. REV. STAT. ANN. § 13-1401(7)(b) (2015) ("The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment . . . and such condition is known or should have reasonably been known to the defendant. For the purposes of this subdivision, 'mental defect' means the victim is unable to comprehend the distinctively sexual nature of the conduct");WIS. STAT. ANN. § 940.225(2)(c) (2013) ("Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition."); See infra Section II.B (describing the six legal tests of incapacity used by jurisdictions throughout the country).

of the impairment itself. One key cautionary lesson for broader sexual assault discussions is to recognize that the risk-averse approach—one that resolves the inherent uncertainties of consent determinations in favor of victim protection over individual agency—may unnecessarily constrain agency and, long-term, may create greater vulnerability to sexual violence. Accordingly, a concept of capacity as fluid, temporal, and thus contestable, among other disability rights concepts,[46] can assist courts in the resolution of both questions (intoxication and disability) and highlight the similarities rather than the differences between these two types of decisional impairment.

This Article proceeds in three parts. Part I discusses current claims in legal scholarship regarding sexual regulation and disability, their

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46. Critical disability studies offer potential theoretical and normative principles to inform judicial resolution of questions regarding consent. See, e.g., Licia Carlson & Eva Feder Kittay, Why Philosophy and Cognitive Disability?, in COGNITIVE DISABILITY AND ITS CHALLENGE TO MORAL PHILOSOPHY 1–3 (Licia Carlson & Eva Feder Kittay, eds., 2010) ("[P]eople with cognitive disabilities offer an opportunity to explore the nature and limits of concepts like justice, rights, respect, care, and responsibility . . . [and also] the difficult question of how we realize these conceptions in practice given the challenges presented by those with cognitive disabilities."); Abby L. Wilkerson, Normate Sex and its Discontents, in SEX AND DISABILITY 183–207 (Robert McRuer & Anna Mollow eds., 2012) (discussing the power of non-normative sexual conduct and expressions as an organizing principle for sexual agency).

empirical foundations, and why scholars have cause for concern about the state's regulatory reach. Part II is the empirical heart of this paper and explores how prevailing scholarly claims fare in the context of a new survey covering the statutory and jurisprudential landscapes over the last two decades. Part III seeks to reframe the problem, considering how the results of the empirical analysis in Part II complicates the traditional scholarly conversation and examining how information deficits regarding disability and functional capacity affect the adjudication process. Reframing the central question in this way opens new avenues for normative and prescriptive intervention, while also countering a common argument made by various disability law scholars that greater specificity from legislatures or judges would cure constraints on sexual agency.[47]

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47. See Denno, supra note 25, at 394–95 (proposing that courts should apply a contextual approach to determine consent and provide more specificity in jury instructions to "limit any potential vagueness inherent in the contextual approach"); Elizabeth J. Reed, Note, Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity, 83 VA. L. REV. 799, 822–27 (1997) (proposing that Virginia's legislature should develop and adopt an assessment tool that uses a clinical perspective to assess a person's capacity to consent to sexual conduct to bring consistency where there has not been clear professional standards prior).

I. Sexual Regulation and Mental Disability

This Part addresses existing scholarly claims concerning the state's sexual regulation of people with mental disabilities and explains why the state's history of sexual regulation justifies present scholarly concerns.

A preliminary note on sexual consent and criminal law: The law seeks to protect sexual autonomy primarily through the legal construct of "consent."[48] While contemporary legal scholarship seeks to define a central governing principle for this body of law, the leading contenders at the moment are "sexual agency" or "sexual autonomy"—albeit problematic.[49] As a procedural matter, when a complainant alleges non-consent

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48. Feminist legal scholars have written extensively about the notion of "consent" (implied or express) as inherently flawed based on historically gendered patterns of sexual violence and oppression that subordinate women through unequal sexual power dynamics vis-a`-vis men. See generally Catharine A. MacKinnon, Substantive Equality: A Perspective, 96 MINN. L. REV. 1 (2011) (discussing the need for a "substantive" approach to gender dynamics, including examination of gender violence as form of oppression and patriarchy).

49. See, e.g., Rubenfeld, supra note 26, at 1417–23 (asserting the theoretical flaws of sexual autonomy as the cornerstone of modern rape doctrine); Sex Without Consent, supra note 26, at 337–41 (asserting that a violation of "sexual agency" and not "sexual autonomy" is an adequate understanding of rape); see also MODEL PENAL CODE §§ 213.1–213.6 comment on mens rea for sections 213.1–213.6 (AM. LAW INST., Tentative Draft No. 1 2014) (noting the tension between

in sexual assault and rape cases, the state has the burden of showing beyond a reasonable doubt that the complainant did not consent.[50] State law defines non-consent to include incapacity to consent on the basis of age, consanguinity, mental disability, physical helplessness, or intoxication.[51] State laws do not consistently define either "incapacity" or "mental disability" as this study will illustrate.[52] The prosecution has the burden of proving defendant's knowledge of the victim's incapacity in some states as an element of the offense, and thus, beyond a reasonable doubt. In other states, defendants may affirmatively argue (and must prove by a lesser standard of proof, often a preponderance of the evidence) that

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sexual autonomy and the need for state regulation and citing to Lawrence v. Texas).

50. See, e.g., Anne E. Melley, § 21 Generally, 31A Ill. Law and Practice Rape and Related Offenses § 21, in ILLINOIS LAW & PRACTICE (2017) (contending the State has the burden of proving the issue of consent beyond a reasonable doubt); ROBERT S. HUNTER ET AL., § 14:10 Consent as Defense, in 1 TRIAL HANDBOOK FOR ILLINOIS LAWYERS - CRIMINAL § 14:10 (9th ed. 2017) (contending that the "state has a burden of proof beyond reasonable doubt on the issue of consent").

51. See MODEL PENAL CODE §§ 213.1, 213.4 (AM. LAW INST. 2016).

52. See infra Section II.C (discussing state statutory definitions of incapacity on the basis of mental disability and proposing a new taxonomy for understanding state regulation in this area).

they lacked actual or constructive knowledge of the victim's incapacity to consent.[53]

A. The Stakes in Sexual Regulation

It is an uncommon occurrence for the state to regulate private sexual decisions for nondisabled persons.[54] For people with disabilities whose

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[53] See, e.g., ARK. CODE ANN. § 5-14-102(e) (2018) ("When criminality of conduct depends on a victim's being incapable of consent because he or she is mentally defective or mentally incapacitated, it is an affirmative defense that the actor reasonably believed that the victim was capable of consent."); CONN. GEN. STAT. § 53a-67(a) (2018) ("[I]t shall be an affirmative defense that the actor, at the time such actor engaged in the conduct constituting the offense, did not know of such condition of the victim."); N.Y. PENAL LAW § 130.10(1) (LexisNexis 2018) ("In any prosecution under this article in which the victim's lack of consent is based solely upon his or her incapacity to consent because he or she was mentally disabled, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent.").

[54] See Emens, supra note 25, at 1310–11 ("Because we do not police the intimate domain for discrimination, people are more explicit here about the distinctions they draw along lines of race, disability, and sex. [However,] the law has required intimate discrimination with regard to sex and disability."); Miriam Taylor Gomez, The S Words: Sexuality, Sensuality, Sexual Expression and People with Intellectual Disability, 30 SEXUALITY

lives are highly controlled, in part, because of receipt of public economic supports and services,[55] however, sexual regulation is often a reflexive part of legitimate state regulation of some other area of their lives. Disability studies scholar Michael Gill offers a personal example of his work with people with intellectual disabilities in the context of a "sheltered workshop."[56] The manager of the residential home notified the private

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& DISABILITY 237, 238 (2012) ("Although sexuality is an integral part of all of our lives, people with intellectual disability may find sexual expression inaccessible because of service barriers including institutionalised living, lack of privacy, lack of knowledge about what sexuality is and opportunities to express themselves.").

55. See, e.g., Samuel R. Bagenstos, The Future of Disability Law, 114 YALE L.J. 1, 10–14 (2004) (discussing the reliance of many individuals with disabilities upon a strong social welfare state and the efforts of disability rights activists to structurally distance supports and services from medical insurance and entrenchment in the medical profession); Shirli Werner, Individuals with Intellectual Disabilities: A Review of the Literature on Decision- Making Since the Convention on the Rights of People with Disabilities (CRPD), 34 PUB. HEALTH REVS. 1, 2 (2012) ("Individuals with [intellectual disabilities] are in need of specialized, integrated treatment and are provided for by services within the health, education, and social welfare sectors.").

56. MICHAEL GILL, ALREADY DOING IT: INTELLECTUAL DISABILITY AND SEXUAL AGENCY xi-xiv (2015). A sheltered workshop is a form of transitional employment for people with intellectual and developmental

employment day program of two women residents who the staff suspected might be engaged in a same-sex relationship.[57] Home staff and family members had raised concerns after the women were seen holding hands and kissing in their private room in the group home. The residential staff responded by separating the women in different rooms, explaining to the women that this behavior was inappropriate, and notifying the employment program staff to take precautions and report inappropriate behavior.[58] Professor Gill, who at the time worked as an employee of the sheltered workshop program, was charged with surveilling and managing the risk of sexual intimacy between these two women:

> Effectively, though we were supposed to provide employment for these women labeled as intellectually disabled, we were now regulating behaviors not necessarily related to work efficiency. Sexuality was a threat in the workshop [and]

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disabilities that provides training on-site in the course of employment. Sheltered workshops have been criticized for subminimum wages and poor conditions serving more as a form of discriminatory employment as opposed to transitional training. See Susan Stefan, Beyond Residential Segregation: The Application of Olmstead to Segregated Employment Settings, 26 GA. ST. U.L. REV. 875, 879–80 (2010) (noting that "[s]heltered workshops are outmoded vestiges of a historical perspective that people with disabilities could not be employed in the regular workforce and needed to be 'sheltered' in segregated settings").

57. GILL, supra note 56, at xiii.

58. Id.

> was policed based on assumptions about not only when and where one can be sexual, but also who can be sexual.[59]

Although the Supreme Court has not yet decided the constitutional question of whether Lawrence v. Texas[60] is applicable to state criminal regulation of sexual consent, lower courts have recognized the heightened stakes in cases of state regulation of sexual consent and mental disability.[61] The state has a legitimate interest in sexual regulation for people with disabilities.[62] At the same time, a healthy body of research concludes that people with mental disabilities are capable of sexual desires and decisionmaking.[63] The central challenge, then, is how to

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59. Id. at xiii–xv. See also PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 282–89 (2004) ("[T]he cost of safety is to deny bodily pleasure.").

60. 539 U.S. 558 (2003).

61. See, e.g., Anderson v. Morrow, 371 F.3d 1027, 1037–45 (9th Cir. 2004) (Berzon, J., dissenting) (explaining that the sexual liberty interest established by Lawrence implicated the mens rea requirement in an Oregon rape statute).

62. Id. at 1033 ("[T]he state [has a] legitimate interest and indeed, duty, to interpose when consent is in doubt"); People v. Thompson, 142 Cal. App. 4th 1426, 1429 (Ct. App. 2006) ("Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people.").

63. See, e.g., GILL, supra note 56, at xiv ("Although there are active efforts to restrict or constrain sexual activities of people with intellectual

define the risks and stakes so as to reconcile the state's legitimate interests in protection with the interests in sexual agency of people with disabilities and their potential partners (with and without disabilities).

Decisional agency is iterative for people with and without disabilities.[64] Access to opportunities to manage decisional risks—to make good

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disabilities, individuals are already sexual in . . . [existing] regulatory spaces."); Gomez, supra note 54, at 243 ("People with intellectual disability experience the same range of sexual needs and desires as other people. With appropriate education and good social support, people with intellectual disability are capable of safe, constructive sexual expression and healthy relationships.").

64. See, e.g., Charles R. Schwenk, Cognitive Simplification Processes in Strategic Decision-Making, in 5 STRATEGIC MGMT. J. 111 (1984) (noting the iterative process of decisionmaking in terms of building cognitive capabilities). See Nina A. Kohn, Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney, 59 RUTGERS L. REV. 1, 27–30 (2006) (explaining how psychologists have long recognized that an individual's perceived sense of control over his or her life significantly affects his or her physical and psychological well-being); Michael L. Wehmeyer et al., Essential Characteristics of Self Determined Behavior of Individuals with Mental Retardation, 100 AM. J. ON MENTAL RETARDATION, 632, 632–33 (1996) (proposing that self-determined actions leads to four essential characteristics: autonomy, self-regulation, psychological empowerment, and self-realization, after conducting interviews with individuals involved in self-advocacy groups for individuals with mental retardation).

and bad decisions—assists the person in both the process of making decisions and the outcomes of decisionmaking for the individual, and how those decisions are publicly perceived. However, people with disabilities often lack such access. As a general matter, the lives of people with disabilities are often highly controlled in institutional and community settings. Criminal, civil, and professional liability structures encourage people with disabilities to be risk averse in decisionmaking, which can itself generate learned helplessness and vulnerability.[65] Such risk aversion is encouraged notwithstanding the fact that opportunities for decisionmaking are often mundane with low stakes—e.g., choices of meals, television programs, or clothes to wear.

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65. See, e.g., Leslie Salzman, Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act, 81 U. COLO. L. REV. 157, 167–70 (2010) (describing the loss of the right to make one's own decisions such as financial or medical decisions or even traveling freely and engaging in social interactions and how it can lead to experiencing a loss of control and a feeling of helplessness); Nandini Devi, Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities, 41 J.L. MED. & ETHICS 792, 794 (2013) (explaining that adaptive behaviors include practical skills such as eating and dressing while emphasizing the need to recognize the right to make decisions for oneself).

In this context, sex is understood as an unnecessary (or less tolerable) risk of community integration.[66] Controlled environments restrict opportunities for the exercise of sexual expression in the name of safety.[67] In the absence of information about functional capacities for sexual expression, the dignity of sexual risks,[68] and the positive value of those

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66. See Jacob M. Appel, Sex Rights for the Disabled?, 36 J. MED. ETHICS 152, 152 (2010) (describing how the public discourse surrounding sex and disability has largely been focused on protecting vulnerable populations from abuse). See also supra Section I.A and notes 56–59 (relaying Professor Michael Gill's experience working as a staff member at a sheltered workshop with individuals with intellectual disabilities).

67. See Tobin Siebers, A Sexual Culture for Disabled People, in SEX AND DISABILITY 37, 45 (Robert McRuer & Anna Mollow eds., 2012) (discussing how the intimate lives of disabled men and women in group homes, long-term care facilities, and institutions are "monitored, documented, and discussed by others"); Appel, supra note 66, at 153 (arguing reform for the "no sex" policies that exist in nursing facilities, mental hospitals, and group homes under the assumption that institutionalized individuals require a higher degree of protection than those living outside of institutions).

68. 68 First used by Robert Perske in his 1972 article about intellectual disability, the concept of the "dignity of risk" refers to the default risk-averse position taken by the state, service providers, and family members with respect to the interaction with people with disabilities. Robert Perske, The Dignity of Risk, in THE PRINCIPLE OF NORMALIZATION

expressions to the individual with a mental disability,[69] the balance

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IN HUMAN SERVICES 194, 194–95 (Wolf Wolfensberger ed. 1972) (advocating for opportunities for people with mental retardation to take risks commensurate with their functioning). Originally applied in the context of service providers, the concept of the dignity of risk has a much broader application. Since 1972, it has become a principal theoretical tool in the disability rights movement and legal scholarship. See, e.g., Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare Reform, 44 WM. & MARY L. REV. 921, 997–98 (2003) (discussing the "dignity of risk" as a core concept driving the independent living movement); Denno, supra note 25, at 359 (discussing the "dignity of the risk" as a philosophical concept in the context of people with intellectual disabilities) (citation omitted); Fischel & O'Connell, supra note 24, at 486 n.348 (referencing Denno's discussion of "dignity of risk" in relation to sexual assault and mental disability); Nevins- Saunders, supra note 25, at 1102 (referring to the "dignity of risk" in relation to defendants with disabilities and prosecutions for statutory rape); Salzman, supra note 65, at 179 (discussing "dignity of risk" in relation to guardianship reform); Roy G. Spece, Jr., et al., (Implicit) Consent to Intimacy, 50 IND. L. REV. 907, 919–20 (2017) (noting that "personhood involves the 'dignity of risk'"); Judith Welch Wegner, The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973, 69 CORNELL L. REV. 401, 436 (1984) (discussing the "dignity of risk" in the context of understanding overprotection as a form of discrimination).

69. See Mitchell S. Tepper, Sexuality and Disability: The Missing

seems to tip decidedly in favor of protection—particularly given the high incidence of sexual violence against this population.[70] However, without opportunities to practice informed decisionmaking in sex and other matters, people with disabilities are situated in a dangerous catch-22 where they are not afforded sufficient education or experiential opportunities to understand sexual decisions and their consequences, but are precluded from engaging in sexual decisionmaking—on the basis of that lack of knowledge—by legislatures and court constructions of capacity to consent. Overregulation in this sense might raise constitutional concerns under Lawrence v. Texas, for example.[71]

Sexual regulation in the context of mental disability, therefore, presents tough questions with high stakes and an abundance of legal uncertainty for policymakers, courts, and scholars to address. Criminal

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Discourse of Pleasure, 18 SEXUALITY & DISABILITY 283, 288–89 (2000) (noting that sexual expression is viewed as less important than provision of services and that without a discourse of sexuality, there is an experiential poverty that results).

70. See U.S. DEP'T OF JUSTICE, supra note 39 (rate of sexual violence against people with disabilities is three times that of non-disabled people). See also NPR Interview, supra note 39 (noting rate of sexual assault for people with intellectual disabilities is seven times that of nondisabled).

71. See Anderson v. Morrow, 371 F.3d 1027, 1033 (9th Cir. 2004) (Berzon, J., dissenting) (discussing the applicability of Lawrence v. Texas to questions of consent for people with disabilities).

law as a site of sexual regulation has been recognized as particularly problematic. The public safety lens is fraught with risk aversion and paternalism. Legal scholars have decried the exclusive placement of rape within criminal law, a site "ill suited to meet the challenges rape poses," namely, a deeply-rooted cultural view of "sex as antagonistic—something to be taken or won from a partner."[72] The next Section discusses current scholarly claims in this area that form the basis of the empirical study in this Article, and its redirection of the traditional assumptions.

B. Current Scholarly Claims

The central claim made by legal scholars and scholars in other disciplines is that the state overregulates the sexual expression of people with mental disabilities and illegitimately denies people who should have access to sexual expression the ability to engage in sexual conduct.[73]

[72.] Margo Kaplan, Rape Beyond Crime, 66 DUKE L.J. 1045, 1047 (2017); see also Melissa Murray, Rights and Regulation: The Evolution of Sexual Regulation, 116 COLUM. L. REV. 573, 584–85 (2016) (explaining the spread of the criminal framework for regulating sex into civil law). Yet disability is part of this story of the state's surveillance and management of perceived sexual risks.

[73.] The area of sexual rights and disability is an underdeveloped area of legal scholarship. Perlin & Lynch, supra note 20, at 300 ("[T]hese substantive topics and the detrimental laws that do exist remain so under-discussed because we are still so astonishingly uncomfortable thinking about the questions at hand "). However, those scholars who have begun

The empirical baseline for these claims is a comprehensive study in 1997 of state statutes and legal tests conducted by Professor Deborah Denno. In the study, Professor Denno concludes that women with intellectual and

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to occupy this space incorporate the claim of overregulation as a foundational principle without much contestation. See, e.g., Appel, supra note 66, at 152–53 (discussing regulation through denial of sex surrogacy benefits and the, perhaps less controversial, regulation of access to potential sexual experiences through intimacy and relationship building); Emens, supra note 25, at 1381–82 ("With disability, the norm is of desexualization, of isolation and exclusion from the intimate realm altogether. In this arena, then, state efforts to lift barriers to entry to intimate relationships are in order."). See also Fischel & O'Connell, supra note 24, at 430 ("We worry that such paternalist legislation may unjustifiably impede persons with disabilities' wanted sexual relations, reflect the phobic conjunction of disability with asexuality or pathological sexuality, and reiterate the common, careless equivalence of disabled adults and children."); Perlin & Lynch, supra note 20, at 264–65 ("[W]e . . . superimpose a societal presumption of incompetency—a damaging message[ ] when applied to any aspects of a person with a mental disability."). See also Jasmine E. Harris, The Role of Support in Sexual Decision- Making for People with Intellectual and Developmental Disabilities, 77 OHIO ST. L.J. FURTHERMORE 83 (2016), http://moritzlaw.osu.edu/students/groups/oslj/files/2016/10/ Harris-FINAL.pdf (representing the Author's own views before this Article regarding overregulation, based on Denno's study).

developmental disabilities[74] are held to a higher consent standard than nondisabled women.[75] Professor Denno defends this claim by presenting evidence of state statutes criminalizing sexual conduct with a person "incapable of consent" on the basis of mental disability, and arguing that these statutes are unduly ambiguous as exemplified by the failure of all but six of the states to define consent, as well as the use of ten different terms to define intellectual disability.[76] The ambiguity and conflicting ter-

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74. Professor Denno uses the term "mentally retarded" rather than the current language of "individuals with [intellectual and] developmental disabilities" which has since her article been more widely adopted. Denno, supra note 25, at 321. Professor Denno's subsequent work reflects the change in terminology. See, e.g., Deborah W. Denno, How Prosecutors and Defense Attorneys Differ in Their Use of Neuroscience Evidence, 85 FORDHAM L. REV. 453, 462 n.59 (2016) (acknowledging author's continued use of "mental retardation" but acknowledging move in federal law and academia towards new terminology); see also Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (replacing references to "mental retardation" in the U.S. Code with "intellectual disabilities"). See generally AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES (AAIDD), INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed. 2010) (noting terminological changes while arguing that the underlying elements of the definition of intellectual disability has remained largely consistent over time).

75. Denno, supra note 25, at 321.

76. Id. at 341.

minology, she argues, leaves significant discretion to courts to construct legal tests and apply statutory prohibitions in overly restrictive ways.[77] Denno reviewed twenty years of case law from the 1970s through the 1990s to understand the legal tests employed by courts and the evidence relied upon to determine incapacity in each case. Prescriptively, she offered a "contextual approach" for courts to resolve statutory ambiguities with greater attention to such factors as modern knowledge about intellectual disability, individual attributes beyond the labels of IQ and mental age, and the specific context of the sexual encounter.[78] Statutorily, she recommended purging disability from the statutes to make disability status less relevant to the adjudicative process.[79] Professor Denno's data became the empirical fulcrum powering broader scholarly debates and prescriptive claims for twenty years.

Contemporary scholars continue to base normative and prescriptive claims on Professor Denno's empirical work, often beginning from a descriptive claim of overregulation and concluding with proposals for statutory reforms or revision of the judicial tests to adjudicate legal incapacity. Professor Elizabeth Emens, for example, relies on the empirical survey work of Professor Denno in support of her discussion regarding overly restrictive legal interventions in "intimate discrimination" that shape who can have sex or marry.[80] Professor Boni-Saenz's recent work

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77. Id. at 344–49.

78. Id. at 366–73.

79. Id. at 394–95.

80. Emens, supra note 25, at 1316–17 nn.20–24.

also builds on Denno's study to assert that current legal tests suffer from a lack of specificity and, as a result, constrain the sexual autonomy of some individuals with cognitive disabilities who are capable of consent.[81] His prescriptive intervention, "cognition-plus," offers courts a way to judge consent that accounts for the existence of a network of decisional supporters who can account for deficits in independent decisionmaking but nevertheless, with support, can cure knowledge and processing deficits.[82] While existing interventions remain relevant in understanding the stakes and challenging conventional wisdom regarding sexual agency and mental disability (and approaching questions of sexual regulation in more highly regulated institutional settings), this Article calls upon legal scholars and decisionmakers to address difficult and underexplored questions of sexual violence in less-regulated, community settings.

Accordingly, this Article examines the four most common scholarly assertions related to overregulation in the context of sexual assault and rape law. First, scholars contend that the statutes are unduly vague and either overor under-emphasize disability without sufficient legislative guidance for courts.[83] The danger, they argue, is that courts will fill

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81. Boni-Saenz, supra note 24, at 1216–23.

82. Id. at 1234–44 (discussing the "cognition-plus" test and comparing the test to Denno's "contextual approach").

83. See, e.g., Denno, supra note 25, at 341 (noting that only six states mention consent in their statutes and that in 1997 every state except Georgia used one of ten different terms to refer to mental disability); Perlin & Lynch, supra note 20, at 300 ("First, there is no unitary definition of

the interpretative voids with illegitimate moralizing, such as judging incapacity ex ante based on non-normative sexual conduct—for example, adultery, non-marital sex, or same-sex relationships.[84] Second, scholars argue that courts overemphasize the existence of cognitive disability in their legal and factual determinations. Cognitive disability is the focal point of the deliberative process either because of explicit references in the statutory language or because of an evidentiary overreliance on proxies such as IQ and mental age or medical diagnoses in making these determinations.[85] Third, the primary demographic for current scholarly

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competency in this area. Often, there are no definitions, and when definitions exist, they are often circular and contradictory."). See also Fischel & O'Connell, supra note 24, at 478 (arguing statutes are vague in the other direction, leaving some individuals with disabilities, such as the victim in State v. Fourtin, 52 A.3d 674 (Conn. 2012), more susceptible to sexual violence, a point addressed more broadly in this Article).

84. See, e.g., Boni-Saenz, supra note 24, at 1218 (describing New York's approach which includes "consideration of the moral quality of the [sexual] act as it would be measured by society").

85. See id. at 1205 (responding to the overemphasis on the disability in the context of older adults and proposing a new legal test, "cognition-plus," that would "grant legal capacity to adults with cognitive impairments if they are embedded in an adequate decision-making support network. In other words, the right to sexual expression should not be withheld due to cognitive impairment alone."); Nancy M. Fitzsimons, Justice for Crimes Victims with Disabilities in the Criminal Justice System: An

intervention is the institutionalized individual with cognitive disabilities. Scholars emphasize the potential for the greatest marginalization and sexual violence experienced by individuals with significant disabilities residing in institutional settings such as nursing homes, hospitals, and other state-run residential institutions.[86] Yet, the extent to which this con-

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Examination of Barriers and Impetus for Change, 13 U. ST. THOMAS L.J. 33, 78–82 (2016) (discussing overreliance on IQ testing as a baseline for competency to testify and participate in legal process).

86. See, e.g., Appel, supra note 66, at 152 ("[R]eform is desperately needed [to address] the 'no sex' policies that exist in American nursing facilities, mental hospitals and group homes. The assumption underlying these restrictions is that anything short of clearly expressed wishes by a fully competent and rational individual does not fulfil a minimum standard to consent to sexual relations."); Hannah Hicks, To the Right to Intimacy and Beyond: A Constitutional Argument for the Right to Sex in Mental Health Facilities, 40 N.Y.U. REV. L. & SOC. CHANGE 621, 625 (2016) ("[T]here are numerous reasons for one to conclude that people who are institutionalized on the basis of mental disability are often more deprived of sexual freedom than people who experience mental disability, but are not institutionalized, or people who undergo institutional treatment due to physical disability."). See also Boni-Saenz, supra note 24, at 1234–43 (explaining the prescriptive "cognition-plus" legal test in the context of residential institutions); Denno, supra note 25, at 379 ("An intriguing issue that courts have yet to confront systematically is how sexual relations among mentally retarded individuals should be regulated in the situational context of institutions or residential homes.").

textual setting forms the bulk of cases dealing with sexual consent and disability may be overemphasized.[87] Fourth, the literature on procedural justice in rape and sexual assault cases argues that people with mental disabilities are often denied opportunities to testify in court and criticizes the overreliance on IQ and mental age as threshold questions for witness competency.[88] More generally, this author's prior scholarship has empha-

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87. This is not to suggest that the rates of sexual violence in institutional settings are less than that of non-institutionalized individuals. The lack of data, absence of transparency, and problematic power dynamics create significant obstacles to accurate reporting and prosecution in non-institutionalized environments. Scholars have cause for concern. The point is that data now exist to show the rates of violence among those living outside of institutional settings and that scholars, courts, and policymakers must pay attention to this group and the regulatory challenges it presents

88. Fitzsimons, supra note 85, at 78–82 (discussing the overreliance on IQ testing as a baseline for competency to testify and participate in legal process). The sub-field of therapeutic jurisprudence pioneered by David Wexler and Bruce Winick emphasizes the importance of voice as restorative in the adjudicatory process. See, e.g., DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 4–5 (1990) (discussing the definition and importance of therapeutic jurisprudence and its role in legal processes). International legal scholars have produced significant scholarship on this point. See, e.g., Janine Benedet & Isabel Grant, More Than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on a Promise to Tell the Truth, 25 CANADIAN J.

sized the ways in which the legal process and institutional design choices deny people with disabilities opportunities for voice and the performance of agency in public settings.[89]

While some of the assertions above do cite to contemporary statutes and judicial interpretations in one or more jurisdictions,[90] scholars by and large rely on categorical descriptions of the universe of statutes, legal

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WOMEN & L. 31, 33–40 (2013) (describing the scrutiny applied to the testimony of adults whose mental capacity is challenged under the Canada Evidence Act); Janine Benedet & Isabel Grant, Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief, 52 MCGILL L.J. 243 (2007); Janine Benedet & Isabel Grant, Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues, 52 MCGILL L.J. 515 (2007).

89. Harris, supra note 27, at 495–503 (arguing that participation in the legal process can have an anti-stigma effect and generate more positive narratives of agency and disability than what currently exists in public circulation). See also Annette R. Appell, Children's Voice and Justice: Lawyering for Children in the Twenty-First Century, 6 NEV. L.J. 692 (2006) (discussing the representation of children in legal proceedings and procedural justice considerations).

90. See Boni-Saenz, supra note 24, at 1216–23 (citing to Denno's categorical organization of statutes and legal tests but also offering examples of more recent cases on incapacity); Fischel & O'Connell, supra note 24, at 499 (focusing on Connecticut in an empirical review not specific to disability).

tests, and cases from the last comprehensive empirical intervention of twenty years ago.

C. The Roots of Sexual Regulation and Disability

The story of how and when states began to regulate sex and disability offers insights about the evolution of states' risk-averse approach in regulating risk in this area, and why disability scholarship often roots normative and prescriptive claims skeptical of state intervention.[91] The two primary contextual elements that came together to shape the bounds of state regulation were the political and economic environments and the evolution of medical science and technology.[92]

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91. "State regulation" can be direct (e.g., state statutory definitions of who can and cannot consent to sex) or indirect (e.g., access to contraceptives, restrictions on sexual conduct in private rooms or spaces, or gender segregation in residential and employment settings). However, state regulation is more often indirect and less formal, and it takes shape through attitudes about sex and disability, capabilities of people with mental disabilities, and definition of appropriate and acceptable risks of sexual conduct. Harris, supra note 27, at 457.

92. The infusion of evolutionary and medical science into discourse on sex and disability extends more broadly to sexual assault and rape cases. Owen D. Jones, Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention, 87 CALIF. L. REV. 827, 831–32 (1999) (discussing the importance of both biological and social theories and research in rape discourse).

Without engaging in a full historical recitation of the relationship between people with mental disabilities and the state,[93] this section identifies the interaction between ideological shifts about the nature

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93. The literature on the history of sexual regulation and disability is relatively thin, though disability studies scholars have more recently begun to engage this history. See, e.g., GILL, supra note 56, at 12–22 (discussing the history of sexuality and disability in the United States); Gomez, supra note 54, at 238 ("Historically, people with disability have been subject to sexual segregation, sexual confinement, marital prohibition and legally- sanctioned sterilisation under the guise of patient protection from pregnancy and sexual abuse."); Winifred Kempton & Emily Kahn, Sexuality and People with Intellectual Disabilities: A Historical Perspective, 9 SEXUALITY AND DISABILITY 93 (1991); Abby L. Wilkerson, Normate Sex and its Discontents, in SEX AND DISABILITY 5–15 (Robert McRuer & Anna Mollow eds., 2012) (documenting the relatively recent treatment of sex and disability, explaining the deeply political nature of this subject, and calling for greater scholarly engagement); Tepper, supra note 69, at 287 (2000) (stating that until recently that "sexual pleasure in people with disabilities has remained remarkably silent in the disability advocacy"). See generally TOM SHAKESPEARE, KATH GILLESPIE-SELLS & DOMINIC DAVIES, THE SEXUAL POLITICS OF DISABILITY 5 (1996) ("[I] t would be fair to say that issues of sexuality, relationships, and personal identity have also been neglected It is not just that 'the personal is political', but also that a key area of disabled people's experience has been largely ignored.").

of intellectual and developmental disabilities,[94] economic and scientific developments, the role of the state, and the institutions of care that developed in response to these evolving ideas. The state's default regulatory position, at least historically, has been a full denial of economic

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94. Although this Article covers a broad range of cognitive disabilities, the author also recognizes the distinctions among individuals with the same and different disability "classifications" included in references to "cognitive," "mental," "intellectual," or "developmental." See supra note 20. For purposes of the historical section, this Article refers to people with "intellectual and developmental disabilities" specifically given the discriminatory treatment and relative insularity of the group. This history generates particular narratives of incapacity that become part of the public consciousness and are applied over time more broadly and without differentiation.

rights, bodily autonomy,[95] and political rights[96] on the basis of mental

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95. For denial of economic rights, see, Robert D. Dinerstein, Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making, 19 AM. U. WASH. C. L. no. 2, 2012, at 2 (describing how states operate under the assumption that the mere status of having an intellectual or psychosocial disability provides a sufficient basis to presume that the individual does not have the legal capacity to participate fully and autonomously in society, which includes deciding where to live, who to marry if one chooses to do so, how to spend one's money, and for whom to vote). For denial of bodily autonomy, see, for example, Act of March 9, 1907, 1907 Ind. Acts ch. 215 (passing the first statute that provided for sterilization of "idiots" and "imbeciles" upon recommendation by a board of experts); 1924 Va. Acts ch. 394 (also known as the "Virginia Sterilization Act of 1924," which allowed for sterilization of patients afflicted with hereditary forms of insanity or imbecility upon a board's opinion that it was for the best interests of the patients and of society, and was upheld in Buck v. Bell, 274 U.S. 200 (1927)).

96. Dinerstein, supra note 95, at 2 (describing states' presumption that intellectual disability precludes legal capacity to participate fully in society, including voting). See, e.g., Rabia Belt, Contemporary Voting Rights Controversies Through the Lens of Disability, 68 STAN. L. REV. 1491, 1505–13 (2016) (discussing contemporary voting rights issues facing people with disabilities); Benjamin O. Hoerner, Note, Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA's

disability. State laws and policies designed to regulate the sexuality of persons with mental disabilities have sought to control risk (initially the risk of harm to society, then, most recently, a concern about the harm to the person with a mental disability).[97] The means of control have shifted over time to reflect advances in science, political theory, and economic developments.[98]

The dominant rhetoric may have shifted over time but the driving motivation for control of sexual choices consistently reflects eugenic fears of reproduction, contagion, and disgust.[99] The state had little inter-

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Potential, 20 TEX. J. ON C.L. & C.R. 89, 107–08 (2015) (describing how states had exclusionary provisions in their constitutions to exclude citizens with disabilities from voting since the nineteenth century and well into the twentieth century).

97. See, e.g., Leslie Salzman, supra note 65, at 164 ("The states, however, have often exercised the parens patriae authority with less concern about the needs of persons with disabilities, focusing instead on society's desire to protect itself from those deemed 'dangerous' or merely different.").

98. See id. (discussing the history of public guardianship laws—from the early focus on control of property owned or inherited by persons deemed incapacitated, to state means of protection of its citizens from people with disabilities, to contemporary rhetoric of parens patriae and protection of people with disabilities from abuse and neglect in society.

99. See, e.g., Martha C. Nussbaum, Disgust or Equality? Sexual Orientation and Indian Law, 6 J. INDIAN L. & SOC. 1 (2014) (discussing

est in regulating the care of people with intellectual and developmental disabilities prior to the late eighteenth and nineteenth centuries, with the exception of people with mental disabilities who came into possession of property (primarily land) through inquest or otherwise.[100] Families and non-secular institutions bore the responsibility of managing the care of family members with mental disabilities.[101] The focus was on the care and management of these family members, and not inclusion into the broader community. There was a presumption of incapacity to engage in sex and an almost "automatic" regulation of sexual behaviors first by families and then, as services decentralized, by service providers.[102]

Nussbaum's theory of disgust in the context of a recent decision by the Indian Supreme Court regarding same sex marriage).

100. See generally Harris, supra note 27, at 507–09 (describing the development of guardianship proceedings for the "management of the property of a person believed to be legally incompetent").

101. See Jacobus tenBroek & Floyd W. Matson, The Disabled and the Law of Welfare, 54 CALIF. L. REV. 809, 816 (1966) (explaining the "older custodial attitude" which entailed policies of segregation and shelter, and of special treatment and separate institutions). See also Ellyn S. Kravitz & Carolyn Reinach Wolf, Who Will Stand in My Shoes? When Adult Children Need Lifelong Support and Supervision, 83 N.Y.S.B.A. J. 37 (2011) (describing how families of children with disabilities make decisions regarding appropriate housing for their adult children, post-secondary education, employment, health care and guardianship).

102. See, e.g., Michel Desjardins, The Sexualized Body of the Child:

To be clear, people with disabilities have always had sexual desires and urges as part of the human biological development.[103] As states became more invested in the provision of care to people with intellectual and developmental disabilities through large-scale institutions,[104] the dis-

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Parents and the Politics of "Voluntary" Sterilization of People Labeled Intellectually Disabled, in McRuer & Mollow, supra note 93 (describing how "voluntary sterilization" of people with intellectual disabilities facilitates the family's control of their child's fertility); Siebers, supra note 67, at 45 ("Group homes and long-term care facilities purposefully destroy opportunities for disabled people to find sexual partners or to express their sexuality.").

103. See Perlin & Lynch, supra note 20, at 258 (arguing that individuals with disabilities "have the same needs for intimate relationships and sexual expression as everyone else"). In some cases, developmental and comorbid physical disabilities may impair sexual functioning. See, e.g., Nancy Murphy & Paul C. Young, Sexuality in Children and Adolescents with Disabilities, 47 DEVELOPMENTAL MED. & CHILD NEUROLOGY 640, 640 (2005) (noting that individuals with disabilities can experience "both functional limitations and intentional or unintentional societal barriers" to sexual development).

104. Dr. Johann Guggenbu¨ hl established Abendberg, the first known residential facility for persons with intellectual disabilities, in 1841. Abendberg received international attention as the prototype for institutional care for people with ID/DD. See Chas A. Lee, Cretinism, 6 PAC. MED. & SURGICAL J. 109, 109 (1863); David Katims, Literacy Instruction for People

tinction between public and private spaces blurred. Scientific advances in the mid-1800s sparked curiosity about the personhood of people with intellectual and developmental disabilities and the potential for science to rehabilitate them as a solution to growing workforce demands. The argument for state-sponsored institutions was rooted in the need for laborers, and couched in terms of national pride.[105]

Researchers in the late nineteenth century produced medicallybased taxonomies of mental disability and capacity for the purpose of identifying the "educable" and "deserving poor" eligible for scarce government resources.[106] These classifications were not devised to ascertain legal

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with Mental Retardation: Historical Highlights and Contemporary Analysis, in 35 EDUC. & TRAINING IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 3, 4–5 (2000) (describing how Dr. Guggenbu¨ hl conducted systematic literacy instruction for individuals with mental retardation at Abendberg).

105. Matilda F. Dana, Idiocy in Massachusetts, 15 S. LITERARY MESSENGER 367, 369 (1849), http://www.disabilitymuseum.org/dhm/lib/detail.html?id=1383&page=3. ("Other countries have shown us that idiots may be trained to habits of industry, cleanliness and self-respect Shall we who can transmute granite and ice into gold and silver, and think it pleasant work, shall we shrink from the higher task of transforming brutish men back in- to human shape?").

106. See, e.g., Mary Elizabeth Frederick, Note, Classification of the Educable Mentally Retarded by Intelligence Testing: A Discriminatory Effect, 30 CATH. U. L. REV. 335, 335–36 (1981) (describing the use of IQ tests

capacity but are instructive on the analytical and evidentiary value of these categories. In 1877, the superintendents of several public institutions for persons with mental disabilities assembled for an annual meeting to discuss their work. They recognized the existence of cognitive disability on a continuum:

> [T]he range of idiocy is a wide one. Thus, at one end of the scale is seen almost the entire absence of manifestations of sensibility, of intelligence and will [marked by the term 'idiot']. At the other end of the series are to be found cases where, to a casual observation, the question may arise whether any default in these particulars exists at all [and these are marked by the terms 'imbecile' or 'weakminded'] . . . . Of course, in

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to place students into different categories of handicapped children served by special education classes, including "the educable mentally retarded"); see also Robert L. Hayman, Jr., Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent, 103 HARV. L. REV. 1201, 1214–15 (1990) (explaining the "widespread agreement that mentally retarded persons may be broadly divided into four categories," which includes "mildly mentally retarded," also known as "educable mentally retarded," who are those whose abilities are just under the "below average" or "borderline" rankings for intellectual ability); Anita Silvers, Reconciling Equality to Difference: Caring (F)or Justice for People with Disabilities, 10 HYPATIA 30, 44 (1995) (distinguishing the "undeserving, willfully malfunctioning poor" from the "deserving poor," which encompasses disabled individuals "who would have worked but for their unfortunate impairments").

> the popular mind, the line between these two classes is not well defined; but that is unavoidable, from the insensible gradation in the mental features of the individuals composing the whole category.[107]

Despite this understanding of the gradations of capacity, the superintendents nevertheless recognized that starker, more administrable medical labels served heuristic functions for society to understand how to interact with these individuals:

> The term idiot, then, however originally used, has acquired a popular meaning. From my experience, I may say that it is thus used in a generic sense, covering the whole range referred to. On the other hand, it is also used in a specific sense, and is then applied to the lower grades of idiocy, for the reason that in the formation of our ideas the type of any genus is usually made up of its most marked characteristics. There is a mental image formed of an individual thoroughly stamped with the peculiar features of the class. Applying this to the class before us, it is often said of an individual that he is, or is not, a complete idiot [but an idiot nonetheless].[108]

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107. H.B. Wilbur, The Classifications of Idiocy, in PROCEEDINGS OF THE ASSOCIATION OF MEDICAL OFFICERS OF AMERICAN INSTITUTIONS FOR IDIOTIC AND FEEBLE-MINDED PERSONS 29–30 (Philadelphia, J.B. Lippincott Company 1877), http://www.disabilitymuseum.org/dhm/lib/detail.html?id=1794.

108. Id.

Accordingly, intellectual disability, and the capacity of persons labeled as such, became popularly understood as a much narrower range of severe incapacity.

U.S. courts struggled during these years to define the law's applicability to persons with intellectual disabilities. Early cases recognize persons with intellectual disabilities as "people" subject to the law's protection.[109] In State v. Crow, for example, the question presented was whether the law of rape applied to people with intellectual disabilities.[110] The defendant argued that the law did not apply because people with intellectual disabilities lacked the requisite "will" necessary for the crime of rape. The court rejected the defendant's argument and, drawing upon ordinary definitions and medical understanding of the term "idiot," reasoned that "an idiot cannot be said to have no will, but a will weakened and impaired, a will acting, but not acting in conformity to those rules, and motives, and views, which control the action of the will in persons of

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109. While common law recognized people with disabilities as subject to the law's protection, the cases did not address affirmative questions of legal personhood, i.e., when people with disabilities could exercise agency without state interference, an open question today.

110. 1853 Ohio Misc. LEXIS 58, at *5 (1853).

sound mind."[111] Similarly, in State v. Schlichter,[112] as regards the defendant's mens rea, the court noted:

> It would not be enough to show merely that [the victim] was weakminded, and that the defendant knew that she was so. The mere fact that a woman is weak-minded does not disable her from consenting to the act. So long as the woman is capable of consenting, and does consent, the act is not rape, and this is true though the man may know that she is of weak intellect.[113]

Perhaps motivated less by a concern for the suppressed agency of the woman with a mental disability[114] and more by the desire to minimal-

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111. Id. at *6 (emphasis removed). Interestingly, this case had to resolve whether a statutory definition of rape that used the term "insane" included idiot. The court distinguished "insanity" from "idiocy" based on inception and the former being a perversion of the will, not the impairment of it. Yet the court ultimately concluded that the term "insane" is sufficiently broad to include "idiots." Id. But see People v. Crosswell, 13 Mich. 427, 437 (1865) (distinguishing State v. Crow by noting that not all sex with a person with intellectual or developmental disabilities is rape because the prosecution must prove either force or fraud to show that it was against the woman's will).

112. 263 Mo. 561 (1915).

113. Id. at 574.

114. Antiquated statutory definitions of rape were gendered and assigned criminal liability to a male for "carnal knowledge" of a female. See

ize criminal liability for defendants who have sex with disabled women, courts at this time—at least rhetorically—emphasized the need to show, as a matter of proof, more than the existence of a mental disability to deny sexual agency. Over time, the cases reflect a greater focus on special protection and inherent vulnerability because of mental disability.[115]

The growth of industrialization and urbanization further marginalized those with more significant mental disabilities who could not participate in the workforce. Social narratives of deficient genetic composition surrounded people with intellectual and developmental disabilities as society associated this group with crime and degeneracy more broadly.[116] By

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generally RANDY THORNHILL & CRAIG T. PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION 153–57 (2000) (discussing the ways in which biology and gender influenced legal constructions of rape).

115. See, e.g., GA. CODE ANN. § 16-5-102 (a) (b) (West 2016) (special protection for "elderly" and other vulnerable individuals); GA. CODE ANN. § 16-6-5.1 (West 2016) (sexual assault by persons with supervisory or disciplinary authority); IDAHO CODE ANN. § 18-1505B (West 2017) (separate code provision for prosecution of crimes against vulnerable adults).

116. See, e.g., A.O. WRIGHT, The Defective Classes, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 222 (Isabel C. Barrows, ed. 1891) (proposing the classification of "defective classes, depending upon the three divisions of the mental faculties which are generally accepted by psychologists," and noting that

1912, "nature" dominated "nurture." The work of Henry Goddard in heredity and the societal dangers associated with cognitive disability became increasingly popular.[117] Goddard's legacy includes use of emerging scientific measures of intelligence, most notably the intelligence quotient (IQ), as a means of identifying "feeblemindedness" and justifying the exclusion of politically undesirable immigrants from entry into the United States.[118] Later, this same rationale (and assessment tool) was used as a justification for assigning second-class citizenship to women, African Americans, Latinos, Asians, and Native Americans.[119]

"[i]nsanity and idiocy are different forms of defective intellect," "[c]rime and vice are caused by defect of the emotions or passions," and "pauperism is caused by defect of the will").

117. Two Immigrants Out of Five Feebleminded, in 38 THE SURVEY, 528, 528–30 (1917) (discussing the results of Henry H. Goddard's research published in the Journal of Delinquency in September 1917).

118. See id.

119. See, e.g., LEILA ZENDERLAND, MEASURING MINDS: HENRY HERBERT GODDARD AND THE ORIGINS OF AMERICAN INTELLIGENCE TESTING (1998) (chronicling the history of Goddard, his work, and the controversy over measuring intelligence over time); Jay Dolmage, Disabled upon Arrival: The Rhetorical Construction of Disability and Race at Ellis Island, 77 CULTURAL CRITIQUE 24, 54 (2011) ("The attitudes incubated or accelerated at Ellis Island led to the eugenic 'racial knowledge' that can be seen clearly in [leading scientific texts.] . . . The use of terms such as 'moron' and 'feeble-minded,' applied nimbly for eugenic

Interestingly, despite widespread use by legislators, several early court decisions expressed a degree of skepticism about the use of medical tests to capture legal capacity. For example, in Delafield v. Parish, a probate matter concerning testamentary capacity, the court cautioned against the overreliance on medical science to determine what is fundamentally a complex, uncertain state:

> If a medical witness comes to the conclusion, from the mental manifestations of an individual, that his mind is disordered; that he is insane or imbecile, and from that infers that his brain is diseased, and then tells us that this disease of the brain must necessarily destroy the intellectual powers, we have gained nothing whatever from medical science: we have simply reasoned in a circle. We had arrived at the end of the inquiry as to mental capacity, before touching upon the connection between the mind and the brain, which connection alone brings the question within the scope of that science. [I] n so far as [medical opinions] rest upon the evidence going to show a want of intellect directly, and not merely as the result of disease of the brain, they derive very little, if any, additional force from the professional education of the witnesses.[120]

At least some courts seemed less inclined (in the early twentieth century) to use the existence of a disability alone as a proxy for incapacity to

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purposes, created the rhetorical potential for . . . a lexicon of eugenics into the American psyche.").

120. Delafield v. Parish, 25 N.Y. 9, 115–16 (1862).

consent. Ironically, some early rhetoric sounds more nuanced than many of the modern cases.[121]

By the early 1900s, public justifications for the sterilization of people identified as intellectually disabled increasingly surfaced. Medical professionals and scholars suggested that sexuality exacerbates the existing nervous system impairments of persons with intellectual and

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[121.] Compare Stephenson v. State, 48 So. 2d 255, 259 (Ala. Ct. App. 1950) (reversing lower court's finding of incapacity to consent to sex on insufficiency grounds: "[T]he evidence relating to the mental impairment of [twenty-seven year-old complainant] was deducible solely from the fact that, although she attended school for a number of years, she reached adulthood without the ability to read and write and tell the time of day") and Metzger v. State, 565 So. 2d 291, 292 (Ala. Crim. App. 1990) (affirming lower court finding of twenty-nine year-old complainant's incapacity to consent on sufficient evidence including living with her mother, attendance at "school for mentally retarded" for seven years, incapacity to spell, unemployment, and receipt of social security benefits). Nevertheless, even early courts used mental disability as a proxy for incapacity to consent to sexual intercourse and other forms of sexual expression deemed precursors to sex itself. Cf. Liebscher v. State, 69 Neb. 395, 400 (1903) ("It was not the intention of the legislature that a female under twelve years of age should be protected from an accomplished act of seduction, but left entirely unprotected from all of the defiling acts of the seducer that lead up to her seduction." (internal citations omitted)).

developmental disabilities;[122] that the removal of "this vicious tendency"[123] would make the individual more "docile and amenable to efficient training";[124] that sterilization would allow for greater freedom and interaction

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122. S.D. Risley, Is Asexualization Ever Justifiable in the Case of Imbecile Children, DISABILITY HISTORY MUSEUM, http://www.disabilitymuseum.org/dhm/lib/detail.html?id= 1391&page=all (last visited Apr. 4, 2018) ("The baneful influence of the abnormal sexual dominance which characterizes the lives of these persons manifests itself in aggravating the nervous disorders already existing.").

123. Id.

124. Id.

with others;[125] and that it would eliminate the "burden" placed on the individual to be a "menace to succeeding generations."[126]

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125. Current debates on sterilization in bioethics and family law concern the bounds of voluntary sterilization as a form of contraception where parents or legal guardians argue that sterilization affords greater sexual agency to minors and adults with mental disabilities who are freed from the burdens of reproduction and parenthood and receive the intimate connections desired. Compare In re Grady, 426 A.2d 467, 486 (N.J. 1981) (articulating the stakes in cases that are neither compulsory by the state or voluntary in a traditional sense and noting that if the individual with a mental disability "can have a richer and more active life only if the risk of pregnancy is permanently eliminated, then sterilization may be in her best interests"), with In re Romero, 790 P.2d 819, 821 (1990) (recognizing that exercise of state power to order the non-consensual sterilization of an individual must be carefully scrutinized, as sterilization "destroys an important part of a person's social and biological identity, can be traumatic for the individual, and can have long-lasting detrimental emotional effects" (internal quotation marks omitted)). See also Ariela R. Dubler, Sexing Skinner: History and the Politics of the Right to Marry, 110 COLUM. L. REV. 1348, 1365 (2010) (situating sterilization and birth control debates as part of the same political and rhetorical history); Eva Feder Kittay, Forever Small: The Strange Case of Ashley X, 26 HYPATIA 610, 610–11 (discussing a case about the voluntary sterilization and reproductive management of a six-year-old girl with cognitive disabilities by her parents).

126. Risley, supra note 122, at 97.

More than thirty states enacted compulsory sterilization laws in the first three decades of the twentieth century that resulted in the sterilization of more than 60,000 individuals labeled "mentally deficient." In addition to sterilization laws, thirty-nine states passed legislation restricting the ability of persons with mental disabilities to marry.[127] In Buck v. Bell, the most widely known example of a case discussing this issue, the Supreme Court upheld the constitutionality of Virginia's mandatory

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[127.] Many of these laws stayed on the books until as recently as the 1970s and remain on the books in other contexts such as voting. See, e.g., Rabia Shahin Belt, Mental Disability and the Right to Vote 1–2 (2015) (unpublished Ph.D. dissertation, Michigan University) (on file with author) (nearly forty states continue to disenfranchise people with mental disabilities based on this status and a minority of states continuing to employ archaic terms such as "idiot" and "imbecile"); Kay Schriner & Lisa Ochs, "No Right is More Precious": Voting Rights and People with Intellectual and Developmental Disabilities, 11 POL'Y RESEARCH BRIEF 1, 4 (2000) (discussing statutory changes to purge antiquated proscriptions on voting for "idiots" and "imbeciles" and others mental disabilities); see also Brooke Pietrzak, Marriage Laws and People with Mental Retardation: A Continuing History of Second Class Treatment, 17 DEV. MENTAL HEALTH L. 1, 2 (1997) (stating that as of 1997, thirty-three states still had laws that limited or restricted the rights of people with mental disabilities to marry); Perlin & Lynch, supra note 20, at 279–89 (discussing court decisions on capacity to marry and key issues in this area of law).

sterilization law.[128] Justice Oliver Wendell Holmes, Jr. offered his unfettered support for Virginia's compulsory sterilization law and the state's broad regulatory authority over the bodies and minds of individuals with intellectual and developmental disabilities: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[129]

Though early eugenics laws emphasized the dangers of heredity as the primary impetus for compulsory sterilizations in public institutions, the scope of constitutionally permissible sterilizations expanded over time to include those in community, as opposed to only in institutional, settings. For example, courts ratified the decisions of parents and guardians to sterilize minors living in non-institutionalized settings.[130]

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128. 274 U.S. 200, 207 (1927); see also ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016) (describing the history of and politics surrounding Buck v. Bell).

129. Buck, 274 U.S. at 207; see also Smith v. Wayne, 231 Mich. 409, 415 (1925) ("Under the existing circumstances it was not only its undoubted right, but it was [the state's] duty to enact some legislation that would protect the people and preserve the race from the known effects of the procreation of children by the feeble-minded, the idiots and the imbeciles.").

130. See, e.g., Ruby v. Massey, 452 F. Supp. 361, 366–69 (D. Conn. 1978) (holding statute unconstitutional by allowing parents of children in state facilities rights to sterilize not afforded to parents of

The use of disability diagnoses (particularly ones related to mental disabilities) as heuristic tools to judge the individual's functional capabilities is a part of broader etiological efforts to define disability. These etiological debates concern the relationship between an actual physical or mental impairment and its disabling effect, that is, how societies design choices of institutions, places of public accommodations, services, programs, and resource allocation make the existence of an impairment disabling to the individual.[131] This particular history generated an almost impenetrable presumption of incapacity based on the mere existence of a mental disability, even though "[t]he lack of capacity often has less to do with a person's inherent limitations than with societal attitudes that limit opportunities to make choices and to receive guidance and training in making those choices."[132] It is this history to which current disability

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non-institutionalized children).

131. See, e.g., Harris, Processing Disability, supra note 27, at 488–89 n.133 (2015) (discussing scholarly literature on the "social model" of disability). Harlan Hahn has written thoughtfully and deeply about a range of conceptions of disability both imposed upon people with disabilities and those actively adopted. See, e.g., Harlan Hahn, Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?, 21 BERKELEY J. EMP. & LAB. L. 166, 168–72 (2000) (distinguishing between "disability" and "impairment" and economic and medical views of disability in contrast to "disability" as a social and political identity).

132. NAT'L RESEARCH COUNCIL, CRIME VICTIMS WITH DEVELOPMENTAL DISABILITIES REPORT OF A WORKSHOP 42–43 (Joan

scholarship responds with caution, and which motivates greater normative awareness by legislatures and courts that the existence of a mental disability alone should not dictate the law's prohibitions on sexual consent. Part II, which follows, tests the four common scholarly assertions discussed in Section B above.

II. Empirical Analysis of Sexual Consent and Disability

This Part responds to four common claims established in Part I. The core empirical contribution of this Article, Part II directly challenges three of the four assertions—(1) that courts over-rely on IQ or mental age; (2) that victims reside in institutional settings; and (3) that people with mental disabilities do not testify—and revises a fourth assertion—(4) that the incapacity statutes are unduly vague. Part II begins with an examination of the statutes concerning incapacity and current legal tests to contextualize current scholarly claims. How do state statutes define incapacity to consent on the basis of mental disability? What guidance do statutes offer courts in judging consent? The author concludes that states have amended incapacity statutes in search of greater specificity; however, that specificity has relied on medical definitions of disability that raise new issues with respect to judicial interpretation and application. Thereafter, Part II presents select findings from the empirical review of twenty years of caselaw in this area to refute the existing empirical baseline informing the remaining three scholarly assertions discussed in Part I.

Petersilia, Joseph Foote & Nancy A. Crowell eds., 2001).

A. Statutory Landscape

Claims of overregulation rest on assertions of vague statutory language regarding incapacity to consent. Thus, this study first analyzes statutory structure and language with respect to incapacity to consent across all states and the District of Columbia over a twenty-year period from 1997 to the present.[133] The goal was to understand the legal definitions of incapacity and what baselines, if any, they offered courts to judge incapacity based on mental disability.

1. A New Structural Taxonomy

States define incapacity to consent based on roughly four categories of legal impairments: age, consanguinity, physical incapacity, and mental incapacity. The first two categories offer relatively clear, administrable rules for court resolution: state definition of minimum ages and degrees of familial relationships.[134] The latter two categories present the greatest challenges for legislatures and courts in both the construction of the offense and its application to individuals. Physical helplessness or incapacity in most states includes a state of unconsciousness due to intoxication or otherwise, but also includes physical incapacitation because of a disability. A critical question is whether the person could voluntarily consent (and express any consent) under case-specific

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133. The author used January 1, 1997 as the starting date for statutory analysis to account for the last comprehensive assessment published in 1997 by Deborah Denno.

134. Or through a legally recognized affinity such as a step-parent through marriage.

circumstances. Mental incapacity is often divided between temporary incapacitation because of intoxication (not unconsciousness) or the presence of a long-term or permanent mental disability—both, with the broadest brush stroke, turn on the question of whether the impairment (intoxication or disability) prevented the person from making a voluntary and informed choice to engage in sexual conduct. This Article focuses on the ways statutes capture incapacity for the latter group of individuals with long-term or permanent cognitive disabilities.[135]

FIGURE 1. INCAPACITY STATUTES ACROSS 50 STATES AND THE DISTRICT OF COLUMBIA AS OF OCTOBER 2017

Disability-Neutral(6 states + D.C.)	Disability-Specific(18 states)	Disability-Defined (30 states)	
Colorado District of Columbia Georgia Illinois Nebraska Nevada Ohio*	California* Idaho (2003) Indiana (2013, 2014) Iowa (1999)Kansas Maine Massachusetts (2010)Missouri New Hampshire (2012) New Jersey (2011, 2013)New Mexico North DakotaOhio* Oklahoma Pennsylvania South Dakota Wisconsin* Wyoming** (2018)	Alabama Alaska Arizona (1998) Arkansas (2001) California* Connecticut (2013) Delaware (2009)Florida Hawaii (2006) Kentucky (2012) Louisiana (1997) Maryland (2016) Michigan (2000) Minnesota Mississippi Missouri Montana (2015)	New Mexico New York (2000) North Carolina (2002) Oregon (2017) Rhode Island (1999) South Carolina (2006)Tennessee Texas (2015) Utah** (2018) Vermont (2006)Virginia Washington West Virginia Wisconsin*

* State has more than one type of statutory structure within sex offense statutes

** Pending legislation

(Parenthetical references refer to the year that the state changed its definition or added greater specificity to provisions on incapacity on the basis of mental disability if amended between 1997–2017)

Figure 1 above provides a new organizing taxonomy for state statutory provisions on incapacity to consent applicable to people with mental disabilities.[136] Structurally, state incapacity provisions can be orga-

135. See also infra Section II.B (discussing the potential for under-regulation of sexual relationships).

136. Some states employ a mix of subtypes in their criminal sexual

nized into three categories, from least disability-specific to most: (1) disability-neutral, (2) disability-specific (enumerating disability without defining it), and (3) disability-defined (enumerating disability and defining it). At the broadest level, disability-neutral statutes do not mention disability in either the substantive offenses or any separate statutory definitions. Incapacity is defined as an inability to understand the nature and/or consequences of one's conduct regardless of the underlying cause and temporal nature of that incapacity. For example, Colorado's sexual assault statute reads: "Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if: [t]he actor knows that the victim is incapable of appraising the nature of the victim's conduct."[137] The emphasis is on the victim's ability to understand the sexual act and make an informed decision in the moment, regardless of the underlying reason for potential incapacity. Five states and the District of Columbia have similar disability-neutral sex offense statutes.[138]

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offenses. See, e.g., CAL. PENAL CODE § 261(a)(1) (West 2017) (rape); § 261.5 (sex with minors); § 286 (g)–(h) (sodomy); § 243.4(b)–(c) (sexual battery).

137. COLO. REV. STAT. ANN. § 18-3-402(b) (West 2017).

138. See id; Georgia (GA. CODE ANN. § 16-6-1 (2011)); Illinois (720 ILL. COMP. STAT. 5/ 11-1.20(a)(2) (2016)); Nebraska (NEB. REV. STAT. § 28-319(1)(a), (b) (2006); Nevada (NEV. REV. STAT. § 200.366(1)(a) (2015)). For complete statutory analysis, see Jasmine E. Harris, Sexual Consent and Disability, 93 N.Y.U. L. REV. online app. (2018), http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-93-1-Harris.pdf

Although Professor Denno called for states to expunge disability from the criminal sex offenses,[139] most states have not adopted this prescription. Instead, states have opted for more robust descriptions of disability in the statutory provisions, with most of the statutory amendments occurring in the past ten years.[140]

The second type of incapacity statute, disability-specific (enumerated), mentions disability within the substantive offense but offers no additional statutory guidance.[141] California's statute, for example, defines rape as "[when] a person is incapable, because of a mental disorder or

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139. Denno, supra note 25, at 342–43.

140. See supra, Figure 1.

141. See CAL. PENAL CODE § 261(a)(1) (West 2013); IDAHO CODE § 18-6101(3) (2016); IND. CODE § 35-42-4-1(3) (2014); IOWA CODE tit. 17-A § 709.1(A) (2017); KAN. STAT. ANN. § 21-5503(a) (2018); ME. STAT. § 253(2)(C) (2017); MASS. GEN. LAWS ch. 265, § 22 (a) (LexisNexis 2018); N.H. REV. STAT. ANN. § 632-A:2(I)(h) (2018); N.J. STAT. ANN. § 2C:14-2(a)(7) (2014); N.D. CENT. CODE § 12.1-20-07(1)(b) (2017); OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2018); OKLA. STAT. tit. 21, § 1114(A)(2) (2017); 18 PA. CONS. STAT. ANN. § 3121(a)(5) (2018); S.D. CODIFIED LAWS § 22-22-1(3) (2016); WIS. STAT. § 940.225(2)(g), (2)(j), (3), (3)(m), (4)(b) (2013); WYO. STAT. ANN. § 6-2-302(a)(iv) (2018). Ohio and Wisconsin have a combination of subtypes within their sex offense statutes. For complete statutory analysis, see Harris, supra note 138.

developmental or physical disability, of giving consent."[142] Similarly, Kansas's statute enumerates disability without separately defining it: "Rape is . . . [k]nowingly engaging in sexual intercourse with a victim when the victim is incapable of giving consent because of mental deficiency or disease."[143]

The third type of incapacity statute present in a majority of states, disability-specific (defined), excludes people who meet the statutory definition of "mentally defective" or its progeny from providing effective legal consent to sex. For example, in Alabama, "[a] person commits the crime of rape in the second degree if [h]e or she engages in sexual intercourse with a member of the opposite sex who is incapable of consent by reason of being mentally defective" and "[m]entally [d]efective means that a person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct."[144]

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142. CAL. PENAL CODE § 261(a)(1) (2013). Note that although California references disability specifically within its rape statute, sexual assault is a general, disability-neutral statute. California and other states employing this subtype of incapacity provision, particularly in defining rape, may be responding to former criticism of sexual violence prohibitions that provided protections for particularly vulnerable groups under lesser criminal offenses, such as "abuse," rather than characterizing and punishing such acts as more violent and serious criminal offenses.

143. KAN. STAT. ANN. § 21-5503(a)(2) (West 2017).

144. 144 ALA. CODE § 13A-6-62(a)(2) (2017); id. § 13A-6-60(5) (2017). The statute includes separate provisions for temporary incapacity due

2. Qualitative Review of Statutes

A qualitative analysis of the statutes reveals that legislatures are struggling to contextualize legal incapacity on the basis of disability and, with some exceptions, have sought greater statutory clarity in the form of additional definitions and qualitative language to direct courts away from using the existence of disability as a proxy for incapacity. There is no single, common construction of legal incapacity across states. Most states do not enumerate baseline functional capacities for an individual to consent to sex;[145] rather, statutes articulate some skeletal version of the "nature and consequences test"[146] and, in some instances, func-

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to intoxication or other reasons. See, e.g., id. § 13-A-6-70(3)–(4) ("A person is deemed incapable of consent if he is . . . [m]entally incapacitated . . . or . . . [p]hysically helpless."); id. § 13-A-6-60(6) ("[M]entally incapacitated . . . means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent"); id. § 13-A-6-60(7) ("[P]hysically helpless . . . means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.").

145. While perhaps more administrable, this would create other problems with respect to who has or can develop these functional capabilities and require explicit normative statements that would likely prove politically impossible or undesirable.

146. "Nature and consequences" refers to a person's inability because of disability or other impairment to understand or appraise the nature and

tional capacities can be extracted from negative statements about what incapacity looks like. Thus, an ability to understand or appraise sexual conduct includes the ability to discern: its "distinctly sexual" nature in Arizona,[147] "potential for harm to that person" in Alaska,[148] the "quality" of the conduct in Mississippi,[149] "lewd and lascivious conduct" in Vermont,[150] or, generally, ability to evaluate the "nature of the person's own

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consequences of the sexual act. See infra Part II.B (discussing the judicial tests that have developed at common law).

147. ARIZ. REV. STAT. ANN. § 13-1401(7)(b) (2017) ("For the purposes of this subdivision, 'mental defect' means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.").

148. ALASKA STAT. ANN. § 11.41.470(4) (West 2017) ("'[M]entally incapable' means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person.").

149. MISS. CODE ANN. § 97-3-97(b) (West 2017) ("'[M]entally defective person' is one who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct.").

150. VT. STAT. ANN. tit. 13, § 3254(2)(A), (D) (West 2017) (defining a person acting without consent as having knowledge that the other person was "mentally incapable of resisting, or declining consent to, the sexual act or lewd and lascivious conduct, due to a mental condition or a

conduct" in Montana.[151] The ability to give "knowing" and "voluntary" consent includes: acting "freely and voluntarily and hav[ing] knowledge of the transaction involved" in California,[152] understanding that the individual has a right to say no or withdraw consent in Maine,[153] the ability to "freely arrive[ ] at an independent choice as to whether or not to engage in sexual conduct" in New Hampshire,[154] and the ability to "apprais[e] the nature of his or her conduct," "resist[ ]," "and communicate

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psychiatric or developmental disability").

151. MONT. CODE ANN. § 45-2-101(40) (West 2017) ("'Mentally disordered' means that a person suffers from a mental disease or disorder that renders the person incapable of appreciating the nature of the person's own conduct.").

152. CAL. PENAL CODE § 261.6 (West 2017) ("'[C]onsent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.").

153. ME. REV. STAT. ANN. tit. 17-A, § 253(2)(C) (2017) ("'Mental disability' . . . which in fact renders the other person substantially incapable of appraising the nature of the contact involved or of understanding that the person has the right to deny or withdraw consent.").

154. N.H. REV. STAT. ANN. § 632-A:2(I)(h) (2017) ("When . . . the victim has a disability that renders him or her incapable of freely arriving at an independent choice as to whether or not to engage in sexual conduct, and the actor knows or has reason to know that the victim has such a disability.").

unwillingness to submit to the act" in North Carolina.[155] The ability to exercise "judgment" includes: "know[ing] the right and wrong of conduct in sexual matters" in Iowa[156] and the ability to give "a reasoned consent" in Minnesota.[157]

Many state definitions of incapacity adopt a conception of mental disability that privileges medical expertise in its assessment and identification.[158] By privileging medical definitions and diagnostic categories

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155. N.C. GEN. STAT. ANN. § 14-27.20(1) (West 2017) ("Mental disorder . . . which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.").

156. IOWA CODE ANN. § 709.1(2) (West 2017) ("Such other person is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.").

157. MINN. STAT. ANN. § 609.341(6) (West 2017) ("'Mentally impaired' means that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.").

158. See, e.g., DEL. CODE ANN. tit. 11, § 761(a) (West 2017) (defining "cognitive disability" as "developmental disability . . . including, but not limited to, delirium, dementia and other organic brain disorders for which there is an identifiable pathologic condition, as well as nonorganic brain

of disability, states legislate the scope and content of relevant evidence and preferred expertise.[159] Whether an individual has a "mental disease or defect that renders them incapable" of understanding the sexual decision and its consequences also generalizes the inquiry,[160] making it

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disorders commonly called functional disorders . . . [and] mental retardation, severe cerebral palsy, and any other condition found to be closely related to mental retardation"); KY. REV. STAT. ANN. § 510.060(1)(a) (West 2017) ("person who is incapable of consent because he or she is an individual with an intellectual disability"); MD. CODE ANN., CRIM. LAW § 3-301(f) (West 2017) (defining a "substantially cognitive impaired individual" as one who "suffers from an intellectual disability or a mental disorder").

159. See, e.g., Warren v. Kentucky, No. 2003-SC-0138-MR, 2004 WL 2364478, at *5–6 (Ky. Oct. 21, 2004) (addressing relevance of evidence of disability diagnosis—e.g., testimony that the victim received social security benefits and had a representative payee, and that victim received special education services while she was a student—and finding the evidence relevant even though the prosecution did not allege that the victim lacked the ability to consent as it rebutted the defendant's claim that the charge was fabricated).

160. This language reflects the operative legal inquiry in a number of states. In Alabama, for example, a person is "incapable of consent" by being "mentally defective." ALA. CODE § 13A-6-70(c)(2) (2017). The statute defines "mentally defective" as "a person [that] suffers from a mental disease or defect which renders him incapable of appraising the nature of his

about whether X diagnosis manifests in impaired reasoning, judgment, and information processing rather than whether the individual possessed the adaptive abilities to make the sexual decision at issue.[161] Consider Texas's definition of "[d]isabled individual" for purposes of sexual offenses: "[A] person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self."[162] While not a categorical prohibition such as one in Louisiana tied to a set intelligence quotient (IQ),[163] or one

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conduct." ALA. CODE § 13A-6-60(5) (2017). See also ARK. CODE ANN. § 5- 14-101(4) (West 2017); HAW. REV. STAT. ANN. § 707-700 (2017); OR. REV. STAT. ANN. § 163.305(2) (West 2017); S.C. CODE ANN. § 16-3-651(e) (2017).

161. The privileging of medical expertise reflects a deeply-rooted history of pathologizing non-normative differences that cut across race, class, gender, and sexual identity and served as a state-sponsored means to disenfranchise minority groups in the United States. It reflects a principal tension in disability rights law to wed medical science and disability in legal definitions, particularly those in welfare benefits legislation. Cf. Bagenstos, supra note 55, at 10–19 (discussing a shift from social welfare paradigms to civil rights).

162. TEX. PENAL CODE ANN. § 22.021(b)(3) (West 2017).

163. See LA. STAT. ANN. § 14:42(A)(6) (2017) ("[V]ictim is prevented from resisting the act because the victim suffers from a . . . mental infirmity."); id. § 14:42(C)(2) ("'Mental infirmity' means a person with an intelligence

that explicitly enumerates medical diagnoses,[164] read broadly, Texas's statutory language suggests that an individual's limited adaptive capabilities, such as the need for supported living or personal assistance, might qualify as proof that the person is "disabled" for purposes of sexual decisionmaking.[165]

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quotient of seventy or lower.").

164. See, e.g., MICH. COMP. LAWS ANN. § 750.520a(i) (West 2017) ("'Mentally disabled' means 'that a person has a mental illness, is intellectually disabled, or has a developmental disability.'").

165. Further, such definition is directly at odds with Texas's reform efforts in the guardianship arena. Texas recently passed legislation, the first of its kind nationally, giving legal recognition to supported-decisionmaking agreements between the individual with a mental disability and a designated "supporter" as an alternative to the appointment of a legal guardian. See Supported Decision-Making Agreement Act, TEX. EST. CODE ANN. §§ 1357.001–1357.102 (West 2017). Legislators passed House Bill 39 and Senate Bill 1881 during the 84th Texas Legislative Session in 2015. See H.B. 39, 84th Leg., Reg. Sess. (Tex. 2015); S.B. 1881, 84th Leg., Reg. Sess. (Tex. 2015). Yet in the context of sexual consent, Texas appears to use evidence of supported decisionmaking as evidence of incapacity to make sexual decisions. On a more theoretical level, the conception of incapacity as synonymous with requiring support runs counter to such theories as Martha Albertson Fineman's shared vulnerability as part of the human condition or Martha Nussbaum's notion of capabilities. See, e.g., Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality

Of note is that the Texas state legislature in 2015 changed the definition of "disabled" from a prior (and also recent) amendment that enumerated specific categories of disability.[166] Texas currently has a bill pending that would eliminate reference to disability in its sexual assault statute such that people with temporary and permanent mental impairments would be adjudged under the same section and found incapable of consent if they were "incapable of appraising the nature of the act."[167]

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in the Human Condition, 20 YALE J.L. & FEMINISM 1, 12 (2008) ("The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity."); Martha C. Nussbaum, HUMAN CAPABILITIES, FEMALE HUMAN BEINGS, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61, 78 (Martha Nussbaum & Jonathan Glover eds., 1995) ("All human beings participate (or try to) in the planning and managing of their own lives, asking and answering questions about what is good and how one should live. Moreover, they wish to enact their thought in their lives—to be able to choose and evaluate, and to function accordingly.").

166. TEX. PENAL CODE ANN. § 22.04 (West 2017). The new definition says that a "disabled individual" refers to someone "(A) with one or more of the following: (i) autism spectrum disorder. . .; (ii) developmental disability. . .; (iii) intellectual disability. . .; (iv) severe emotional disturbance. . .; or (v) traumatic brain injury. . .; or (B) who otherwise . . . is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self." Id.

167. H.B. 265, 85th Leg., 1st Sess. (Tex. 2017).

Though the goal of the bill is not to address disability, disability ends up being addressed explicitly or implicitly as part of the broader legislative efforts to clarify and streamline the interpretive process.[168]

While many states have amended statutory provisions on sexual incapacity over the last twenty years,[169] few have made substantive

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168. Consider the current efforts of the American Law Institute (ALI) to reform section 213 of the Model Penal Code on Rape and Sexual Assault. See Model Penal Code: Sexual Assault and Related Offenses, AM. LAW INST., https://www.ali.org/projects/show/sexual- assault-and-related-offenses (last visited Jan. 8, 2018). Though the impetus for reform is not disability-specific, nevertheless, the overhaul includes attempts to streamline tests for incapacity on the basis of disability. See Stephen J. Schulhofer, Reforming the Law of Rape, 35 L. & INEQ. 335, 343–52 (2017) (discussing his proposed provisions involving "prohibited kinds of force, fraud, coercion, exploitation, and vulnerability" before the ALI in its revision of the sexual offense provisions of the Model Penal Code). The ALI recommends returning to a bright line test for legal incapacity—chronological or mental age of twelve years or below—essentially applying the statutory rape model to mental disability. The proposal to use mental age as the evaluative tool is particularly problematic given the research on its unreliability.

169. Twenty-three states have made at least one revision (or such revision is pending) to the sex offense provisions on incapacity on the basis of mental disability: Arizona, Arkansas, Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan,

amendments that significantly change the statutory meaning or legal standard itself, other than to further entrench medical diagnostic categories within legal definitions of incapacity. Most of the statutory

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Montana, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Texas, Utah, Vermont, and Wyoming. See Harris, supra note 33. Other states, such as Idaho, Louisiana, Michigan, New Jersey, Texas, and Wyoming, have made more than one amendment to statutory language on incapacity to consent over the past twenty years (broader than just incapacity on the basis of mental disability). See id. For example, Louisiana has amended its statute on sexual offenses at least four times ranging from shifts in the degrees of the offenses, grammatical edits, and amendments to terminology regarding mental disability. See, e.g., H.B. 604, 2001 Leg., Reg. Sess. (La. 2001) (removing aggravated oral battery); S.B. 659, 2004 Leg., Reg. Sess. (La. 2004) (renaming second degree sexual battery from "aggravated" to "second degree"); H.B. 232, 36th Leg., Reg. Sess. (La. 2010) (changing the grammar of LA. STAT. ANN. § 43(2) (2017) from "[w]hen the victim is incapable, through unsoundness of mind" to "[w]hen the victim, through unsoundness of mind, is temporarily or permanently incapable"); H.B. 139, 41st Leg., Reg. Sess. (La. 2015) (changing titles of rape and sexual assault offenses). Compare H.B. 269, 1997 Leg., Reg. Sess. (La. 1997) (defining "mental infirmity" to mean "a person with an intelligence quotient of seventy or lower"), with LA. STAT. ANN. § 43.1(A)(3) (including new language for "mental infirmity" reading "incapable, through unsoundness of mind, of understanding the nature of the act") (repealed 2015).

amendments regarding incapacity reflect a decision to remove antiquated references to "idiocy," "imbecility," "feeblemindedness," and "mental retardation" based on a more widely held view of their stigmatizing quality.[170] Changes in terminology have significant expressive value.[171] Twen-

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170. In 2013, Connecticut, for example, replaced the term "mentally defective" with "person is impaired because of a mental disability or disease." H.B. 6641, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013); see also CONN. GEN. STAT. ANN. § 53a-71(a)(2) (West 2017) (containing the updated language); Connecticut Judiciary Committee Transcript, March 25, 2013, 2013 Gen. Assemb., Reg. Sess. (Conn. 2013) (statement of Rebekah Diamond) (providing arguments in favor of the amendment, including that derogatory language such as "mentally defective" "invite[s] the public to think of those who are disabled . . . as less than the rest of us" and keeps people with disabilities institutionalized); Connecticut Senate Transcript, May 16, 2013, 2013 Gen. Assemb., Reg. Sess. (Conn. 2013) (statement of Sen. Eric Coleman) (recognizing the importance of this bill to strike out the offensive terminology "mentally defective").

171. See, e.g., Denno, supra note 25, at 342–43 (contending that terms like "mentally defective," "idiocy," and "imbecility" are problematic and encourages the perception that mental retardation is static); Robert Sandieson, A Survey on Terminology that Refers to People with Mental Retardation/Developmental Disabilities, 33 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 290, 291 (1998) (discussing the literature on the stigmatizing effect of terminology used in reference to people with intellectual disabilities); see also Denno,

ty-eight years after the promulgation of the Americans with Disabilities Act, and eight years after President Obama signed Rosa's Law[172] calling for federal and state expungement of stigmatizing and antiquated statutory references to intellectual and developmental disabilities, only two state statutes continue to use "mental retardation" explicitly in substantive definitions of sexual offenses.[173] However, twenty-two states continue to use "mentally defective" or its variants including "unsoundness of mind"

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supra note 25, at 342 (noting that the American Association of Mental Deficiency changed its name to American Association on Mental Retardation (AAMR) in 1987 "for the sole purpose of eliminating any reference to a label it considered 'outmoded' and 'pejorative'"). The AAMR subsequently changed its name to the American Association for Intellectual and Developmental Disabilities in 2007. Press Release, Am. Ass'n on Mental Retardation, World's Oldest Organization on Intellectual Disability Has a Progressive New Name (Nov. 27, 2006), http://www.prnewswire.com/news- releases/worlds-oldest-organization-on-intellectual-disability-has-a-progressive-new-name- 56524127.html.

172. Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (codified as amended in scattered sections of 20 U.S.C.A., 29 U.S.C.A., and 41 U.S.C.A.).

173. See N.C. GEN. STAT. ANN. § 14-27.20(1) (West 2017) ("'Mentally disabled' means (i) a victim who suffers from mental retardation."); DEL. CODE ANN. tit. 11, § 761(a) (West 2017) (defining "cognitive disability," which is used in the substantive offenses, to explicitly include "mental retardation").

to show incapacity to consent to sex.[174] Other states incorporate defini-

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[174.] Nine states continue to use the term "mentally defective": ALA. CODE § 13A-6-70(c) (2018) (Alabama), ARK. CODE ANN. § 5-14-101(4) (2017) (Arkansas), FLA. STAT. § 794.011(1)(b) (2017) (Florida), HAW. REV. STAT. § 707-700 (2017) (Hawaii), MISS. CODE ANN. § 97-3-97(b) (2017) (Mississippi), OR. REV. STAT. ANN. § 163.305(3) (2018) (Oregon), S.C. CODE ANN. § 16-3-651 (2018) (South Carolina), TENN. CODE ANN. § 39-13-501(3) (2013) (Tennessee), and W. VA. CODE § 61-8B-1(3) (2007) (West Virginia). Two states use "unsoundness of mind": IDAHO CODE § 18-6101(3) (2018) (Idaho) and OKLA. STAT. ANN. tit. 21, § 1114(A)(2) (2017) (Oklahoma). An additional eleven states use mental "defect," "condition," "disorder," or "disease": ARIZ. REV. STAT. ANN. § 13- 1401(7)(b) (2015) (Arizona), IND. CODE § 35-42-4-1(3) (2014) (Indiana), IOWA CODE § 709.1(2) (2017) (Iowa), KAN. STAT. ANN. § 21-5503(a) (2018) (Kansas), MO. ANN. STAT. § 566.030 (2017) (Missouri), MONT. CODE ANN. § 45-2-101(40) (2017) (Montana), N.M. STAT. ANN. § 30-9-10(A)(4) (2018) (New Mexico), N.D. CENT. CODE § 12.1-20-07(1)(b) (2017) (North Dakota), OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2008) (Ohio), 11 R.I. GEN. LAWS ANN. § 11-37-2 (1) (2017) (Rhode Island), and UTAH CODE ANN. § 76-5-402(1) (2017) (Utah). Ohio's definition of "sexual battery" omits reference to mental disability as the reason for incapacity. See OHIO REV. CODE ANN. § 2907.03(A)(2) (LexisNexis 2017) ("No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: . . . (2) The offender knows that the other person's ability to appraise the nature

tions of mental disability from social welfare statutes where definitions of disability track medical diagnoses for purposes of entitlement to public benefits, programs, and services as discussed previously. For example, Delaware uses the term "cognitive disability" in its criminal sexual offenses and its definition offers a list of included medical diagnoses including "developmental disability," "delirium, dementia and other organic brain disorders," "mental retardation, severe cerebral palsy, and any other condition found to be closely related to mental retardation."[175]

While some states have added or revised definitions of disability (sometimes making only cosmetic changes to reflect new terminology), others have included statutory language that qualifies the degree of impairment necessary to be adjudged incapable of sexual consent requiring that the disability render the person "substantially incapable of appraising the nature of the conduct."[176] Still other states, including

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of or control the other person's own conduct is substantially impaired."). Note that Ohio's definition of rape, however, predicates incapacity on the presence of a mental disability that renders the person "substantially impaired because of a mental or physical condition." OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2017). For complete statutory analysis, see Harris, supra note 138.

175. DEL. CODE ANN. tit. 11, § 761(a) (West 2017).

176. See, e.g., ME. REV. STAT. ANN. tit. 17A, § 253 (2)(C) (2017) ("[S]ubstantially incapable of appraising the nature of the contact"); N.C. GEN. STAT. ANN. § 14-27.20(1) (West 2017) ("[S]ubstantially incapable of appraising the nature of his or her conduct") OHIO REV. CODE ANN.

Arkansas and California, have explicitly stated in the statute that the existence of disability is not a proxy for legal incapacity to consent.[177]

Even where there is an effort to define in more detail the degree of impairment that is considered within the statute, states have not provided greater clarity with respect to a defendant's knowledge of the victim's incapacity to consent. Whether a state structurally defines a defendant's knowledge of the victim's incapacity as an element of the offense (including as a part of consent) or as an affirmative defense determines

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§ 2907.02(A)(1)(c) (West 2017) ("No person shall engage in sexual conduct with another . . . when . . . [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition"). Most recently, in 2016, Maryland amended its provision on incapacity to replace the previously defined term "mentally defective" with "substantially cognitively impaired individual." MD. CODE ANN., CRIM. LAW § 3-301(f) (West 2016) (amended 2016).

177. See ARK. CODE ANN. § 5-14-101(4) (West 2017) ("'Mentally defective' means that a person suffers from a mental disease or defect that renders the person: (i) Incapable of understanding the nature and consequences of a sexual act [D]etermination that a person is mentally defective shall not be based solely on the person's intelligence quotient.") (emphasis added); CAL. PENAL CODE § 261(a)(1) (West 2017) ("Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act , the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.").

who has the burden of proof in the case.[178] In thirty-seven states and the District of Columbia, the defendant's knowledge of the victim's incapacity is either incorporated into the element of consent or is an explicit element of the substantive sex offense, assigning the burden of proof to the prosecution beyond a reasonable doubt.[179] Three states include

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178. Compare, e.g., ARIZ. REV. STAT. ANN. § 13-1406(A) (2017) (making a defendant's knowledge an element of the offense by requiring the state to prove knowledge or intent beyond a reasonable doubt), with ARK. CODE ANN. § 5-14-102(e) (West 2017) ("When criminality of conduct depends on a victim's being incapable of consent because he or she is mentally defective or mentally incapacitated, it is an affirmative defense that the actor reasonably believed that the victim was capable of consent.") (emphasis added). Thus, Arkansas prosecutors do not have to prove defendant's knowledge to convict; rather, defendants can raise lack of knowledge as an affirmative defense and hold the burden of production (evidence) and persuasion (degree of certainty) by a preponderance of the evidence. For a discussion of the impact of burdens in criminal courts versus campus adjudication of sexual assault offenses see, for example, David DeMatteo et al., Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault, 21 PSYCHOL., PUB. POL'Y, & L. 227, 229 (2015).

179. See ALASKA STAT. § 11.41.410(a)(3)(a) (2017) (Alaska); ARIZ. REV. STAT. ANN. § 13-1401(7)(b) (2015) (Arizona); CAL. PENAL CODE § 261(a)(1) (West 2013) (California); COLO. REV. STAT. §18-3-402 (2013) (Colorado); DEL. CODE ANN. tit. 11, § 770 (2010) (Delaware); D.C. CODE

§ 22-3002-3006 (2018) (District of Columbia); FLA. STAT. § 794.011 (4)(e)(5) (2017) (Florida); HAW. REV. STAT. § 707-730(1) (2017) (Hawaii); 720 ILL. COMP. STAT. 5/11-1.20(a)(2) (2016) (Illinois); IND. CODE § 35-42-4-1(3) (2014) (Indiana); KAN. STAT. ANN. § 21-5503(a) (2018) (Kansas); LA. STAT. ANN. § 14:41(A) (2017) (Louisiana); ME. STAT. tit. 17-A, § 253 (2)(C) (2017) (Maine); MD. CODE ANN., CRIM. LAW § 3-303(a)(1)(ii) (LexisNexis 2017) (Maryland); MASS. GEN. LAWS ANN. Ch. 265, § 22(a) (2018) (Massachusetts); MICH. COMP. LAWS § 750.520b(1)(g), (h) (2014) (Michigan); MINN. STAT. § 609.342(1)(e)(ii) (2007) (Minnesota); MO. REV. STAT. § 566.030 (2017) (Missouri); MONT. CODE ANN. § 45-5-502 (2017) (Montana); NEB. REV. STAT. § 28- 319(1)(a)-(b) (2018) (Nebraska); NEV. REV. STAT. § 200.366(1)(a) (2015) (Nevada); N.H. REV. STAT. ANN. § 632-a:2(I)(h) (2018) (New Hampshire); N.J. STAT. ANN. § 2C:14- 2(a)(7) (West 2014) (New Jersey); N.M. STAT. ANN. § 30-9-11(D)(2) (2009) (New Mexico); N.C. GEN. STAT. ANN. § 14-27.22(a) (2015) (North Carolina); N.D. CENT. CODE § 12.1-20- 07(1)(b) (2017) (North Dakota); OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (LexisNexis 2008) (Ohio); 11 R.I. GEN. LAWS ANN. § 11-37-2(1) (2017) (Rhode Island); S.C. CODE ANN. § 16-3-654(1)(b) (2018) (South Carolina); S.D. CODIFIED LAWS § 22-22-1(3) (2018) (South Dakota); TENN. CODE ANN. § 39-13-503(a)(3) (2017) (Tennessee); TEX. PENAL CODE ANN. § 22.011(a)(1) (West 2017) (Texas); UTAH CODE ANN. § 76-5-402(1) (LexisNexis 2018) (Utah); VT. STAT. ANN. tit. 13, § 3252(a)(1) (2018) (Vermont); WIS. STAT. § 940.225(2)(g) (2013) (Wisconsin); WYO. STAT. ANN. § 6-2-302(a)(iv) (2018) (Wyoming). This is compared to thirty-six states in 1997. See

an affirmative defense for defendant's lack of knowledge of the victim's incapacity to consent, assigning the burden of proof to the defendant.[180] For example, in rape cases based on incapacity to consent because of mental defectiveness or incapacitation, a defendant in Arkansas has the burden of proving an "affirmative defense that that the actor reasonably believed that the victim was capable of consent" by a preponderance of

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Denno, supra note 25, at 371. South Dakota has since addressed defendant's knowledge and Denno did not count the District of Columbia in 1997 at the time of her study. For complete statutory analysis, see Harris, supra note 138.

180. See ARK. CODE ANN. § 5-14-102(e) (West 2017); CONN. GEN. STAT. ANN. § 53a- 67(a) (West 2017); N.Y. PENAL LAW § 130.10(1) (McKinney 2017). The applicable burden of proof is defined by statute to be less than beyond a reasonable doubt, which could be either a preponderance of the evidence standard or a clear and convincing evidence standard. See Wright v. State, 254 S.W.3d 755, 757–58 (Ct. App. Ark. 2007) (discussing the appellant's burden to prove the affirmative defense by a preponderance of the evidence); People v. Bjork, 163 N.Y.S.2d 472, 477–78 (N.Y. App. Div. 2013) (citing N.Y. PENAL LAW § 25.00(2), which states "[w]hen a defense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence"); see also State v. Tozier, 46 A.3d 960, 970–71, 971 n.8 (App. Ct. Conn. 2012) (noting legislative intent to not include an actor's knowledge of a victim's mental incapacity as an essential element of the crime).

the evidence.[181] In Delaware, however, a defendant's knowledge is an element of the offense and the legislature explicitly rejects any affirmative defense based on defendant's lack of knowledge of the victim's incapacity.[182] Other notable affirmative defenses include that the defendant has an intellectual or developmental disability or that the defendant and victim are spouses.[183]

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181. ARK. CODE ANN. § 5-14-102(e) (West 2017) (providing affirmative defense in rape cases that the actor did not know the victim was incapable of consent); § 5-1-111(d)(1) (requiring that affirmative defense be proven by a preponderance of the evidence). See supra note 53; see also N.Y. PENAL LAW § 130.10(1) (McKinney 2017) ("In any prosecution under this article in which the victim's lack of consent is based solely upon his or her incapacity to consent because he or she was mentally disabled, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent.")

182. See DEL. CODE ANN. tit. 11, § 1105(d) (West 2017) ("[I]t is no defense to an offense or sentencing provision . . . that the accused did not know that the victim was a vulnerable adult or that the accused reasonably believed the person was not a vulnerable adult unless the statute defining the underlying offense . . . expressly provides that knowledge that the victim is a vulnerable adult is a defense.").

183. See, e.g., ALASKA STAT. ANN. § 11.41.432(a) (West 2017) ("It is a defense . . . that the offender is (1) mentally incapable; or (2) married to

Despite legislative amendments, statutory ambiguity continues within and among state incapacity statutes.[184] As discussed previously,

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the person.") (defense to sexual assault); ME. REV. STAT. ANN. tit. 17-A, § 255-A (2017) ("It is an affirmative defense to prosecution that the actor receives services for an intellectual disability or autism or is a person with an intellectual disability or autism"); MASS. GEN. LAWS ANN. ch. 265, § 13F (West 2017) (noting affirmative defense to indecent assault and battery by a person with an intellectual disability upon another person with an intellectual disability).

184. Consider the current debates around affirmative consent and the role of intoxication in impairing one's sexual decisionmaking on university and college campuses. See, e.g., Jacob Gersen & Jeannie Suk, The Sex Bureaucracy, 104 CAL. L. REV. 881, 925–31 (2016) (discussing sexual assault definitions at colleges and universities); Aya Gruber, Consent Confusion, 38 CARDOZO L. REV. 415 (2016) (attempting to provide clarity to the legal consent landscape); Stephen J. Schulhofer, Consent: What It Means and Why It's Time to Require It, 47 U. PAC. L. REV. 665, 681 (2016) (defending affirmative consent as a common sense norm); Shaw, supra note 44, at 1410–11 (discussing state statutory responses to the affirmative consent debate); see also Janet Napolitano, "Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL'Y REV. 387, 389–90 (2015) (quoting the University of California's affirmative consent policy and noting that "[t]he standard provides greater clarity for both partners than the previous 'no means no' standard by requiring lucid, affirmative statements or

assumptions regarding statutory ambiguity is a key feature of the existing scholarship and its treatment of legislative standards. While this ambiguity may raise a cautionary flag regarding the exercise of judicial discretion, the presence of ambiguity alone does not result in overregulation.[185] Thus, despite the continued vagueness in the statutes on what constitutes mental incapacity on the basis of disability, many state legislatures are sending clearer messages about how courts making incapacity determinations should treat disability. While the Texas statute

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actions at each step of a sexual encounter in order to ensure consent. Put simply, only yes means yes.").

185. Courts necessarily wrestle with statutory vagueness in other areas. See, e.g., Bernard W. Bell, R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory, 78 N.C.L. REV. 1253, 1316 n.270 (2000) (noting the success of the Sherman Antitrust Act despite its statutory vagueness). The claim of overregulation relies on the following reasoning: vagueness in the context of criminal law promotes risk averse court decisions and the deterrence of potential sexual partners of people with mental disabilities because they are concerned about risk of error and uncertainty in the law where the stakes are particular high. However, the problem is not the vagueness per se but the potential errors in legal decisionmaking caused by the lack of normative shifts in understanding the full spectrum of capabilities of people with disabilities that inject bias into the decisionmaking process. See Harris, Processing Disability, supra note 27, at 483 (discussing the information deficit about disability norms that infect the legal decisionmaking process); infra Section III(A)–(B).

may premise statutory disability on the wrong markers (self-care),[186] the legislature has sent a clear message to courts concerning the use of diagnoses as proxies for incapacity to consent. The legislature amended the definition of "disabled individual" from a list of diagnoses such as "autism," "intellectual disability," "severe emotional disturbance," or "traumatic brain injury" to a more general reference to a person "who by reason of age or physical or mental disease, defect or injury is substantially unable to protect the person's self from harm."[187]

Courts have taken note of such legislative directives and, at least rhetorically, their decisions have begun to reflect an awareness that the existence of the disability is not dispositive of incapacity to consent.[188]

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186. See supra notes 162–65 and accompanying text (discussing TEX. PENAL CODE ANN. § 22.021(b)(3)).

187. H.B. 2589, 84th Leg., Reg. Sess. (Tex. 2015) (emphasis added) (proposing a separate subdivision for and providing a definition of disabled individuals). While the amended language does not explicitly seek to clarify the use of diagnoses in incapacity determinations, the statutory language, in effect, provides judges with greater clarity with respect to the need for evidence showing degree to which a disability must impair the person's capacity for self-care. For legislative intent, see TEXAS COMMITTEE REPORT, S.84- 2589, Reg. Sess., at 1 (2015) (stating "H.B. 2589 seeks to prevent other victims from falling into th[e] gap" between the age at which a juvenile is considered a disabled individual and the age limit for statutory rape laws for purposes of certain sexual assaults).

188. See, e.g., State v. Hunt, 710 S.E.2d 339, 344 (N.C. Ct. App. 2011)

Consider a Texas court's analysis of evidence of the complainant's capacity to understand "right" from "wrong" (albeit employing an outdated term for intellectual disability): "Appellant's argument that complainant has a similar concept of right and wrong as non-retarded individuals does not offer much proof of his ability to appraise the nature of a sexual act. Whether or not he has the same concept of right and wrong has nothing to do with complainant's capacity to understand the nature of a sexual act."[189] Still, as the analysis above demonstrates, there are no clear statutory baselines for what constitutes legal capacity across states. Judicial tests fill the statutory void and are the first step in the exercise of discretion.

("But even if the evidence was sufficient to establish 'mental retardation[,]' [the statute] requires not just a diagnosis of mental retardation, but also evidence that the mental retardation is of such a degree that it 'temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct ' [The statute] thus recognizes that there is a wide range of abilities among those who have a diagnosis of mental retardation. Some are able to function well in society and live independently or with minimal assistance, while others cannot." (quoting N.C. GEN. STAT. ANN. § 14-27.20(1) (2007))), rev'd on other grounds, 722 S.E.2d 484 (N.C. 2012).

189. Green v. State, No. 14-06-00535-CR, 2007 WL 2265787, at *3 (Tex. Ct. App. Aug. 9, 2007).

B. Legal Tests

The existing literature describes six legal tests of incapacity of consent developed through judicial interpretation of statutory language: (1) nature of the conduct; (2) nature & consequences; (3) judgment; (4) morality; (5) evidence of mental disability; and (6) totality of the circumstances.[190] The "nature of the conduct" test, described by some scholars as the least rigorous of the tests, requires that the individual understand the sexual nature of the conduct and be able to express volition.[191] The "evidence of mental disability" test reflects the absence of any one test; rather, it focuses on mental disability alone as a determinant of legal

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190. See Denno, supra note 25, at 344–46; see also State v. Olivio, 589 A.2d 597, 602 (N.J. 1991) (discussing states' interpretations of statutes similar to the statute at issue); Boni- Saenz, supra note 24 (proposing a "cognition-plus" test for legal incapacity); Clarence J. Sundram & Paul F. Stavis, Sexual Behavior and Mental Retardation, 17 MENTAL & PHYSICAL DISABILITY L. REP. 448, 451 (1993) (identifying three tests used by courts to define capacity to consent).

191. Denno, supra note 25, at 345–46. See, e.g., Warren v. Commonwealth, No. 2003-SC- 0138-MR, 2004 WL 2364478, at *5 n.2 (Ky. Oct. 21, 2004) (noting that the defendant likely could not have been charged under the statute dealing with sexual assault and mental disability as "there [was] no evidence that [the victim's] learning disabilities precluded her from understanding the nature of the sexual acts performed upon her"); Olivio, 589 A.2d at 602 ("[K]nowledge that conduct is sexual surely is implicit in the court's focus on the ability to consent to sexual conduct.").

capacity to consent.[192] The "judgment" test requires an examination of the person's general ability to exercise judgment in the sexual decision.[193]

[192.] Denno, supra note 25, at 345. See, e.g., CONN. GEN. STAT. ANN. § 53a-71(a) (West 2017) ("A person is guilty of sexual assault in the second degree when such person engaged in sexual intercourse with another person and . . . such other person is impaired because of mental disability or disease to the extent that such other person is unable to consent to such sexual intercourse." (emphasis added)); CONN. GEN. STAT. ANN. § 53a-65(4) (West 2017) ("'Impaired because of mental disability or disease' means that a person suffers from a mental disability or disease which renders such person incapable of appraising the nature of such person's conduct."); see also State v. Polynice, 133 A.3d 952, 960–61 (Conn. App. Ct. 2016) (stating that "an understanding of her cognitive abilities . . . was a critical issue in the . . . case because . . . the state bore the burden of proving" she could not consent).

[193.] Denno, supra note 25, at 345. See, e.g., Brooks v. State, 555 So. 2d 1134, 1137–38 (Ala. Crim. App. 1989) (holding that the victim with disabilities "could not have been expected to make a reasonable judgment as to the nature . . . of the acts of sodomy perpetrated upon him"); Baise v. State, 502 S.E.2d 492, 495 (Ga. Ct. App. 1998) ("[C]arnal knowledge of female who, because of mental disability, is incapable of giving intelligent assent or dissent or of exercising judgment in the matter constitutes rape." (emphasis added)); State v. Masuleh, No. C9-98-887, 1999 WL 55496, at *1–2 (Minn. Ct. App. Feb. 9, 1999) (holding that testimony from victim's primary physician that at the time of the incident she lacked "the

The “nature and consequences” test focuses on the individual’s ability to understand the nature of the sexual conduct as well as its potential consequences including sexually transmitted infections and pregnancy.[194] The “totality of the circumstances” and “morality” tests incorporate the “nature and consequences” test but each adds a unique element. The “totality of the circumstances” test accounts for a closer examination of the circumstances surrounding the alleged sexual offenses including the power dynamics between the victim and defendant and defendant’s intent.[195] Finally, the “morality” test, criticized as the most intrusive on the

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ability to make reasoned decisions because of her dementia” was sufficient to support a finding the victim was “mentally impaired”).

194. Denno, supra note 25, at 345. See, e.g., State v. Babb, No. 11-0564, 2012 WL 1246896, at *2 (Iowa Ct. App. Apr. 11, 2012) (“In short, [the statute] protects those who are so mentally incompetent or incapacitated as to be unable to understand the nature and consequences of the sex act. Such persons cannot give the meaningful ‘consent’ required by the enactment” (emphasis omitted) (quoting State v. Sullivan, 298 N.W.2d 267, 272 (Iowa 1980))); State v. Ward, 903 So.2d 480, 485 (La. Ct. App. 2005) (distinguishing the competency to testify from capacity to consent to sex by noting that “[t]here is a vast difference between understanding the distinction between the truth and a lie and understanding the nature and consequences of a sexual act.” (quoting State v. Peters, 441 So.2d 403, 409 (La. Ct. App. 1983))).

195. Denno, supra note 25, at 345. See, e.g., Barnett v. State, 820 S.W.2d 240, 242 (Tex. Ct. App. 1991) (stating that “[t]he victim’s diminished mental

sexual autonomy of the parties, requires an understanding of the nature and consequences of the sexual conduct plus an appreciation of the surrounding moral and social context in which that conduct occurs.[196]

The six tests function today as a general taxonomy but are less distinct than they appear or perhaps were in 1997.[197] The way of think-

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capacity, along with all of the other evidence, could be considered by the jury in determining the sufficiency of the evidence upon the issue of physical force and consent" and noting that "consent is to be determined from the totality of the circumstances") (quoting Bannach v. State, 704 S.W.2d 331, 333 (Tex. Ct. App. 1986)).

196. Denno, supra note 25, at 344–45. See, e.g., People v. Verre, No. 1-12-3252, 2014 WL 3893276, at *3 (Ill. App. Ct. Aug. 8, 2014) ("[W]e note that '[i]n regard to the theory of liability of 'unable to understand the nature of the acts,' this court has said that merely demonstrating 'the victim understood the physical nature of sexual relations is not sufficient to establish that the victim comprehended the social and personal costs involved.'" (quoting People v. Vaughn, 961 N.E.2d 887, 897 (Ill. Ct. App. 2011))); People v. Jackson, 894 N.Y.S.2d 688, 689 (App. Div. 2010) ("[T]he victim did not understand the social and moral implications of such sexual activity.").

197. The six legal tests described by scholars are less distinct in practice. Courts appear to articulate one legal standard but in reasoning the holding apply another standard. Compare, e.g., COLO. REV. STAT. ANN. § 18-3-402(b) (West 2017) (expressing the "nature of conduct" standard in the statute), with Denno, supra note 21, at 416 (listing Colorado's legal

ing about the tests as more or less restrictive in terms of the evidence required to show that the victim has the capacity to consent is not that helpful today because, twenty years later, more courts understand that, at least in theory, disability is not synonymous with legal incapacity.[198] What

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test as "morality"), and Platt v. People, 201 P.3d 545 (Colo. 2009) (describing the "nature of conduct" standard to include morality). Michigan, for example, statutorily enumerates "nature of the conduct" and "evidence of disability." In 1997, Professor Denno described the operative standard as "evidence of mental disability" alone. Denno, supra note 25, at 419. Michigan courts have described the operative legal test as two parts—first, evidence of the disability and second, whether the disability rendered the victim unable to understand the nature of her conduct at issue in the case. See, e.g., People v. Abela, No. 307768, 2013 WL 5576155, at *2 (Mich. Ct. App. Oct. 10, 2013) ("Whether the victim's cognitive limitations rendered her incapable of appraising the nature of her conduct during the charged sexual acts is a separate inquiry from her level of mental competency."); People v. Cox, 709 N.W.2d 152, 157 (Mich. Ct. App. 2005) ("'[M]entally capable' encompasses an understanding of both the physical and nonphysical factors of a sex act. . . . [Here, the victim] did not understand the nonphysical aspects of the sex acts [including its homosexual nature] and was mentally incapable of consenting to the sexual relationship with defendant.").

198. See, e.g., State v. Torresgrossa, 776 So. 2d 1009, 1011 (Fla. Dist. Ct. App. 2001) (holding that while victim's cognitive disability might have rendered her "more easily manipulated . . . , she was clearly aware and

is more important, then, is to review the application of a given state's statute to a set of facts to determine what functional capacities courts deem central to a finding of incapacity (or capacity)—i.e., what are the threshold traits, qualities, knowledge, and skills[199]—and what courts say is relevant to such inquiries.[200]

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capable of appraising the nature of her conduct" and, thus, capable of consent under the statute); State v. Meyers, 799 N.W.2d 132, 143 (Iowa 2011) ("The overall purpose of Iowa's sexual abuse statute is to protect the freedom of choice to engage in sex acts."); Penn v. State, No. 105,777, 2012 WL 3171813, at *5 (Kan. Ct. App. Aug. 3, 2012) ("The problem is none of th[e] evidence [of N.R.'s general impairments, medical and adaptive,] speaks to N.R.'s ability to understand the nature and consequences of sex. . . . [J]ust because N.R. was impaired does not mean she was incapable of knowingly consenting to sex."); Abela, 2013 WL 5576155, at *2 ("Whether the victim's cognitive limitations rendered her incapable of appraising the nature of her conduct during the charged sexual acts is a separate inquiry from her level of mental competency.").

199. Prescriptively, these could be established by state legislatures (not courts) as a reflection of a normative baseline shared by the people in a particular state. They would likely not be codified (and perhaps should not be) in the actual statute but reflected in the legislative history or public commentary. This would be a shared baseline for sexual consent for both disabled and nondisabled persons.

200. The two are related. Knowledge of the physical and psychological aspects of sexual conduct, for example, may be a threshold requirement

Despite the persistent assumption that courts may be overly reliant on traditional measures of cognitive functioning when making capacity decisions, it is increasingly rare to see a case that describes an expert IQ test and score and uses such a fact to end the legal inquiry regarding consent. There is some discussion of adaptive evidence in the cases, and this Article's review of the case law documents and describes the kinds of adaptive evidence courts use and consider probative relative to the sexual decision.

In that vein, a review of the case law reveals that the six judicial tests generally reduce to a two-step legal inquiry for establishing legal incapacity to consent to sex: (1) a threshold inquiry of the existence of a cognitive impairment[201] (disability, intoxication, or other depending on the statute)

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for sexual consent. Once this is set, courts must decide as a matter of initial admissibility what evidence comes in as more probative than prejudicial of that particular threshold requirement. The fact that the victim took three years of sex education courses in high school, for example, would be probative of this knowledge. A harder question is on the requisite cognitive capacity. What, normatively, should the threshold be? Once we answer this question we can consider how to measure it, that is, what evidence would be probative (and prejudicial) of that threshold. I will explore these difficult questions in a future project.

201. Impairment is distinct from disability. See Michelle A. Travis, Impairment as Protected Status: A New Universality for Disability Rights, 46 GA. L. REV. 937, 943–44 (2012) (distinguishing "impairment," which is "a description of one's physical or mental condition, which is not inherently

and (2) a causal analysis regarding the effect of that impairment on the victim's ability to meet the standard set forth in the statute, which can be (a) nature of the conduct, (b) nature and consequences, (c) morality, or (d) judgment. For example, in State v. Ash, a Minnesota appellate court discussed the operative legal standard as "capacity to give reasoned consent to sexual intercourse."[202] The court first described the testimony of a special education teacher to establish that the 17-year-old victim had an IQ of 52, took special education classes, and was "moderately mentally impaired."[203] The court then shifts to the main stage discussion of her ability to give "reasoned consent" by exploring whether she understood the nature and consequences of the sexual act, something more than mere understanding of the mechanics of the sexual act, though it is not clear what else the court considered necessary.[204] In sum, the court looked to the existence of a mental disability then shifted to the effect of that disability on her capacity to make a reasoned decision. The court never articulates any actual requirements for "reasoned consent" other than an equally amorphous ability to understand the nature and

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limiting outside of the social context in which it exists" from "disability," which is "a causal description of the source of disadvantage for individuals with impairments").

202. State v. Ash, No. A07-0761, 2008 WL 2965555, at *2 (Minn. Ct. App. Aug. 5, 2008).

203. Id. at *1.

204. See id. at *2–4.

consequences of the sexual act and opine that something more than biology is needed.[205]

Disability is always the entry point to any discussion on incapacity to consent. Whether courts analytically advance to step two and discuss the nexus between the existence of disability and the conduct at issue is the primary issue. If courts do advance, then disability is no longer the proxy for incapacity, and a court then takes on a more nuanced approach that considers the impact of the disability on the person's capacity to make a sexual decision.

The cases reflect a mix of legal interpretations of state statutes as courts, like legislatures, appear to struggle with the process of determining legal incapacity. Rhetorically, courts express an understanding that the existence of a mental disability is not a proxy for incapacity and that, as an evidentiary matter, something more is required to find legal incapacity to consent. For example, the court in State v. Hamlin recently wrote: "Disabilities that gravely influence one sphere of a person's life may not limit a person in another sphere. Consequently, legal determinations of capacity and competency do not rely upon sweeping generalizations."[206] However, the application of this nuanced position

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205. See id.

206. State v. Hamlin, 324 P.3d 1006, 1014 (Idaho Ct. App. 2014); see also Sanford v. Commonwealth, 678 S.E.2d 842, 845 (Va. Ct. App. 2009) ("It is the confluence of IQ (or mental age) and adaptive skills that are relevant to the establishment of mental incapacity. 'Intellectual functioning is measured by the intelligence quotient ('IQ'),

has proven difficult and at odds with this rhetoric. Consider State v. Ash discussed above. While the court notably articulated a more nuanced approach to incapacity determinations beyond using the IQ score as a proxy for incapacity, closer examination of its reasoning for affirming the lower court's finding of incapacity reveals consideration of evidence with questionable probative value such as the victim's communication impairment and difficulty testifying in court.[207]

Interestingly, while a threshold question of the existence of impairment should, as a matter of statutory interpretation, be limited to disability-specific jurisdictions, a review of the cases shows that even in the handful of disability-neutral jurisdictions, courts frequently begin their analysis with the existence of a cognitive impairment. For example, in Georgia, a disability-neutral jurisdiction, rape is defined as "carnal

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which is obtained using standard intelligence tests. Adaptive functioning includes an individual's social skills, communication skills, daily living skills, personal independence, and self-sufficiency.'" (quoting Elizabeth J. Reed, Note, Criminal Law and the Capacity of Mentally Retarded Persons to Consent to Sexual Activity, 83 VA. L. REV. 799, 801 (1997))).

207. State v. Ash, 2008 WL 2965555, at *3 ("[The victim] had a difficult time testifying at trial, and the jury observed her struggle to understand the questions posed to her. The jury was entitled to draw its own conclusion that A.O.'s mental abilities rendered her incapable of reasonably consenting to sexual activity with appellant based on her limited communication skills, her demeanor, and her difficulty in understanding and answering questions.").

knowledge" of a female against her will.[208] Yet, courts interpret this disability-neutral statute to require an initial showing of disability: "the State [has] the burden of proving beyond a reasonable doubt that the victim's disability rendered her incapable of knowing and intelligent consent [sic] to the alleged sexual act."[209] Similarly, in Page v. State, the appellate court's discussion on a sufficiency of the evidence claim begins with a restatement of the legal test (which is disability-neutral) and ends with an emphasis on the existence of a mental disability.[210]

C. Empirical Analysis of Incapacity Cases

If courts anchor legal incapacity tests on the existence of a disability, then the evidence becomes an important site of analysis for the

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208. GA. CODE ANN. § 16-6-1(a)(1) (West 2017).

209. Page v. State, 610 S.E.2d 171, 174 (Ga. Ct. App. 2005) (quoting Durr v. State, 493 S.E.2d 210, 212 (Ga. Ct. App. 1997)); see also Melton v. State, 639 S.E.2d 411, 416 (Ga. Ct. App. 2006) ("[T]he fact that the victim had never been declared legally incompetent did not mandate a conclusion by the jury that the victim was, therefore, competent to consent to sexual activity."); Baise v. State, 502 S.E.2d 492, 495 (Ga. Ct. App. 1998) ("[C]arnal knowledge of a female who, because of mental retardation is incapable of giving intelligent assent or dissent or of exercising judgment in the matter constitutes rape.")

210. Page, 610 S.E.2d at 174. But see People v. Jackson, 974 N.E.2d 855, 871 (Ill. App. Ct. 2012) (noting that despite the victim's developmental disability, "at no time did the State argue that J.P. was part of a class of citizens that needed extra protection").

purported overregulation of sexual agency. Evidentiary proffers and decisions reveal what courts think are the critical functional capacities to be able to consent to sex. This Section discusses the comprehensive empirical analysis of the jurisprudence of incapacity conducted to generate a new empirical baseline for this emerging area of legal scholarship.

1. Methodology

This empirical project began with an intent to study how courts have and are currently applying the existing legal tests through the evidence proffered in support of legal incapacity. In all cases reviewed, the primary statutory offense was rape and/or sexual assault of a person incapable of consent on the basis of mental disability.[211] The dataset reflects all avail-

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[211.] The cases reviewed involved varying degrees of rape/sexual assault with secondary offenses such as sodomy and kidnapping. Definitions of the offense varied by state. The dataset includes cases in disability-neutral states where disability is not specifically enumerated in the statute but courts in those jurisdictions have nevertheless adjudicated questions of incapacity to consent. Statutory differences did not affect the variables tracked for purposes of this study, particularly because even in disability-neutral jurisdictions, courts continue to ground reasoning in the existence of a diagnosed mental disability that impairs capacity to consent in some way. Procedurally, a defendant is accused of rape or sexual assault (sometimes in addition to other criminal charges such as sodomy or kidnapping), tried, convicted of rape/sexual assault of a person incapable of consent because of mental disability. The defendant appeals the conviction and at least one ground for the appeal relates to the fact-finder's

able appellate decisions where the trial court adjudicated the question of legal capacity of the victim/target to consent and the appellate decision addressed the fact-finder's determination of legal incapacity.[212]

A review of the universe of cases produced a unique dataset of 172 state criminal appellate cases.[213] The field is limited to those cases

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determination of legal capacity to consent. This study tracked appellant's claims on appeal which included sufficiency of the evidence of incapacity to consent, sufficiency of the evidence of defendants' knowledge of incapacity to consent, general evidentiary questions of admissibility, erroneous jury instructions, and statutory vagueness.

212. Several of the opinions reviewed are marked "unpublished" which affects an opinion's precedential value in the litigation process but does not prohibit scholarly review and citation.

213. To assess the primary research question, the author necessarily narrowed the universe of case law. The author designed a broad search to return all criminal cases involving persons with disabilities and the issue of consent. Under the umbrella of this broad search, the author selected further filter terms to return relevant cases involving persons with diverse disabilities, across jurisdictions, and implicating all manner of sexual offenses. Given this Article's focus on the criminal law, civil cases were excluded. In total, the author evaluated 987 federal cases and 1843 state cases. The author identified as relevant 228 cases, over 90% of which were state criminal appeals. The author sorted the collective universe of state and federal cases by a number of factors relevant to the purpose of the study: only criminal cases, excluding cases unrelated to the inquiry

(litigation involving child abuse and sex offender statutes—the terms "child abuse," "Adam Walsh," "sex offender," and "minor" were omitted (using the Boolean symbol: %), involving persons with cognitive disabilities (developmental, intellectual, and specific diagnostic categories and historical terms used to describe mental disability such as "mental retardation" and "imbecility")). The author made a decision to limit the inquiry to those cases involving victims with cognitive disabilities, the demographic focus of this study. Federal habeas cases were included when they discussed state law on incapacity, and when the defendant was appealing a state level conviction on grounds of errors in incapacity adjudication. Federal habeas cases, however, are not included as part of the 172-case dataset, but are explored qualitatively in this Article. The author then narrowed the universe of cases by year to capture those cases between 1997–2017: the time between the last comprehensive study and the present. The relevant universe then became 172 state cases. The author then ran an analysis of the dataset in Stata, a data analysis software, first, to identify any coding errors but also to generate summary statistics across variables. Table 1 provides a descriptive overview. Next, the author identified the following variables for coding: jurisdiction, jury/bench trial, origin of prosecution, whether the victim testified, the victim's residential status, the nature of the sexual relationship (e.g., consensual, non- consensual, physically violent, etc.), the relationship between the victim and the defendant, the trial court result, the questions on appeal, and the final court result. The author also identified in each case the witnesses who were qualified to testify as experts, the expert evidence admitted, the witnesses

that result in publicly available opinions,[214] preserved in judicial reporters. In all cases, such opinions are issued on appeal, largely precluding scholarly review of the trials, hearings, and occurrences that preceded appellate review.[215]

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who provided lay testimony, and the lay evidence admitted. Two research assistants were trained as coders to populate the selected variables. Both coders were unaware of the working hypothesis and shielded from the literature in this area to preserve independence and reliability. The two split the universe of cases to code, each reviewing 114 cases independently. Coder 1 ultimately reviewed cases for consistency and accuracy. When the Coders disagreed with the results or had questions regarding the coding process, they flagged and discussed the question, ultimately reached a consensus, and then consulted with the author regarding their results and coding process to ensure consistency and accuracy. Each of the variables was then "operationalized," a term used to describe the assignment of a pre-defined category.

214. "Publicly available" here includes both published and those designated "unpublished" opinions which are still relevant and available for academic study if not for litigation precedential value. See supra note 212.

215. Review of trial records across jurisdictions would not have been possible given the variance among state courts regarding electronic publication of trial records and the absence of a national clearinghouse for aggregation of cases such as Westlaw or Lexis, a function, in part, of state resources and centralization as well as concerns regarding the privacy interests of criminal defendants during and after trial (subsequent

This study reflects the universe of available data for review and, as such, is limited. The methodology section reflects several limitations. The data draws from research databases, which necessarily only include cases where the state or the defendant appealed an unfavorable decision. It does not include the universe of state criminal trial verdicts or preliminary evidentiary decisions in limine or during those criminal trials, or cases resolved through plea bargains. Nor does it include appellate cases without a publicly available decision.

Notably, there is no method to account for triage interference—where the victim did not report to law enforcement authorities, the victim reported to family or caregivers who declined to report the rape/sexual assault, the victim or caregiver reported to the police but the police exercised discretion in choosing not to make an arrest, the state could not (because of lack of evidence) or chose not to prosecute, or those cases not captured by the search terms, given the shifting terminology

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improper use of convictions or other information). The Supreme Court, for example, has recognized a criminal defendant's privacy interest in the recording and distribution of the proceedings even though the public has access to those proceedings in person. Estes v. Texas, 381 U.S. 532, 534–35 (1965); see also Margot E. Kaminski, Privacy and the Right to Record, 97 B.U.L. REV. 167, 210 (2017) (describing the privacy interests recognized by the Supreme Court with respect to the public "even though information had already been disclosed to those participating in the trial and even to the press").

of intellectual and developmental disabilities over time.[216] For example, 40% of violent crimes against people with disabilities are never reported to the police and are dealt with in another way, and 22% of the victims chose not to report a sexual assault because they believed the police would not help resolve the issue. Note that the figures on the number of crimes that go unreported is comparable to people without disabilities. These numbers are for people with disabilities living in the community and not in institutionalized settings where the numbers might be higher and with greater reporting difficulties. The Department of Justice recognizes the pattern of underreporting of violence that might arise.[217] In the institutionalized settings, in addition to difficulty reporting and lack of transparency in caregiving, there is the added problem of institutional liability and individual caregivers' professional responsibilities pursuant to licensing standards which may result in a more risk averse policy/practice/approach to sexual expression/relations given the perceived risks involved.

The potential universe of cases for the dataset is also limited by a specific chain of events: a defendant gets convicted, chooses to appeal, and the decision is published (or at least written and marked

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216. See, e.g., GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 59–61 (Wadsworth ed., 1989) (describing the processing of rape cases over a three-year period in the 1970s in Indianapolis).

217. CRIME AGAINST PERSONS WITH DISABILITIES, supra note 39, at 7–8.

unpublished).[218] Yet despite these limitations, this study has significant value. The literature currently lacks an empirical basis for several descriptive and normative assertions. First, criminal sex offense statutes and cases interpreting them offer a window into the ways in which disability and sexual risk are understood and constructed by the law itself. Second, much of the sexual regulation in the context of disability occurs in the shadow of criminal and civil tort law without public transparency or scrutiny. Little data exists on the adjudication of sexual consent, in part, because many of the legal proceedings in which these could occur ex ante, such as conservatorship or guardianship hearings, are effectively

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218. The dataset also does not account for those cases where the defendant was acquitted. This number may be large but the state may have chosen to let the conviction stand and avoid an appeals process given the resources at stake or other problems related to the alleged difficulty in prosecuting (and winning) these cases. See, e.g., Joseph Shapiro, How Prosecutors Changed the Odds to Start Winning Some of the Toughest Rape Cases, NPR (Jan. 16, 2018), https://www.npr.org/2018/01/16/577063976/its-an-easy-crime-to-get-away- with-but-prosecutors-are-trying-to-change-that ("The rape of someone with an intellectual disability remains one of the hardest crimes for police to investigate and one of the hardest for prosecutors to win in court. A victim with an intellectual disability may have trouble speaking, or may not have words at all. And when victims can speak, they may have trouble telling precise details, which makes them easy to confuse in a courtroom.").

closed to the public and their decisions unpublished.[219] This study provides the first comprehensive review, aggregation, and analysis of existing public information that can serve as a basis for future empirical and normative work.

2. Overview

Table 1 offers a descriptive overview of the dataset in this study. A majority of appellate courts reviewed trial findings of incapacity at the trial level (87.2%), almost all trials resulting in convictions for rape or sexual assault, and produced affirmances of the lower court decisions (83.6%). Juries sat as factfinders of incapacity to consent to sex in 88.8% of cases reviewed. The two primary questions on appeal were the sufficiency of the evidence of incapacity (49%) and admissibility of evidence (35.5%) (for example, expert and lay opinion testimony on incapacity to consent).

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219. See Processing Disability, supra note 27 (reviewing legal rules and procedures on closed hearings and arguing that they have contributed to the absence of information about the capabilities of people with mental disabilities in public circulation).

TABLE 1. DESCRIPTIVE STATISTICS

Variable	Percent (%)	N
Region of the U.S.[220]		172
Northeast	15.1%	
South	32.0%	
West	27.9%	
Midwest	25%	
Final Outcome on Appeal (Incapacity Finding)[221]		171
Affirmed	83.6%	
Modified/Reversed/Remanded	16.4%	
Primary Question on Appeal*		155
Sufficiency of the Evidence/Capacity	49.0%	
Sufficiency of the Evidence/Mens Rea	3.9%	
Admissibility of Evidence	35.5%	
Constitutional Questions (State/Federal)	5.2%	
Jury Issue	6.5%	
Determination of Target/Victim's Legal Capacity to Consent Determination at Trial*		156
Capacity to Consent	12.8%	
Incapacity to Consent	87.2%	
Result of Trial = Conviction for Rape/Sexual Assault[222]	97.7%	172
Fact-Finder at Trial Level*		169
Jury	88.8%	
Bench	11.2%	
Race/Ethnicity of Defendants/Victims[223]	Unavailable	—
* = Removed "unknown" category		

220. The four regions mirror the United States Census regional categories. U.S. CENSUS BUREAU, CENSUS REGIONS AND DIVISIONS OF THE UNITED STATES, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf.

221. Removed case from sample pending appeal.

222. 2.3% of cases fell into the "other" category (e.g., pleas, dismissals).

223. The cases do not specifically discuss the race or ethnicity of the victim or defendant. Although perhaps ascertainable from the party's surname, for example, in the case of Latinos, the process would be inherently flawed and driven by essentialist constructions rather than well-established empirical methods.

3. Findings

This study makes three novel findings that refute or disrupt the current scholarly literature: First, IQ scores and mental age are not the primary evidence of incapacity; second, most complainants in the decisions reviewed lived in community-based settings (approximately 89%); and third, victims with mental disabilities testified in 86% of the cases reviewed. The implications of these findings are discussed in turn.

a. Evidence of Incapacity to Consent

Contrary to existing claims in the literature, expert testimony on standardized tests, IQ scores, and mental age are not the primary forms of evidence of incapacity to consent for people with mental disabilities.[224]

[224.] Contemporary legal scholars contend that states overregulate the sexual agency of people with mental disabilities through vague statutes on incapacity to consent to sex coupled with legal determinations that rely on evidence of IQ scores and mental age as proxies for incapacity. Professor Denno's 1997 article provided empirical support for this descriptive claim. Denno, *supra* note 25, at 366 ("Courts nearly always refer to a victim's IQ when the crime charged is rape or an assault against a mentally retarded person. Although IQ is a convenient clinical and administrative tool, alone it has limited predictive value. . . . '[M]ental age' is [also] considered misleading and controversial."). Many scholars have relied upon this description in their own work to shape their prescriptive recommendations. See, e.g., Boni-Saenz, *supra* note 24 (discussing an individual's legal capacity to make decisions in the presence of certain chronic conditions); Fischel & O'Connell, *supra* note 24, at 484–85 (considering Denno's disapproval

Evidence on incapacity to consent on the basis of mental disability comes from both lay and expert witnesses.[225] In practice, although expert tes-

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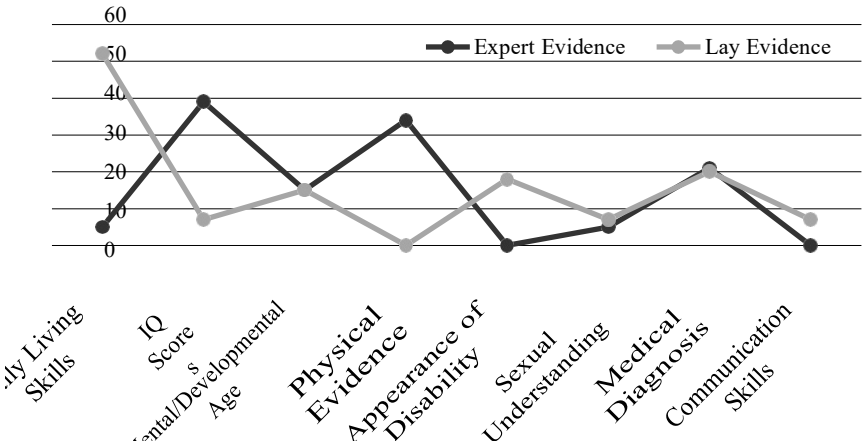
of the use of "mental age" as a factor for determining the presence of consent); GILL, supra note 56, at 38 (introducing assessment scales for determining ability to consent); Reed, supra note 47, at 799 (focusing on the issues that legislatures should consider when reviewing the consent ability of those with mental disabilities and describing clinical assessment tools).

[225.] Cases tend to include both expert and lay testimony on the question of incapacity to consent, in part, because of the ability of experts to opine on the formal, diagnostic measures of incapacity while the lay witnesses can often testify as to the adaptive deficits of the individual. *See, e.g.*, Page v. State, 610 S.E.2d 171, 174 (Ga. Ct. App. 2005) (recounting that mother testified that victim "functions 'like a two year old or less'" and nurse qualified as an expert testified as to victim's appearance of disability and physical evidence of rape). Lay witnesses, also called fact witnesses, testify on the basis of their personal knowledge about the events at issue in the case. In the context of sexual assault and mental disability, lay witnesses on the question of incapacity to consent tend to be individuals with a prior relationship to the victim such as family, friends, teachers, service providers, treating physicians or other treating professionals who testify as to the types of functional capabilities the victim has based on their own experience interacting with the victim outside of the case before the court. The most frequently proffered types of primary lay evidence are daily living skills, testimony regarding the physical appearance of disability, and testimony from the witness about the medical diagnoses

of the victim. *See, e.g.*, Duhart v. Vasquez, No. ED CV 12-922-GHK(E), 2012 WL 6761878, at *4 (C.D. Cal. Oct. 5, 2012) (referencing the following lay testimony on personal hygiene: "Jane was given instruction in hygiene, but she often came to school with an odor. She would say that she understood personal care tasks in the abstract, but when she came to school staff could tell she was not following good hygiene habits."); People v. Thompson, 48 Cal. Rptr. 3d 803, 806 (Ct. App. 2006) (referencing lay testimony from family member that the victim could not travel independently, get a driver's license, or, according to the mother, safely cross the street at a crosswalk). Expert witnesses, in contrast to lay witnesses, are qualified by experience, technical knowledge, or training to opine on a matter at issue and assist the fact-finder with resolution of an issue of consequence in the case. The source of their authority is not personal knowledge of the facts of the specific case, rather, their general expertise. In the dataset, expert witnesses tend to be medical professionals (psychiatrists, psychologists, physicians, nurses) who use formal assessment tools such as IQ tests or other standardized measures and, at times, observations, to opine on the question of incapacity to consent to sex and, because of their special stature as experts, may opine on the ultimate issue in many states. *See, e.g.*, Desper v. Commonwealth, No. 2116-10-3, 2011 WL 5346030, at *4 (Va. Ct. App. Nov. 8, 2011) (noting that the State proffered Dr. Thomas Ryan, a board certified clinical psychologist, who conducted twenty hours of testing and observation with the victim and focused his testing and assessment on whether she had an intellectual disability pursuant to standardized tests).

timony on incapacity to consent is not required by statute or common law,[226] courts rely heavily upon expert testimony to assist factfinders in consent determinations.[227]

FIGURE 2. EVIDENCE OF INCAPACITY TO CONSENT



226. General consensus across jurisdictions exists that expert evidence is not required in sexual assault and rape cases to resolve questions of incapacity on the basis of disability. *See, e.g.*, State v. Hunt, 722 S.E.2d 484, 491 (N.C. 2012) (holding that expert testimony is not required on questions of mental incapacity based on disability). Courts agree that incapacity is a question of fact to be resolved according to the fact-finders' common base of knowledge and experience. See, e.g., State v. Perkins, 689 N.W.2d 684, 689–90 (Wis. Ct. App. 2004) (explaining that no expert testimony is required to prove mental incapacity under the statute because, although undefined, mental illness or defect is within the common knowledge base of the jury). *See infra* Section III (identifying this as a central problem in the context of mental disability).

227. Experts qualified under state evidentiary rules testified in seventy-eight percent of cases reviewed.

The data show that courts routinely review a mix of evidence of IQ, mental age, and adaptive evidence in evaluating a victim's incapacity to consent. Said differently, there is no one form of evidence that dominates. While this does not capture the fact-finder's precise assignment of probative weight, it does indicate that adaptive evidence is being considered—contrary to some of the traditional assumptions. Given the two step analytical process courts tend to adopt in determinations of legal incapacity to consent,[228] evidence of IQ scores and mental age, while still used, tend to fall within the court's first order query regarding the existence of a disability and, depending on the jurisdiction, may be presented by a lay or expert witness.[229] As previously discussed, while some states stop the analysis at this point, the majority of states continue to a second order analysis as to whether the person's disability prevented them from understanding the nature or consequences of the sexual conduct.

A more important question, therefore, is not whether the evidence of functional, adaptive capacity comes into court, but rather, what specific types of adaptive evidence are considered and what is the connection between that evidence and the person's functional capacity to make a

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228. See supra Section II.B (discussing judicial tests and new taxonomy).

229. See, e.g., Commonwealth v. Fuller, 845 N.E.2d 434, 439 (Mass. App. Ct. 2006) (stating that expert testimony is not required to prove mental disability when lay testimony from state service provider testified that people with an IQ of 76 and below qualify to receive services and victim had an IQ of 33) (citing Commonwealth v. Aitahmedlamara, 823 N.E.2d 408 (Mass. App. Ct. 2005)).

sexual decision. Table 2 organizes the evidence proffered into five categories: (1) diagnostic-based; (2) receipt of welfare benefits/economic or social supports; (3) functional capacities; (4) aesthetics/physical; and (5) sexual knowledge/understanding. Reviewing the examples below without the specific facts of the case is somewhat of an abstract exercise, but is useful to see what connection each one of these categories has (or should have) to the legal standards set forth in statutory and common law.

While some of the examples of evidence proffered in each category appear appropriate when considering whether someone had the capacity to understand their sexual decision, such as whether the person received sex education and can answer very basic questions about the mechanics and consequences of sex, other examples such as understanding the social and moral context of a decision to engage in homosexual conduct move into the zone of illegitimate moralizing and raise concerns about overregulation and constitutionality.[230]

The primary evidence connecting the existence of a disability with incapacity to consent is necessarily circumstantial as it goes to the victim's state of mind. The illustration below raises the central question of relevance of the evidence proffered in support of incapacity to consent to sex and affords

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230. The development of a detailed normative taxonomy of appropriate functional capacities examined by courts is beyond the scope of this Article. The goal of this Article is to extract from recent cases what courts deem both relevant and highly probative of incapacity to consent such that scholars, including this author in a future Article, can assess the normative value of current functional capacities used by courts to judge consent.

an opportunity to critically examine the probative weight of some examples. The very types of evidence that, as a relative matter, seem most probative of an individual's capacity to consent to sex include knowledge of sexual activity and its biological consequences, the ability to communicate (by any means), receipt of sex education, prior decisionmaking experience, as well as prior relationships and opportunities for sexual expression.[231]

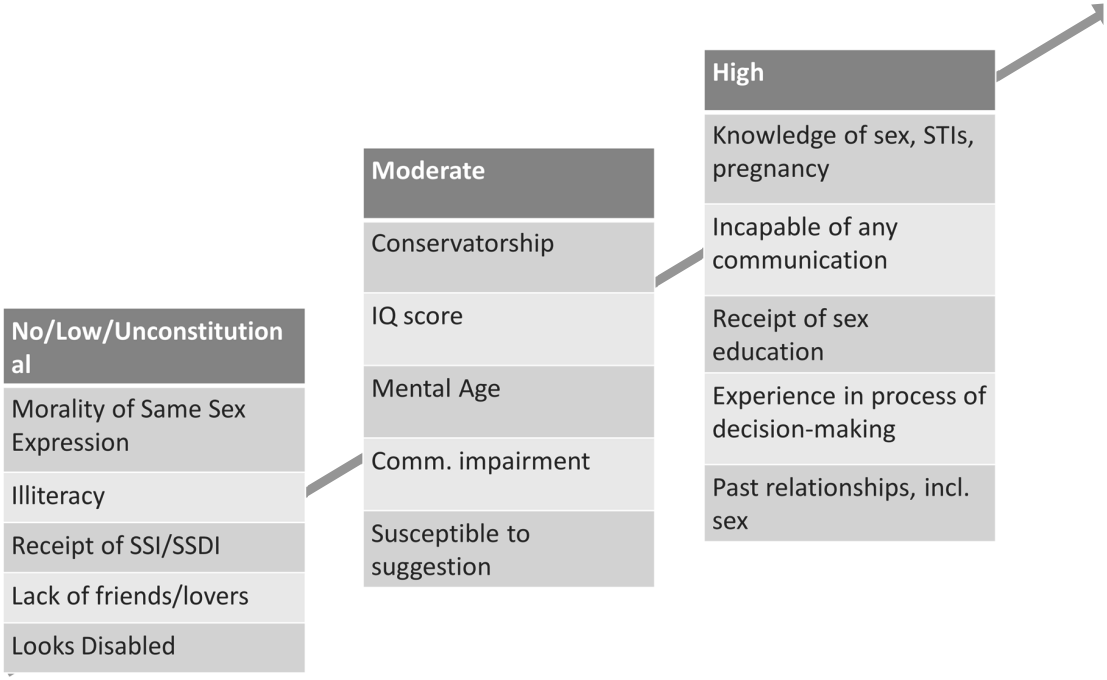
TABLE 2. EXAMPLES OF EVIDENCE PROFFERED TO SHOW INCAPACITY TO CONSENT

Diagnostic-Based	IQ scores ranging from unreadable to 75 Developmental/Mental Ages from 11 months to 15 years Diagnoses of Cerebral Palsy, Down Syndrome, Intellectual Disability, Hydrocephalus, Dementia, Anxiety, Learning Disabilities, Deaf
Receipt of Welfare Benefits/Social Supports	Receipt of Supplemental Security Income Benefits, State Department of Disability Services Residence in a group home or facility for people with intellectual or developmental disabilities
Functional Capacities	Has a conservator or guardian (plenary or limited) who makes financial and medical decisions Communication impairments, nonverbal communication including grunting sounds, and behavioral responses to verbal cues Inability to write name or recite address correctly (Un)Employment or employment in sheltered workshop Non-specific testimony of impairments from family members, friends, support worker, case or social worker, teachers, school administrators, employers, law enforcement officers Inability to live independently without family, roommates, care or support workers Illiteracy Inability to make financial decisions such as manage monthly bills, pay rent, write checks, own a home Inability to drive a car, navigate public transportation independently Self-care skills such as inability to brush teeth, cook dinner, clean apartment/home, shower/bathe, eat, use the bathroom Lack of friends, social or romantic relationships Susceptible to suggestion Wants to please others and makes decisions based on earning affection or positive response from external sources Unable to express volition Poor personal hygiene and body odor Cannot engage in "reasoned judgment" Cannot understand how homosexual sexual conduct would be perceived negatively Cannot understand consequences of non-marital sex and social implications of "provocative dancing" Has slow, poor information processing as shown by taking a long time to respond to questions and giving answers that are not always responsive to the prompt Cannot exercise "good judgment"

231. Interestingly, evidence of past relationships including sexual relationships would likely be excluded by the prosecution pursuant to rape shield laws yet this evidence is highly probative, not of whether the individual consented in the case before the court, but on the question of capacity to consent to sex.

Aesthetics/Physical Appearance	Testimony from the victim from which the factfinder was able to observe "appearance of disability" (with this specific goal) Observations of the victim's physical appearance and adaptive abilities from experts retained for purpose of trial and experts qualified based on ongoing treatment relationship with the victim
Sexual Knowledge/ Understanding	(Non)Receipt of sex education in school (In)Ability to use biologically accurate terms to describe sex, female and male sexual organs Cannot understand sex and its risks including pregnancy and sexually transmitted infections Cannot comprehend moral nature of sex or its social implications Lacks knowledge of the "social, medical, and practical" consequences of sexual conduct

FIGURE 3. RELEVANCE: PROBATIVE WEIGHT OF PROFFERED EVIDENCE OF INCAPACITY



Evidence of disability is also much more detailed and defined in the cases than the evidence establishing its connection to incapacity to consent. In other words, the cases show less clarity and comfort with establishing the nexus between the disability and the nature of conduct, or nature and consequences of the sexual conduct—in part a function of the lack of political consensus on what someone needs to know or be able to do to shield sexual decisions from government intervention.

b. Profile of the Victim

TABLE 3. DESCRIPTIVE STATISTICS RE: VICTIM AND DEFENDANT

Variable	Percent	N
Profile of the Victim		172
V has a mental disability[232]	99.4%	
V described as female	89.5%	
V described as male	10.5%	
Profile of the Defendant		172
Non-Disabled D	97.7%	
D described as male	97.7%	
D described as female	2.3%	
Victim's Residence*		147
Facility	10.9%	
Group Home	12.9%	
Independent	12.9%	
Parent/Family	63.3%	
Relationship Between Victim and Defendant*		160
Friend/Acquaintance of the Person with a Disability	28.8%	
Family (Consanguine)	0.9%	
Formal Position of Authority/Access	26.3%	
Stranger	12.5%	
Family Friend/Close Relationship with Family	23.8%	
* Removed "unknown" category.		

An analysis of the victim descriptions in the case law demonstrates a second inconsistency between the traditional assumptions in the scholarship, and the reality of how these cases are brought in courts today. While many scholars assume that most victims of sexual assault and rape are in institutionalized settings and focus their interventions accordingly,[233] over 76% of victims in this study actually lived independently

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232. Only one victim was suspected of having a disability but without a diagnosis or discussion of medical conditions.

233. See, e.g., Boni-Saenz, supra note 24 (focusing on nursing homes); Denno, supra note 25 (focusing on women with disabilities in institutional settings); Perlin & Lynch, supra note 20 (focusing on psychiatric hospitals and institutional settings).

or with a parent or family member.[234] Only 11% of victims lived in institutional settings, with a majority of these individuals being older adults. Yet current scholarship focuses almost exclusively on people in residential institutions. Such focus is justifiable given the severity of disabilities experienced by people in institutional settings,[235] the level of state regulation of their lives, and, as a result, the possibility of complete denial of sexual expression in the name of risk management as well as the documented assault, neglect, and abuse in institutional settings.[236] How-

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234. See supra Table 3.

235. But see S.A. Larson et al., In-Home and Residential Long-Term Supports and Services for Persons with Intellectual or Developmental Disabilities: Status and Trends Through 2012, U. OF MINN., NAT'L RESIDENTIAL INFO. SYS. PROJECT (2014), https://iacc.hhs.gov/publications/general/2012/residential_Information_systems_project.pdf (finding that people in institutional settings are not necessarily the most severely disabled and that people in community placements have similar or some more severe physical and cognitive impairments than those in the most restrictive institutional environments).

236. See Denno, supra note 25, at 379–95 (devoting last part of paper entirely to the question of sexual agency for people in institutionalized settings). See generally Boni-Saenz, supra note 24 (devoting entire Article to older adults in institutionalized settings with headliner case, State v. Rayhons, No. 04211FECR01078, 2014 WL 12594215 (Iowa Dist. Ct. Aug. 14, 2014)); Fischel & O'Connell, supra note 24 (recommending reformulation of the law to account for relational autonomy and dependency that leaves,

ever, this literature is lacking discussion of the experience of people with mental disabilities living in community settings (including with family, friends, independently, or in group homes). This group represents the majority of complainants in the cases reviewed. While this does not mean that institutionalized individuals are at higher risk for abuse or experience abuse more or less than those individuals living in the community, what it does suggest is that scholars and lawmakers must pay attention to this group of people and consider how their experiences with sexual violence might be different than those in institutionalized settings.

Therefore, this study identifies a need to devote additional scholarly attention to sexual regulation, rape, and sexual assault of people outside of more formally regulated institutionalized settings. The shift from residential centers as the site of support services to a disaggregated model of care in the community was the result of legal and policy advances documenting the conditions of abuse and neglect in state-funded institutions and framing unnecessary segregation in institutional settings as discrimination.[237] The

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according to the authors, the most severely disabled vulnerable to abuse and sexual violence); Perlin, supra note 20 (focusing on people with psychosocial and psychiatric disabilities but references and analogizes the situation to people with intellectual and developmental disabilities in institutional settings).

237. E.g. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1990) (amended 2008), with accompanying DOJ regulations on integrated services under Title II, 28 C.F.R. § 36.203; Rehabilitation Act of 1973, Pub. L. No. 93-112 (amended 1974); Olmstead v. L.C. ex rel. Zimring, 527

regulation of sexual agency in community settings can be quite complex (and the law even less developed) given the more limited reach of the state when people with mental disabilities reside with family members.[238] These complexities should only attract greater scholarly attention to this issue.

c. Victim's Participation in Legal Process

TABLE 4. DESCRIPTIVE STATISTICS RE: VICTIM'S TESTIMONY AT TRIAL

Variable	Percent (%)	N
Victim Testified at Trial*		159
Yes	86.2%	
No	8.8%	
Unable to Communicate[239]	5.0%	

U.S. 581, 597 (1999) (holding that unjustified isolation is discrimination based on disability and confinement to an institution diminishes the everyday life activities of individuals, including family relations, social contracts, cultural enrichment, etc., but also recognizing the States' need to have a range of facilities for the care and treatment of people with diverse mental disabilities); see also Jefferson D.E. Smith & Steve P. Calandrillo, Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 703 (contending that alternative care programs are not only more effective and less costly than mental hospitalization, but have also universally provided more positive results).

238. See infra Part III (discussing the changing nature of familial relationships in the community that create informal caregiving networks that are unregulated by the state); see also Fischel & O'Connell, supra note 24, at 497–98.

239. Referring to cases where the record specifically notes that the victim

* = Removed "unknown" category.		

This study finds that victims with mental disabilities—even with significant communication impairments—testified in over 86% of the cases reviewed.[240] The astonishingly high rate of participation in sexual assault and rape proceedings tempers current descriptive and normative claims on procedural due process and mental disability. Recent scholarship criticizes procedural hurdles preventing victims with mental disabilities from accessing the criminal justice system.[241]

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could not communicate.

240. While no empirical data exists regarding the percentages or rates of victims with mental disabilities testifying in sexual assault cases as a baseline, or data on the percentages of nondisabled victims testifying in sexual assault cases, there is some information on child or adolescent victims of sexual abuse with intellectual disabilities who testify in rape and sexual assault cases. See Bette L. Bottoms et al., Jurors' Perceptions of Adolescent Sexual Assault Victims Who Have Intellectual Disabilities, 27 L. & HUM. BEHAV. 205, 205 (2003) (noting that children and adolescents with intellectual disabilities have high rates of sexual violence and abuse but low rates of prosecution, possibly due to an assumption that the victims with mental disabilities would be poor witnesses and could not testify in court as jurors would be unlikely to believe them).

241. See Courtney S. Bedell, Comment, Vulnerable Victims: Guaranteeing Procedural Protections to Child and Developmentally Disabled Victims in Establishing Probable Cause for Search and Arrest Warrants, 118 PENN ST. L. REV. 729, 746–47 (2014) (arguing that Congress and

However, state and federal evidentiary rules begin from a presumption of witness competency in all cases.[242] Courts have interpreted these

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state legislatures need to enact affirmative legislation addressing the testimony of witnesses with developmental disabilities to balance procedural justice with the defendant's constitutional rights to confrontation and a fair trial); Fitzsimons, supra note 85, at 81–82 ("Rather than focusing effort to discredit and disqualify people with disabilities from giving testimony, every attempt should be made to find reasons why a person should be permitted to give evidence, with supports provided to maximize competency."). Cf. Kristine I. Erickson & Nitza B. Perlman, Knowledge of Legal Terminology and Court Proceedings in Adults with Developmental Disabilities, 25 L. & HUM. BEHAV. 529, 540–41 (2001) (recognizing increasing participation in the justice system of people with intellectual and developmental disabilities but a lack of understanding of technical legal terminology by those individuals, and calling for greater education to make participation meaningful).

[242]. E.g. FED. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise."); CAL. EVID. CODE § 700 (West 2017) ("Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter."). But see CAL. EVID. CODE § 701 (West 2017) (disqualifying a witness who is "(1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) Incapable of understanding the duty of a witness to tell the truth.").

rules to require a low threshold to competency to testify, reasoning that the factfinder can properly assess a witness's credibility and assign the proper evidentiary weight.[243] Of note is how courts managed the question of witness competency particularly in relation to a central issue of fact: the victim's capacity to consent. Contrary to the existing scholarship, analysis of the case law demonstrates that courts regularly disaggregate the two questions and recognize that a person's competency to testify is a relatively lower legal threshold than whether they are capable of consenting to sex. For example, in State v. Peters, the fact that a victim with a mental disability was found competent to testify did not mean that she was also capable of understanding the nature of the sexual act, since there is a vast difference between understanding the distinction between truths and lies and understanding the nature and consequences of sexual

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243. See, e.g., Mathis v. State, 682 So. 2d 175, 180–81 (Fla. Dist. Ct. App. 1996) ("Children having a chronological age younger than the alleged victim's 'mental and developmental age' have been found to possess a sufficient understanding of the difference between the truth and a lie, and the moral obligation to relate the former . . . so as to be competent to testify in court."); see also FED. R. EVID. 601 advisory committee's notes ("Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.") (citing 2 WIGMORE §§ 501, 509).

assault.[244] While there were instances where courts found the victim incapable of testifying, there were many more where neither the court nor the parties raised questions about competency to testify, even where fact-finders ultimately found that person incapable of consent.[245]

The operative question, therefore, is not whether people with disabilities participate in legal process, but when the person does participate, how difficult or easy is it for them to do so meaningfully. Existing scholarship makes compelling arguments about the need for additional scrutiny of the trial process itself and its legal methods, such as cross-examination, that are ill suited for the ways in which people with mental disabilities process and recall information.[246]

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244. 441 So. 2d 403, 409 (La. Ct. App. 1983); see also State v. Jones, No. W2073-00335- CCA-R3-CD, 2014 WL 3002808, at *11 (Tenn. Crim. App. Jan. 29, 2014) ("[T]he fact that the victim was allowed to testify does not undercut the finding that the victim was mentally defective.").

245. See, e.g., Bowman v. State, 760 So. 2d 1053, 1053–55 (Fla. Dist. Ct. App. 2000) ("The fact that . . . a child is competent to testify . . . is not inconsistent with being mentally defective under . . . Florida Statutes. Unlike telling the truth, the inappropriateness of [certain] type[s] of sexual activity . . . is not necessarily something which is normally discussed with a person who is mentally only five years old.").

246. See, e.g., D. Andre-Barron et al., What to Tell and How to Tell: A Qualitative Study of Information Sharing in Research for Adults with Intellectual Disability, 34 J. MED. ETHICS 501, 505 (2008) (discussing the ways in which people with intellectual disabilities may process information

Data in this empirical study challenge certain existing claims and push scholars to reframe others. The next section takes stock of the overall findings and explains how and why reframing the problem reveals previously unidentified regulatory problems as well as novel prescriptive interventions for discussion.

III. Reframing the Problem

This Part draws upon the empirical data in Part II to reframe the problem as one of a deficit in experience and information on the epistemological nature of mental incapacity and disability that affects how states regulate, how judges construct and apply legal tests, and how juries decide legal incapacity. The problem is not vagueness per se, but

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differently, requiring accommodations in the information sharing process to make medical consent meaningful); Richard J. Bonnie, The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense, 81 J. CRIM. L. & CRIMINOLOGY 419, 423–424 (1990) (proposing two corrective arrangements: assuring the client is carefully and thoroughly interviewed about the alleged offense by a properly trained person to assess "legal incompetence" and providing adjunctive assistance through judicially designated "representatives" or "consultants"); Ronda Cress et al., Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion, 25 ST. LOUIS U. PUB. L. REV. 307, 333–39 (2006) (explaining the development of mental health courts to address the criminal justice system's response to the challenges of participation by people with mental disabilities).

rather, how these statutes capture the experience of disability in the first instance and how courts make sense of that language. Reframing the problem in this way exposes unexplored challenges at each institutional level (legislatures, courts, and juries) and clears a path for prescriptive responses reflecting the current state of the law and the experiences of people with disabilities.

A. Legislatures: New Regulatory Realities of Integration

The data show that it is not just a question of poorly drafted, vague statutes that are interpreted too broadly by overzealous, risk averse judges who fail to exercise discretion. Such an overly simplistic construction of the problem misses a critical first order challenge: that legislatures and judges do not have a handle on the experiences of people with mental disability living in the community. Not surprisingly, then, statutes will be unable to capture the way in which people with disabilities encounter and respond to sexual violence. Some degree of statutory vagueness will always exist in sex offense statutes and beyond.

First, current statutes do not account for the experiences of individuals like D.J. in the Stubblefield case who have significant physical and communication impairments and nevertheless may have the mental capacity for consent but are unable to communicate that capacity in normatively typical ways.[247] What is the basis for state nullification of consent in this context and how does the law capture it? A recent Ninth Circuit decision, United States v. James, confronted a related question of when someone with a disability is physically incapable of consent

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247. See supra Part II.

as opposed to physically helpless,[248] an issue of first impression at the federal level.[249] The district court set aside a jury verdict to convict the defendant of sexually assaulting his step-niece, T.C., construing the federal statute under which the defendant was charged narrowly to require complete physical helplessness. Because the record reflected T.C.'s ability to communicate preferences, even if impaired, the district court argued that the state had not met its burden of proving incapacity based on the statutory language. The Ninth Circuit overturned the district court's ruling and held that the legal standard of physical incapacitation on the basis of disability was different from physical helplessness, but that the language should be construed broadly in accordance with congressional intent to protect helpless and vulnerable victims.[250] In the course of a (rather unin-

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248. 810 F.3d 674, 679 (9th Cir. 2016) ("This case turns on the breadth of the 'physically incapable' standard in § 2242(2)(B) for punishing a sexual act with an individual with the physical incapacity to decline participation in or communicate unwillingness to engage in the act.").

249. While an issue of first impression at the federal level, state courts have recently faced similar questions. See, e.g., State v. Fourtin, 52 A.3d 674, 687 (Conn. 2012) (distinguishing physical helplessness from ability to communicate consent); Fischel & O'Connell, supra note 24, at 473–86 (responding to the Fourtin case).

250. James, 810 F.3d at 683 ("The law in its majesty protects from assault those who are too weak and feeble to protect themselves. No society worthy of being called civilized may do any less."); see also D. Aaron Lacy, Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to

tentionally) scathing dissent, Judge Kozinski highlights a central problem with the current statutory framework:

> Because the government chose to prosecute James under subsection (2)(B) (dealing with physical incapacity) rather than subsection (2)(A) (dealing with mental incapacity), we must assume that T.C. was capable of understanding and consenting to sexual intercourse with James. The only question is whether she was able to communicate lack of consent if she chose not to participate. It's possible that T.C. didn't comprehend the situation, either when she was with James or with the nurse . . . . But because the government didn't charge James under section 2242(2)(A), T.C.'s mental capacity to "apprais[e] the nature of the conduct" was never at issue before the jury and is not at issue now. We therefore must presume her limitations were purely physical, and that her comprehension of the situation was no different from that of any other adult woman. The majority's periodic references to T.C.'s mental capacity betray its effort to justify James's conviction under a provision he was not charged with violating.[251]

Self, 44 SANTA CLARA L. REV. 55, 59–72 (2003) (describing congressional history in addressing imbedded prejudices against people with disabilities that have affected people with disabilities in every aspect of their lives to "protect the rights of the oppressed minority groups").

251. James, 810 F.3d at 684–86 (Kozinski, J., dissenting).

Here, unlike in the Stubblefield case where Anna proferred evidence of consent, direct and circumstantial evidence pointed to nonconsent. Yet the principal challenge is the same: How should statutes capture the experiences of D.J. and T.C. that point to communication barriers and not necessarily mental incapacity as the critical impairment at issue?[252] Under the federal statutory scheme, the state will have to prove that individuals like T.C. could not physically say no in order to convict, which moves backwards in time in rape law reform. The two statutory alternatives are insufficient to capture her experience. The state can argue that she was physically helpless akin to unconsciousness or that T.C. was mentally incapable of consent, which may or may not be the case.

Second, state legislatures, aware of the high incidence of sexual violence experienced by people with cognitive disabilities, have extended criminal sexual regulation to caregivers in positions of authority.[253] While

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252. Consider State v. Fourtin, 52 A.3d 674 (Conn. 2012), in which a Connecticut court found a woman with physical (mobility and communication) impairments did not meet the statutory definition of "physically helpless" such that the prosecution could not secure a conviction for rape. See also Fischel & O'Connell, supra note 24, at 473–86 (describing the Fourtin case and its aftermath).

253. This is in addition to civil tort and professional liability for formal, non-family caregivers. See, e.g., GA. CODE ANN. §§ 16-6-5.1(d) (West 2017) ("[A licensed caregiver] commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known had been admitted to or is receiving services

regulation in this area may be justifiable, the statutory structure focuses on formal caregiving relationships that are disconnected from emerging informal caregiving relationships that sit at the intersection of class and disability. The dataset from this Article suggests that a sizable number of defendants in these cases have informal, intimate relationships with the victim's family (relationships with the victim's consanguine relatives such as dating, and cohabitating without being married to the victim's parent) and current statutes do not capture these intimate but informal caregiving networks.

For example, in Michigan, a person is incapable of sexual consent if the individual is, among other categories, "mentally incapable" or "mentally disabled."[254] The latter means having a medical diagnosis of an intellectual or developmental disability and being under the "authoritative care" of another, categorically excluding those who meet the legal

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from [a licensed] facility or the actor."), (e) ("Consent of the victim shall not be a defense to prosecution."); IDAHO CODE §§ 18-1505B (2017) (Sexual Abuse and Exploitation of a Vulnerable Adult), 18-919 (Sexual Exploitation by a Medical Care Provider); MD. CODE ANN., CRIM. LAW § 3-604(b)(1) (LexisNexis 2018) ("A caregiver, a parent, or other person who has permanent or temporary care or responsibility for the supervision of a vulnerable adult may not cause abuse or neglect of the vulnerable adult that: . . . (iii) involves sexual abuse of the vulnerable adult."), (a)(3) (defining "caregiver" as "a person under a duty to care for a vulnerable adult because of a contractual undertaking to provide care").

254. MICH. COMP. LAWS § 750.520a(j) (2017), (i) (respectively).

definition of consenting to sex. The former category, "mentally incapable," ties the legal definition, irrespective of disability, to the person's inability to appraise the nature of the individual's conduct. Prosecutors' charging decisions dictate the scope of relevant evidence in relation to the alleged facts of the case. If the state opts to charge under the latter category, "mentally disabled," then the question of legal consent turns on the existence of a diagnosis of mental disability, the defendant's "position of authority" over the victim, and whether the defendant "used this authority to coerce the victim to submit."[255]

There is some confusion in the case law as to when and how these provisions operate in relation to each other. In People v. Graves, the defendant lived next door to the victim and her mother at an extended stay motel.[256] The victim's mother engaged in sexual conduct with the defendant on a number of occasions but was not "dating" him.[257] As a result of his interaction with the mother and his residential proximity, the defendant had access to the victim on a number of occasions, one of which included the incident in the case.[258] The victim, mother, and defendant were all together in one of the rooms when defendant began to

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255. MICH. COMP. LAWS § 750.520(b).

256. People v. Graves, No. 287730, 2009 WL 3683379, at *1 (Mich. Ct. App. Nov. 5, 2009).

257. Id. at *1.

258. Id. (referencing the victim's mother's testimony that the victim knew the defendant "'[j]ust as the man next door and she knew I liked him and she thought he was a good guy'").

engage in sexual acts with the then fifteen-year-old victim (such as kissing and groping and eventually, penetration) in front of her mother. The appellate court held that sufficient evidence existed to meet the definition of "mentally incapable" based on the victim's failure to comprehend that engaging in such acts as she did was not "normal" and reflected her inability to understand the normative nature of sexual conduct.[259] The record also reflected evidence of functional capacities such as her ability to independently cook (including grocery shopping, reading a recipe, preparing meals, computer proficiency, and self-care such as showering, dressing, and toileting) and evidence of functional incapacities (including her inability to read or write, receipt of special education services, and existence of a "very low" IQ score).[260]

The court held that the mother's description of her daughter's IQ—"her functioning at a level of half of her age, her inability to read and write, and her apparent deficits in ability to recollect—[was] adequate evidence for a reasonable jury to conclude that the complainant was 'mentally disabled' because she was 'mentally retarded.'"[261] While the court held that sufficient evidence of "mental retardation" existed on this record, it reasoned that the state did not present sufficient evidence of the defendant's "authority" over the victim or use of that authority as part of the sexual offense.[262] The court noted that although the statute

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259. Id. at *3.

260. Id. at *2.

261. Id. at *3.

262. Id. at *5.

did not require formal, "legal authority" over the victim (saying teachers or pastors or counselors would count) something more was required.[263] This is not a question of statutory vagueness that results in overregulation; rather, Graves provides an example of how vagueness may actually move in the direction of potential under-regulation based on whether courts read the statutes narrowly or expansively.

The statutory vagueness, then, stems from the inability of the statute to capture the intersection of disability with class and changing familial structures like the facts in Graves illustrate: a single mother living in transient housing, a non-consanguine individual in close residential proximity with no typical "authority" over the victim in the sense intended by the statutory scheme. In turn, courts are faced with a no-win situation: read the statute broadly to protect on facts that display vulnerability (and perhaps cognizant of the law's limitations, as expressed by Judge Kozinski in the James case)[264] or narrowly, consistent with the letter of the law, but significantly removed from the realities of sexual violence. Juries, unfamiliar with the continuum of functional capacities that exist for a person with a cognitive disability, despite the existence of a diagnostic label, continue to gravitate toward the power of the label. In Graves, the jury had significant evidence of functional capacity that would suggest the individual, despite being in possession of a medical label of intellectual disability, might not actually meet the legal definition of "mentally

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263. Id

264. United States v. James, 810 F.3d 674, 683–88 (9th Cir. 2016) (Kozinski, J., dissenting).

disabled." In this respect, the facts of this case may better fall within "mentally incapable" with proof of functional incapacities assigned varying degrees of probative weight based on their connection to the nature of the sexual conduct.

B. Judges: Hierarchies of Legal Incapacity

Experiential and informational deficits about the nature of mental incapacity and disability also permeate the ways in which courts decide questions of legal incapacity to consent. For courts, the central question is how to disaggregate functional capacities to better correlate with the particular legal decision at hand. Functional incapacities in one area do not necessarily relate to or reflect decisional capacities in other areas. For example, one's ability to independently make financial decisions does not mean that the same person is not or should not be recognized as capable of making decisions about marriage or whether or not to have children.

The problem for judges is how to manage epistemological uncertainties about mental incapacity in the legal process and interpretation of statutes that, currently, do not offer much guidance on how to determine legal incapacity. The central question is how judges should decide which functional capacities matter in determinations of legal capacity. Judicial rhetoric reflects an increasing intellectual understanding that the existence of a mental disability does not equate with a finding of legal incapacity to consent.[265] However, judges must grapple with two issues

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265. See supra Part II; see also, e.g., State v. Schaller, 975 S.W.2d 313, 317 (Tenn. Crim. App. 1997) (holding the State's evidence of mental

regarding epistemological uncertainty. First, how does the capacity to consent to sex relate to the broader development of jurisprudence on incapacity? Judges have clearly established the low threshold required for witnesses with disabilities to testify in court. Relative to this, courts have found that sexual consent requires greater functional capacities than testifying, though which ones remains an open question. Are there particular hierarchies of legal capacity that exist or should be developed more intentionally? For example, should decisions about marriage (which in many cases could include decisions about sex) require more or less, different, or the same functional capacities as sexual consent? Where does the decision to enter into financial contracts lie?

Second, in the search for greater epistemological clarity, what is the proper scope of expertise in sexual consent cases and how should courts judge the validity and reliability of non-traditional scientific evidence?

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disability insufficient, including testimony from a detective that the victim "appeared to be mentally challenged" when he interviewed her and testimony from a family counselor for the victim at a therapeutic day program that the victim was in a special education program, received psychiatric counseling, and was "mentally challenged"). Of note is the court's nuanced reasoning: "Neither an emotional problem, psychiatric counseling, nor admission to special education programs equates with being mentally defective. Her testimony reflects a person who
was conscious of her surroundings and capable of appraising the nature of her conduct."
Id. at 317–18.

Expert evidence is a part of nearly 80% of cases reviewed as part of this study,[266] yet this evidence is almost uniformly medical expertise from experts hired to do intelligence testing for purposes of the proceeding or those with existing treating relationships with the victim. The cases do not reflect any significant dispute about the qualifications or relevance of these medical experts. As courts expand the types of evidence of functional capacities deemed relevant to the sexual consent inquiry, non-medical scientific evidence will come before the court—as in the Stubblefield case and in many of the cases discussed in Part II. As a result, judges will have to determine whether such evidence is sufficiently relevant and reliable under the rules of evidence to be considered by factfinders. The Stubblefield case must resolve the evidentiary questions as the foundation of inquiries into sexual consent. How much uncertainty about "facilitated communication" is acceptable? Is facilitated communication a Ouija board to be manipulated by predatory individuals or a technologically experimental process that unlocks the key to distinguishing between mental incapacity and communication impairments? The appellate court's decision in the Stubblefield case suggests greater openness to nontraditional expertise in the context of disability but this is very much an open and live question.[267]

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266. See Harris, supra note 33; see also supra note 227 (citing experts that testified in cases reviewed).

267. State v. Stubblefield, 162 A.2d 1074 (N.J. Super. Ct. App. Div. 2017).

C. Juries: The Aesthetics of Disability

Jurors' lack of experience with and knowledge of the differentiated nature of mental disability negatively affect the fact-finding mission. The question of functional capacity to consent is firmly rooted in the jury's purview for both disabled and nondisabled victims.[268] The jury is charged with deciding (and deemed qualified to decide) this extremely complex question based on the existence of a common base of knowledge and experience.[269] The average lay juror may have experience determining

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268. See, e.g., State v. Cone, 3 S.W.3d 833, 840 (Mo. Ct. App. 1999) ("Generally, [certain cases] stand for the proposition that 'weak-mindedness,' 'unsound mind' or 'imbecility of mind,' as it related to one's ability to know or comprehend the nature of the act, was a question for the jury to determine."); Hacker v. State, 118 P.2d 408, 412 (Okla. Crim. App. 1941) ("In many jurisdictions, including this one, it has been held that whether the female possesses mental capacity sufficient to give legal consent must, save in exceptional cases, remain a question of fact for the jury.").

269. See State v. Perkins, 689 N.W.2d 684, 689 (Wis. Ct. App. 2004) (explaining that no expert testimony is required to prove mental incapacity under the statute because, although undefined, mental illness or defect is within the common knowledge base of the jury: "The jury is not asked to diagnose the victim's mental illness or deficiency—the State only has to prove that the victim suffered from a mental illness or deficiency that rendered the victim incapable of appraising his or her conduct."); see also John H. Mansfield, Jury Notice, 74 GEO. L.J. 395, 395 (1985) (considering the purpose of a jury trial and the background information a jury

whether someone's intoxication level rendered the individual temporarily incapacitated under a statute based on experience or other sources of information.[270] There is a relatively more established baseline of common knowledge and experience related to intoxication.[271] However, most lay jurors will enter the jury room with no experience interacting with a person with a cognitive disability (particularly intellectual disabilities) and limited under standing that the existence of a mental disability does not on its own mean that the person lacks general decisional agency.[272]

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should be able to consider); Donna Shestowsky, Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials, 51 STAN. L. REV. 357, 359 (1999) (asking whether there can be a common body of knowledge that accurately reflects the reality of sexual harassment).

270. See, e.g., State v. Thomas, 98 P.3d 1258, 1263 (Wash. Ct. App. 2004) ("The effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use.").

271. Though even in this context legal scholars have questioned the existence of a clear baseline.

272. See David L. Westling et al., College Students' Attitudes About an Inclusive Postsecondary Education Program for Individuals with Intellectual Disability, 48 EDUC. & TRAINING IN AUTISM & DEVELOPMENTAL DISABILITIES 306, 317 (2013) (in study of college students' attitudes towards students with intellectual and developmental disabilities, evidence of prior contact with individuals with intellectual or developmental disabilities correlated with more positive attitudes towards the participation of

The juror's comment post-verdict in the Stubblefield case most clearly illustrates the challenge of moving beyond the stigma of mental disability to effectively and fairly execute fact-finding responsibilities.[273] This is not to suggest that she did not fairly complete her jury service; rather, her comment reflects the danger of information deficits in decisionmaking and the potential of jurors to rely on more stereotypical notions of what disability looks like and what that actually means—a phenomenon this author calls "the aesthetics of disability."[274]

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students with these disabilities in college programs).

273. The social science literature on the power of stigma as a singular identity is well- developed. See, e.g., IRVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2 (1963) (characterizing stigma as "assumptions as to what the individual before us ought to be"); Brenda Major & Laurie T. O'Brien, The Social Psychology of Stigma, 56 ANN. REV. PSYCHOL. 393, 394–96 (2005) (describing the effect of stigma as reducing a person "from a whole and usual person to a tainted, discounted one").

274. The "aesthetics of disability" refer to socially and medically constructed visual, behavioral, and auditory markers of mental disability that serve as proxies for incapacity. These aesthetic markers are relational and take shape in comparison to culturally defined neuro-typical conventions. The author develops the theoretical and normative implications of the "aesthetics of disability" in a related Article. See Jasmine E. Harris, The Aesthetics of Disability (Mar. 24, 2018) (unpublished manuscript) (on file with author).

In the absence of differentiated information on the capabilities of people with mental disabilities, the aesthetics of disability serve as sensory triggers of heuristics about existing normative perceptions and constructions of the lives of people with mental disabilities. In other words, it captures the look and sounds of incapacity by reference to a set of existing social norms about mental disability. It implies that there are specific, visible physical and auditory markers that uniquely identify someone as incapacitated or disabled.[275]

For example, the aesthetics of autism might include the ways in which certain atypical social (lack of eye contact), communicative (non-verbal or speech and language deficits) and behavioral (rocking or aggressive) manifestations are interpreted by factfinders in court proceedings: "The construct of autism, never located as inherent to the [person], is only made real when it is negotiated between the key social actors (i.e., diagnosticians) and the [person's] very performance of the 'autistic look.'"[276]

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275. Disability studies scholars such as Rosemarie Garland Thompson contend that "particular identities are produced and located within a hierarchy of bodily traits that determines the distribution of privilege, status, and power." Jessica N. Lester & Trena M. Paulus, Performative Acts of Autism, 23 DISCOURSE & SOC'Y 259, 265 (2012).

276. Id. at 266; see also Tombroek v. State, 217 P.3d 806, 814 (Wyo. 2009) (noting that the jury heard testimony concerning the victim's low IQ and other signs of mental disability, observed the victim, and could subsequently evaluate her testimony in light of those statements and

The empirical data in this study support this author's concerns about the role of stigma in jury deliberations. Although courts have diversified the types of evidence allowed to reach the jury—moving from a focus on IQ and mental age to expert and lay evidence of functional capacity—juries continue to struggle with establishing a clear nexus between the mental impairment and its effect on the person's ability to consent. Factfinders appear to overvalue certain types of evidence of functional incapacity that are more clearly tied to general disability and impairment—such as living in a group home or receiving state entitlements designed for people with cognitive disabilities—and less connected to the individual's ability to exercise sexual agency.

The fact that almost 88 percent of complainants with mental disabilities testify in rape and sexual assault cases raises concerns about how jurors are processing the visual and substantive information about mental disability. Is the witness's presence and appearance a demonstrative, like D.J. in the Stubblefield case, or are juries analyzing the substantive content of the testimony? Social science research suggests that jurors perceive witnesses with intellectual and developmental disabilities as honest and credible but significantly discount the substance of their testimony in cases where the conduct of the person is not at issue.[277] Without

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observations).

277. See, e.g., Georgina Stobbs & Mark Rhys Kebbell, Jurors' Perception of Witnesses with Intellectual Disabilities and the Influence of Expert Evidence, 16 J. APPLIED RES. IN INTELL. DISABILITIES 107, 112 (2003).

sufficient information about functional capacities, jurors like the juror in the Stubblefield case risk overreliance on the aesthetics of disability.

While a detailed prescriptive analysis is beyond the scope of this paper, courts should consider ways to buttress the effects of the aesthetics of disability by addressing a root cause, the lack of normative shifts in the understanding of disability has several implications for legal decision-makers. This phenomenon is much broader than sexual assault trials where the victim has a mental disability, including, most immediately, the impending Stubblefield trial. First, courts have an affirmative duty to address the aesthetics of disability in legal decisionmaking. The rules of evidence, such as the rules on expertise, can address the information deficit among legal decision-makers. More specifically, given the relative scarcity of financial resources in criminal defense,[278] courts sua

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[278] See, e.g., Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 HASTINGS L.J. 1031, 1096–1100 (2006) (noting the lack of resources available to court-appointed defense counsel or public defenders to investigate cases and retain experts to challenge the state's cadre of experts); Lauren Sudeall Lucas, Reclaiming Equality to Reframe Indigent Defense Reform, 97 MINN. L. REV. 1197, 1198 (2013) (noting and citing to literature regarding the "inadequate or nonexistent expert and investigative resources for defense counsel"); Ronald F. Wright, Parity of Resources for Defense Counsel and the Reach of Public Choice Theory, 90 IOWA L. REV. 219, 222 (2004) (noting that "parity of resources is not the current reality in criminal justice funding" with prosecutors receiving larger salaries, smaller caseloads, and

sponte should consider appointing an expert on mental disability and legal incapacity questions generally to contextualize the capacity decision before the court and provide the necessary nuance.[279] Second, courts should consider jury instructions addressing the aesthetics of disability and directing juries on the treatment and potential biases of aesthetic evidence. Courts must balance these instructions with the need for juries to assign due probative weight to the evidence and the nature of the adversarial system to drive the presentation of evidence. In criminal sexual assault cases, however, where the stakes are particularly high for a criminal defendant, courts have heightened duties to guard against potential bias infecting due process. These initial prescriptions target the information deficit and decisionmaking process. Future legal scholarship and social science research should consider lessons from other areas of implicit bias in legal decisionmaking such as in the contexts of race, gender, and sexual orientation. This includes qualitative studies of juror and judicial perceptions of individuals with intellectual disabilities who are victims in these cases as well as quantitative explorations of the aesthetics of disability in the outcome of cases, for example.

Conclusion

For the 15 million people with mental disabilities in the United States,[280] legislators and judges must carefully balance the prospect of

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access to investigative and trial resources such as expert witnesses).

279. Federal and state rules of evidence afford judges significant discretion to appoint experts on special matters. See, e.g., FED. R. EVID. 706.

280. BRAULT, supra note 20.

denying someone the ability to engage in consensual sexual activities against the risk of sexual harm or abuse. The gravity of these stakes requires informed public discussions about acceptable levels of risk and uncertainty in this context. How much uncertainty are we willing to tolerate to support the exercise of sexual rights? How much risk is too much? Honest discussions will require confrontation of a sordid history of the treatment of individuals with mental disabilities tainted by eugenics, fear, and disgust that underwrites current sexual regulation.

This Article offers contemporary data as a baseline for informed debates about consent and mental disability. It highlights the sizable information deficits about what it means to have a mental disability and how functional capacities differ across contexts. The Stubblefield case may be the most recent, but it is certainly not the last public reckoning with these questions. The new realities of integration and care only increase the urgency of the conversation. The time has come for the law to recognize this fact and confront these difficult questions.

APPENDIX A

STATE STATUTORY DEFINITIONS AND ELEMENTS OF SEX OFFENSES RELATED TO VICTIMS WITH MENTAL DISABILITIES

State Statutory Provision(s)/Definition(s)

Alabama Offenses & Degrees:

Rape (first & second): ALA. CODE §§ 13A-6–61, -62 (LexisNexis 2018) Sodomy (first & second): ALA. CODE §§ 13A-6–63, -64

(LexisNexis 2018) Sexual Misconduct: ALA. CODE § 13A-6–65 (LexisNexis 2018)[281]

Sexual Abuse (first & second): ALA. CODE §§ 13A-6–66, -67 (LexisNexis 2018) Consent: ALA. CODE § 13A-6–70 (LexisNexis 2018) ("consent" not defined)

"[I]ncapable of consent" by being "[m]entally defective": ALA. CODE § 13A-6–70(c)(2) (LexisNexis 2018); ALA. CODE § 13A-6–60(5) (LexisNexis 2018)

Defendant's Knowledge of Victim's Incapacity: Not mentioned Affirmative Defenses: Not mentioned

Alaska Offenses & Degrees:

ALASKA STAT. § 11.41.410(a)(3) (2017) (first degree) ALASKA STAT. § 11.41.420(a)(2)–(3) (2017) (second degree) ALASKA STAT. § 11.41.425(a)(1) (2017) (third degree)

ALASKA STAT. § 11.41.427 (2017) (fourth degree)[282]

Consent: not defined

"[M]entally incapable" of consent: ALASKA STAT. § 11.41.470(4) (2017) Affirmative Defenses:

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281. But see Williams v. State, 184 So. 3d 1064, 1072 (Ala. Crim. App. 2015) (holding the statute to be unconstitutional in part, as applied to a specific defendant in a particular situation).

282. While this section does not specifically mention people with disabilities, it can be more generally applied to any persons in custody or probationary supervision.

To Sexual Assault: ALASKA STAT. § 11.41.432(a)(1) (2017) (providing for a defense to a sexual assault crime if the offender is mentally incapable)

Defendant's Knowledge of Victim's Incapacity:

Element of the offense. See, e.g., ALASKA STAT. §§ 11.41.410(a)(3)(A) (2017) (first degree) ("with another person . . . who the offender knows is mentally incapable"), 11.41.420(a)(2)(A) (2017) (second degree) ("with a person . . . who the offender knows is mentally incapable"), 11.41.420(a)(3)(A) (2017) (second degree) ("with a person who the offender knows is mentally incapable"), and 11.41.425(a)(1)(A) (2017) (third degree)("with a person who the offender knows is mentally incapable")

Arizona Offenses & Degrees:

Sexual Abuse: ARIZ. REV. STAT. ANN. § 13–1404 (2018) (separate offenses for abuse of minors) Sexual Assault: ARIZ. REV. STAT. ANN. § 13–1406 (2018)

Definitions:

"Consent", "[w]ithout consent" defined: ARIZ. REV. STAT. ANN. § 13–1401(A)(7)(b) (2018) "[M]ental defect": ARIZ. REV. STAT. ANN. § 13–1401(A)(7)(b) (2018)

Defendant's Knowledge of Victim's Incapacity: ARIZ. REV. STAT. ANN. § 13–1401(A)(7)(b) (2018) Affirmative Defenses: ARIZ. REV. STAT. ANN. § 13–1407 (2018)[283] (providing for various affirmative

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283. But see May v. Ryan, 245 F. Supp. 3d 1145, 1171 (D. Ariz. 2017) (holding that the burden-shifting scheme of § 13-1407(E) as applied in this

defenses)

Arkansas Offenses & Degrees:

Rape: ARK. CODE ANN. § 5–14–103(a)(2) (2017)

Sexual Assault (first through fourth degrees): ARK. CODE ANN. §§ 5–14–124 to -127 (2017) Definitions:

"Consent": Not defined

"Mentally defective": ARK. CODE ANN. § 5–14–101(4) (2017) Defendant's Knowledge of Victim's Incapacity: Not mentioned in the statute

Affirmative Defense: Rape: ARK. CODE ANN. § 5–14–102(e) (2017) (providing for an affirmative defense if "the actor reasonably believed that the victim was capable of consent")

California Offenses & Degrees:

Rape: CAL. PENAL CODE § 261(a)(1) (West 2018)

Other Sexual Offenses: See, e.g., CAL. PENAL CODE § 261.5 (West 2018) (sex with a minor); § 286(g)–(h) (West 2018) (sodomy); § 288a(d)(1) (West 2018) (oral copulation); § 243.4(b), (d) (West 2018) (sexual battery)

Definitions:

"Consent": CAL. PENAL CODE § 261.6 (West 2018)

"Mental disorder" and "developmental . . . disability": undefined "Seriously disabled": CAL. PENAL CODE § 243.4(g)(3) (West 2018)

Defendant's Mens Rea (Incapacity to Consent): element of the offense

Affirmative Defenses: Not mentioned

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case violates the Constitution's guarantee of due process of law).

Colorado Offenses & Degrees:

Sexual Assault: COLO. REV. STAT. ANN. § 18–3-402 (West 2018)

Unlawful Sexual Contact: COLO. REV. STAT. ANN. § 18–3-404 (1) (b), (c), (f) (West 2018) Note: no reference to mental disability by name.

Definitions:

Consent: Not defined in statute but see caselaw. See, e.g., People v. Garcia, 296 P.3d 285, 291–92 (Colo. App. 2012).

Defendant's Mens Rea (Knowledge of V's Incapacity to Consent): Element of the offense Affirmative Defenses: Not mentioned

Connecticut Offenses & Degrees:

Sexual Assault in the first degree (Class B or A felony): CONN. GEN. STAT. ANN. § 53a-70 (West 2018)

Aggravated Sexual Assault in the first degree (Class B or A felony): CONN. GEN. STAT. ANN. § 53a-70a (West 2018)

Sexual assault in the second degree (Class C or B felony): CONN. GEN. STAT. ANN. § 53a-71

(West 2018)

Sexual assault in the fourth degree (Class A misdemeanor or class D felony): CONN. GEN. STAT. ANN. § 53a-73a (West 2018)

Definitions:

Consent: Not defined

"Impaired because of mental disability or disease": CONN. GEN. STAT. ANN. § 53a-65(4) (West

2018)

Defendant's Mens Rea (Knowledge of V's Incapacity to Consent): Not mentioned in statute Affirmative Defenses: CONN. GEN. STAT. ANN.

§ 53a-67(a) (West 2018) (providing for a defense if the actor did not know of the victim's condition)

Delaware Offenses & Degrees:

Rape: DEL. CODE ANN. tit. 11, § 770 (2018) (fourth degree), § 771 (2018) (third degree), § 772

(2018) (second degree), § 773 (2018) (first degree)

Sexual Harassment: DEL. CODE ANN. tit. 11, § 763 (2018)

Unlawful Sexual Contact: DEL. CODE ANN. tit. 11, § 767 (2018) (third degree), § 768 (2018) (second degree), § 769 (2018) (first degree)

Crime Against a Vulnerable Adult: DEL. CODE ANN. tit. 11, § 1105 (2018)

Other Sexual Offenses: See, e.g., DEL. CODE ANN. tit. 11, §§ 764–765 (2018) (indecent exposure first and second degrees), § 766 (2018) (Incest)

Definitions:

"Without consent": DEL. CODE ANN. tit. 11, § 761(j) (2018) "Cognitive disability": DEL. CODE ANN. tit. 11, § 761(a) (2018) "Vulnerable adult": DEL. CODE ANN. tit. 11, § 1105(c) (2018)

"Significant intellectual or developmental disabilities": DEL. CODE ANN. tit. 11, § 1100(9) (2018) See DEL. CODE ANN. tit. 11, § 761(f)–(i) (2018) (respectively, defining "sexual contact," "sexual intercourse," "sexual offense," and "sexual penetration"); see also DEL. CODE ANN. tit. 11, § 1100(7)(a)–(l) (2018): "Prohibited Sexual Act[s against vulnerable persons]" (enumerating prohibitions including sexual intercourse, sodomy, etc.)

Defendant's Mens Rea (Knowledge of V's Incapacity to Consent): Element of the offense Affirmative Defenses: See DEL. CODE ANN. tit. 11, § 1105(d) (2018) (stating it is not a defense that the accused did not know the victim was a vulnerable adult or that the accused reasonably believed the

person was not a vulnerable adult, unless the statute expressly provides that knowledge that the victim is a vulnerable adult is a defense)

District of ColumbiaOffenses & Degrees:

Sexual Abuse: D.C. CODE §§ 22–3002–3006 (2018) (respectively, first degree, second, third, fourth, and misdemeanor), § 22–3003(2) (2018) (second degree sexual abuse), § 22–3005(2) (2018) (fourth degree sexual abuse)

Definitions:

"Consent": D.C. CODE § 22–3001(4) (2018). See also D.C. CODE § 22–3001(8) & (9) (defining, respectively, "sexual act" and "sexual contact")

Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): Element of the offense Affirmative Defenses: Not mentioned

Florida Offenses & Degrees:

Sexual Battery: FLA. STAT. ANN. § 794.011 (LexisNexis 2018)

Definitions:

"Consent": FLA. STAT. ANN. § 794.011(1)(a) (LexisNexis 2018)

"Mentally defective": FLA. STAT. ANN. § 794.011(1)(b) (LexisNexis 2018)

Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): Element of the offense, see FLA. STAT. ANN. § 794.011(4)(e)(5) (LexisNexis 2018)

Affirmative Defenses: Not mentioned

Georgia Offenses & Degrees:

Rape: GA. CODE ANN. § 16–6-1 (West 2018)

Sexual Battery: GA. CODE ANN. § 16–6-22.1 (West 2018) Sodomy: GA. CODE ANN. § 16–6-2 (West 2018)[284]

Protection of Elder Persons: GA. CODE ANN. § 16–5-102(a), (b) (West 2018)

Other Sexual Offenses: See, e.g., GA. CODE ANN. § 16–6-3 (West 2018) (statutory rape); GA. CODE ANN. § 16–6-5.1 (West 2018) (sexual assault by persons "who has supervisory or disciplinary authority . . . ")

Definitions: (only for Protection of Elder Persons in Separate Title of Code) "Disabled adult": GA. CODE ANN. § 16–5-100(3) (West 2018)

"Mentally or physically incapacitated": GA. CODE ANN. § 16–5-100(7.1) (West 2018) "Dementia": Persons: GA. CODE ANN. § 16–5-100(2)(A), (B) (West 2018)

Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): For Protection of Elder Persons Offenses: element of the crime, see, e.g., GA. CODE ANN. § 16–5-102(a), (b) (West 2018) ("knowingly and willfully")

Affirmative Defenses: Under the Protection of Elder Persons Offenses, see GA. CODE ANN. § 16–5-103 (West 2018) (vicarious

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284. But see Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998) (holding that § 16-6-2 infringes upon a constitutional provision "insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent").

liability for agent's offenses, but only if the "owner, officer, administrator, board member, employee, or agent was a knowing and willful party to or conspirator to the abuse or neglect")

Hawaii Offenses & Degrees:

Sexual Assault (first degree): HAW. REV. STAT. ANN. § 707–730(1) (LexisNexis 2017) Sexual Assault (second degree): HAW. REV. STAT. ANN. § 707–731(1) (LexisNexis 2017) Sexual Assault (third degree): HAW. REV. STAT. ANN. § 707–732(1) (LexisNexis 2017)

Definitions:

"Mentally defective": HAW. REV. STAT. ANN. § 707–700 (LexisNexis 2017) Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): Element of the offense Affirmative Defenses: Not mentioned

Idaho Offenses & Degrees:

Rape: IDAHO CODE § 18–6101(3) (2018)

Sexual Abuse and Exploitation of a Vulnerable Adult: IDAHO CODE § 18–1505B (2018) Other: See, e.g., IDAHO CODE § 18–919 (2018) (Sexual Exploitation by a Medical Care

Provider) Definitions:

"Legal consent": Undefined

"Vulnerable adult": IDAHO CODE § 18–1505 (2018)

Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): Not mentioned Affirmative Defenses: Not mentioned

Illinois Offenses & Degrees:

Criminal Sexual Assault: 720 ILL. COMP. STAT. ANN. 5 / 11–1.20(a)(2) (West 2018) Aggravated Criminal Sexual Assault: 720 ILL. COMP. STAT. ANN. 5 / 11–1.30(c) (West 2018) Criminal Sexual Abuse: 720 ILL.

COMP. STAT. ANN. 5 / 11–1.50(a)(2) (West 2018) Aggravated Criminal Sexual Abuse: 720 ILL. COMP. STAT. ANN. 5 / 11–1.60(e) (West 2018)

Definitions:

"Knowing consent": Not defined

Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): Element of the offense Affirmative Defenses: Not mentioned

Indiana Offenses & Degrees:

Rape: IND. CODE ANN. § 35–42–4-1(a)(3) (West 2018)

Sexual Battery: IND. CODE ANN. § 35–42–4-8(a)(1)(B) (West 2018)

Other Offenses: IND. CODE ANN. §§ 35–42–4-4(c)(1)(B), (c)(2)(B), (e)(1)(B), (e)(2)(B) (West 2018)

Definitions:

"Consent": Not defined

"Mentally disabled or deficient": Undefined

Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): Element of the offense Affirmative Defenses: Not mentioned

Iowa Offenses & Degrees:

Sexual abuse defined: IOWA CODE ANN. § 709.1(2) (West 2018) Sexual abuse in the first degree: IOWA CODE ANN. § 709.2 (West 2018)

Sexual abuse in the second degree: IOWA CODE ANN. § 709.3 (West 2018) Sexual abuse in the third degree: IOWA CODE ANN. § 709.4(1)(b)(1) (West 2018)

Other Sexual Offenses: See, e.g., IOWA CODE ANN. § 709.15 (West 2018) (Sexual Exploitation by a Counselor, Therapist, or School Employee)

Definitions:

"Consent": not defined.

"Incapacitation": IOWA CODE ANN. § 709.1A (West 2018)

Defendant's Mens Rea (Knowledge of Victim's Incapacity to Consent): Not mentioned Affirmative Defenses: Not mentioned

Kansas Offenses & Degrees:

Rape: KAN. STAT. ANN. § 21–5503(a)(2) (2018)

Aggravated Sexual Battery: KAN. STAT. ANN. § 21–5505(b)(3) (2018) Aggravated Criminal Sodomy: KAN. STAT. ANN. § 21–5504(b)(3)(C) (2018)

Definitions:

"Consent": Not defined

"Mental deficiency or disease": Not defined

Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Kentucky Offenses & Degrees:

Rape in the third degree: KY. REV. STAT. ANN. § 510.060(1)(a) (LexisNexis 2018) Sodomy in the third degree: KY. REV. STAT. ANN. § 510.090(1)(a) (LexisNexis 2018)

Sexual abuse in the second degree: KY. REV. STAT. ANN. § 510.120(1)(a) (LexisNexis 2018) Definitions:

"Lack of consent": KY. REV. STAT. ANN. §§ 510.020(1), (2)(b), (3)(b) (LexisNexis 2018) "Individual with an intellectual disability": KY. REV. STAT. ANN. § 510.010(4) (LexisNexis 2018)

Defendant's Knowledge of V's Incapacity to Consent: Not mentioned Affirmative Defenses: Not mentioned

Louisiana Offenses & Degrees:

Rape: LA. STAT. ANN. § 14:41(A) (2017)

Rape in the first degree: LA. STAT. ANN. § 14:42(A)(6) (2017)[285]

Rape in the third degree: LA. STAT. ANN. § 14:43(A)(2) (2017)

Sexual Battery: LA. STAT. ANN. § 14:43.1(A)(1) (2017)

Sexual Battery in the second degree: LA. STAT. ANN. §§ 14:43.2(A), (C)(3)(b) (2017)

Other Sexual Offenses: See, e.g., LA. STAT. ANN. § 14:43.1.1(A) (2017) (Misdemeanor Sexual Battery) and LA. STAT. ANN. §§ 14:43.3(A)(2)(a)(ii), (C)(3) (2017) (Oral Sexual Battery)

Definitions:

"Consent": Not defined. Rape (and related sexual offenses) is defined as "without the person's lawful consent." LA. STAT. ANN. § 14:41(A) (2017); see also Sexual Battery ("without the consent of the victim") LA. STAT. ANN. § 14:43.1(A)(1) (2017)

"Mental infirmity": LA. STAT. ANN. § 14:42(C)(2) (2017)

"Unsoundness of Mind": Not defined specifically; a condition of incapacity to consent enumerated in substantive sexual offenses. See, e.g., LA. STAT. ANN. § 14:43(A)(2) (2017)

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Maine Offenses & Degrees:

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285. But see Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding that this statute is unconstitutional and the Eighth Amendment prohibits the death penalty "for the rape of a child where the crime did not result, and was not intended to result, in death of the victim").

Gross Sexual Assault: ME. STAT. tit. 17-A, § 253(2)(C) (2018) Unlawful Sexual Contact: ME. STAT. tit. 17-A, § 255-A (2018) Unlawful Sexual Touching: ME. STAT. tit. 17-A, § 260 (2018)

Definitions:

"Consent": not specifically defined; rather, noted that "consent is a defense . . . " ME. STAT. tit. 17A, § 109(3) (2018)

"Legally incompetent": Not defined "Mental defect": Not defined "Mental disability": Not defined

"Cognitive impairments": Not defined "Autism": ME. STAT. tit. 34-B, § 6002(2) (2018)

"Intellectual disability": ME. STAT. tit. 34-B, § 5001(3) (2018) Defendant's Knowledge of V's Incapacity to Consent: Element of the offense

Affirmative Defenses: See ME. STAT. tit. 17-A, § 109 (2018) (providing a defense if consent was provided, but also defines when consent is not a defense)

Maryland Offenses & Degrees:

Rape: MD. CODE ANN., CRIM. LAW §§ 3–303(a)(1)(ii) (2018) (first degree), 3–304(a)(1), (2)

(2018) (second degree)

Sexual Offense in the third degree: MD. CODE ANN., CRIM. LAW § 3–307(a)(2) (2018) Sexual Offense in the fourth degree: MD. CODE ANN., CRIM. LAW § 3–308(b)(1) (2018)

Other Sexual Offenses: See, e.g., MD. CODE ANN., CRIM. LAW § 3–321(2018) (sodomy); § 3–322 (2018) (unnatural or perverted sexual practice); and §§ 3–309–310 (2018) (Attempted rape in the first and second degree). See also § 3–604(a)(10) (2018) (Abuse or neglect of a

vulnerable adult in the first degree), § 3–605 (2018) (Abuse or neglect of a vulnerable adult in the second degree)

Definitions:

"Consent": Not defined

"Substantially cognitively impaired individual": MD. CODE ANN., CRIM. LAW § 3–301(f) (2018) "Intellectual disability": Not defined. MD. CODE ANN., CRIM. LAW § 3–301(f) (2018)

"Mental disorder": Not defined. MD. CODE ANN., CRIM. LAW § 3–301(f) (2018) "Vulnerable adult": MD. CODE ANN., CRIM. LAW § 3–604(a)(10). [abuse and neglect of vulnerable adult; different chapter of criminal code]

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Massachusetts Offenses & Degrees:

Rape: MASS. ANN. LAWS ch. 265, § 22(a) (LexisNexis 2018)

Assault and battery or indecent assault and battery on mentally retarded person: MASS. ANN. LAWS ch. 265, § 13F (LexisNexis 2018)

Definitions:

"Consent": Not mentioned in statute "Intellectual disability": Not defined in statute

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Michigan Offenses & Degrees:

Criminal Sexual Conduct

First degree: MICH. COMP. LAWS SERV. § 750.520b(1)(g), (h) (LexisNexis 2018) Second degree: MICH. COMP. LAWS SERV.

§ 750.520c(1)(g), (h) (LexisNexis 2018) Third degree: MICH. COMP. LAWS SERV. § 750.520d(1)(c) (LexisNexis 2018) Fourth degree: MICH. COMP. LAWS SERV. § 750.520e(1)(c) (LexisNexis 2018)

Definitions:

"Consent": Not defined in statute

"Developmental disability": MICH. COMP. LAWS SERV. § 750.520a(b) (LexisNexis 2018) "Intellectual disability": MICH. COMP. LAWS SERV. § 750.520a(d) (LexisNexis 2018) "Mental illness": MICH. COMP. LAWS SERV. § 750.520a(h) (LexisNexis 2018)

"Mentally disabled": MICH. COMP. LAWS SERV. § 750.520a(i) (LexisNexis 2018) "Mentally incapable": MICH. COMP. LAWS SERV. § 750.520a(j) (LexisNexis 2018) "Mentally incapacitated": MICH. COMP. LAWS SERV. § 750.520a(k) (LexisNexis 2018)

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Minnesota Offenses & Degrees:

Criminal Sexual Conduct

First degree: MINN. STAT. § 609.342(1)(e)(ii) (2018)[286]

Second degree: MINN. STAT. § 609.343(1)(e)(ii) (2018)

Third degree: MINN. STAT. § 609.344(1)(d) (2018)[287]

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286. But see In re Welfare of B.A.H., 829 N.W.2d 431, 438 (Minn. Ct. App. 2013) (holding § 609.342(1)(g) violated appellant's due process and equal protection as applied).

287. But see State v. Wenthe, 822 N.W.2d 822, 830 (Minn. Ct. App. 2012) (holding § 609.344(k)(1) unconstitutional in part as applied in this case).

Fourth degree: MINN. STAT. § 609.345(1)(d) (2018)

Other Sex Crimes: See, e.g., MINN. STAT. § 609.293 (2018) (sodomy), MINN. STAT. § 609.294 (2018) (bestiality)

Definitions:

"Consent": MINN. STAT. § 609.341(4) (2018) "Sexual Contact": MINN. STAT. § 609.341(11) (2018)

"Mentally impaired": MINN. STAT. § 609.341(6) (2018) Defendant's Knowledge of V's Incapacity to Consent: Element of offense Affirmative Defenses: Not mentioned

Mississippi Offenses & Degrees:

Sexual Battery: MISS. CODE. ANN. § 97–3-95 (1)(b) (West 2018) Definitions:

"Consent": Not defined

"[M]entally defective person": MISS. CODE. ANN. § 97–3-97(b) (West 2018) Defendant's Knowledge of V's Incapacity to Consent: Not mentioned in statute Affirmative Defenses: Not mentioned

Missouri Offenses & Degrees: Rape

Forcible rape and attempted forcible rape: MO. REV. STAT. § 566.030 (2018); See also MO. REV. STAT. § 566.031 (2018) (second degree rape)

Sexual Abuse

First degree: MO. REV. STAT. § 566.100 (2018); See also MO. REV. STAT. § 566.101 (2018)

Sexual Conduct with a Nursing Facility Resident or Vulnerable Person (first and second degrees): MO. REV. STAT. § 566.115 (2018) (first degree), 566.116 (2018) (second degree)

Other Sexual Offenses: See, e.g., MO. REV. STAT. § 566.060 (2018) (Sodomy in the first degree), MO. REV. STAT. § 566.061 (2018) (Sodomy in the second degree)

Definitions:

"Consent": MO. REV. STAT. § 556.061(14)(a) (2018)

"Mental disease or defect": Undefined

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Montana Offenses & Degrees:

Sexual Assault: MONT. CODE ANN. § 45–5-502 (2017)

Sexual Intercourse Without Consent: MONT. CODE ANN. § 45–5-503 (2017) Definitions:

"[C]onsent": MONT. CODE ANN. § 45–5-501 (2017)

"[I]ncapable of consent": MONT. CODE ANN. § 45–5-501 (2017) "Consent" (as a defense): MONT. CODE ANN. § 45–2-211 (2017) "Mentally disordered": MONT. CODE ANN. § 45–2-101(40) (2017)

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense

Affirmative Defenses: See MONT. CODE ANN. § 45–2-211 (2017) (providing for consent as a defense, but also provides when consent is ineffective)

Nebraska Offenses & Degrees: Sexual Assault

First degree: NEB. REV. STAT. ANN. § 28–319(1)(a), (b) (LexisNexis 2018)

Second or third degree: NEB. REV. STAT. ANN. § 28–320(1)(a), (b) (LexisNexis 2018)

See also NEB. REV. STAT. ANN. § 28–322.04 (LexisNexis 2018) (sexual abuse of a protected individual)

Definitions:

"Without consent": NEB. REV. STAT. ANN. § 28–318(8)(a) (LexisNexis 2018) [not specific to mental disability]

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense(s) Affirmative Defenses: Not mentioned

NevadaOffenses & Degrees:

Sexual Assault: NEV. REV. STAT. ANN. § 200.366(1)(a) (LexisNexis 2017)

Definitions:

"Consent": Not mentioned (uses "against the will" which is also undefined)

"[M]entally . . . incapable of resisting or understanding the nature of his or her conduct": Used in substantive definition of "sexual assault" but not defined.

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense ("perpetrator knows or should know")

Affirmative Defenses: Not mentioned

New Hampshire Offenses & Degrees:

Aggravated felonious sexual assault: N.H. REV. STAT. ANN. § 632-A:2(I)(h) (2018)

See also N.H. REV. STAT. ANN. § 632-A:3(I) (2018) (defining "Felonious Sexual Assault") Definitions:

"Consent" (as a defense): N.H. REV. STAT. ANN. § 626:6 (2018)

"[D]isability" is undefined and simply an element of the definition of "sexual assault" Defendant's Knowledge of V's Incapacity to Consent: Element of the offense

Affirmative Defenses: Not mentioned

New Jersey Offenses & Degrees:

Sexual Assault: N.J. STAT. ANN. § 2C:14–2(a)(7) (West 2018)
Criminal Sexual Contact: N.J. STAT. ANN. § 2C:14–3(a) (West 2018)
Lewdness: N.J. STAT. ANN. § 2C:14–4(b)(2) (West 2018)

Definitions:

"[C]onsent": Not defined.

"[I]ntellectually . . . incapacitated": Not defined

"[M]ental disease or defect": Not currently defined. Previous statutory references and definitions of "mentally defective" contained in Section 2C:14–1(h) (amended 2012)

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

New Mexico Offenses & Degrees:

Criminal Sexual Penetration (first, second, and third degrees, respectively): N.M. STAT. ANN. § 30–9-11(D)(2), (E)(3), (F) (LexisNexis 2018)

Criminal Sexual Contact: N.M. STAT. ANN. § 30–9-12(A) (LexisNexis 2018) Definitions:

"Consent": Not defined

"[F]orce or coercion": N.M. STAT. ANN. § 30–9-10(A)(4) (LexisNexis 2018)

"Mental condition": Undefined

Defendant's Knowledge of V's Incapacity to Consent: Part of definition of "force or coercion" which is an element of the offense(s)

Affirmative Defenses: Not mentioned

New York Offenses & Degrees:

Rape in the second degree: N.Y. PENAL LAW § 130.30(A)(2) (LexisNexis 2018)

Criminal Sexual Act in the second degree: N.Y. PENAL LAW § 130.45(A)(2) (LexisNexis 2018) Sexual Abuse in the third degree: N.Y. PENAL LAW § 130.55 (LexisNexis 2018)

Aggravated Sexual Abuse in the third degree: N.Y. PENAL LAW § 130.66(2) (LexisNexis 2018) Other Sexual Offenses: See, e.g., N.Y. PENAL LAW § 130.52 (LexisNexis 2018) (forcible touching);

N.Y. PENAL LAW § 130.20 (LexisNexis 2018) (sexual misconduct) Definitions:

"Lack of consent": N.Y. PENAL LAW § 130.05 (LexisNexis 2018) "Mentally disabled": N.Y. PENAL LAW § 130.00(5) (LexisNexis 2018)

Defendant's Knowledge of V's Incapacity to Consent: Not mentioned in the statute but see affirmative defense below

Affirmative Defenses: N.Y. PENAL LAW § 130.10(1) (LexisNexis 2018) (providing for an affirmative defense if the defendant "did not know of the facts or conditions responsible for such incapacity to consent" at the time of the conduct)

North Carolina Offenses & Degrees:

Second degree forcible rape: N.C. GEN. STAT. § 14–27.22(a)(2) (2017) Sexual battery: N.C. GEN. STAT. § 14–27.33(a)(2) (2017)

Definitions:

"Consent": Not mentioned in statute, rather "against the will" statutory term "Mentally disabled": N.C. GEN. STAT. § 14–27.20(1) (2017)

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

North Dakota Offenses & Degrees:

Sexual Assault: N.D. CENT. CODE § 12.1–20–07(1)(b) (2017)

Gross Sexual Imposition: N.D. CENT. CODE § 12.1–20–03(1)(e) (2017)

See also N.D. CENT. CODE § 12.1–20–06 (2017) (sexual abuse of wards) Definitions:

"Consent": Not mentioned in statute

"[M]ental disease or defect": Not defined in statute, rather, part of the definition of the offense(s)

above.

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Ohio Offenses & Degrees:

Rape: OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (West 2018)

Sexual Battery: OHIO REV. CODE ANN. § 2907.03(A)(2) (West 2018)

Gross Sexual Imposition: OHIO REV. CODE ANN. § 2907.05(A)(5) (West 2018). See also OHIO REV. CODE ANN. § 2907.06(A)(5) (West 2018) (sexual imposition) (assignment liability to professionals where the victim is a patient)

Definitions:

"Consent": mentioned in the substantive offenses without definition. See, e.g., OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (West 2018) ("ability . . . to consent")

"Mental . . . condition": Not defined

Defendant's Knowledge of V's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Oklahoma Offenses & Degrees:

Rape (first and second degrees): OKLA. STAT. ANN. tit. 21, § 1114(A)(2) (West 2018) (first degree)

Definitions:

"Rape": OKLA. STAT. ANN. tit. 21, § 1111(A)(2) (West 2018)

"Consent": Not defined.

Defendant's Knowledge of Victim's Incapacity to Consent: Not mentioned Affirmative Defenses: Not mentioned

Oregon Offenses & Degrees:

Rape in the first degree: OR. REV. STAT. § 163.375(1)(d) (2018)

Sexual Abuse in the first degree: OR. REV. STAT. § 163.427(1)(a)(C) (2018)

Unlawful Sexual Penetration in the first degree: OR. REV. STAT. § 163.411(1)(c) (2018) Sodomy in the first degree: OR. REV. STAT. § 163.405(1)(d) (2018)

Definitions:

"Consent": Not defined but referenced in substantive criminal offenses

See OR. REV. STAT. § 163.315(1)(b) (2018) (defining "capability to consent") "Mentally defective": OR. REV. STAT. § 163.305(3) (2018)

"Mental defect": Undefined, noted in substantive definition of sex offenses; also part of definition of "mentally defective"

Defendant's Knowledge of Victim's Incapacity to Consent: Not mentioned Affirmative Defenses: Not mentioned

Pennsylvania Offenses & Degrees:

Rape: 18 PA. CONS. STAT. § 3121(a)(5) (2018) Sexual Assault: 18 PA. CONS. STAT. § 3124.1 (2018)

Involuntary Deviate Sexual Intercourse: 18 PA. CONS. STAT. § 3123(a)(5) (2018) Aggravated Indecent Assault: 18 PA. CONS. STAT. § 3125(a)(6) (2018)

Indecent Assault: 18 PA. CONS. STAT. ANN. § 3126(a)(6) (2018)

Definitions:

"Consent": Undefined in the statute but an element of the sexual offenses

"Mental disability": Undefined but an element of all defined sexual offenses except "sexual assault"

Defendant's Knowledge of Victim's Incapacity to Consent: Not mentioned Affirmative Defenses: Not mentioned

Rhode Island Offenses & Degrees: Sexual Assault:

First degree: 11 R.I. GEN. LAWS § 11–37–2(1) (West 2017)

Second degree: 11 R.I. GEN. LAWS § 11–37–4(1) (West 2017)

Definitions:

"Consent": Undefined.

"Mentally disabled": 11 R.I. GEN. LAWS § 11–37–1(4) (West 2017) Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

South Carolina Offenses & Degrees:

Criminal sexual conduct in the third degree: S.C. CODE ANN. § 16–3-654(1)(b) (2018) Definitions:

"Consent": Used but undefined; another statutory phrase used is "nonconsensual touching" to trigger assault. See, e.g., S.C. CODE ANN. § 16–3-600(C) (2018)

"Mentally defective": S.C. CODE ANN. § 16–3-651 (2018) "Mental disease or defect": Undefined

Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense

Affirmative Defenses: Not mentioned

South DakotaOffenses & Degrees:

Rape: S.D. CODIFIED LAWS § 22–22–1.3 (2018)

Sexual contact with a person incapable of consenting—felony: S.D. CODIFIED LAWS § 22–22–7.2

(2018)

Definitions:

"Consent": Undefined

"Mental incapacity": Undefined

Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Tennessee Offenses & Degrees:

Rape: TENN. CODE ANN. § 39–13–503(a)(3) (West 2018)

Sexual battery: TENN. CODE ANN. § 39–13–505(a)(3) (West 2018) Definitions:

"Consent": Not defined

"Mentally defective": TENN. CODE ANN. § 39–13–501(3) (West 2018) "Mental disease or defect": Undefined

Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Texas Offenses & Degrees:

Sexual Assault: TEX. PENAL CODE ANN. §§ 22.011(a)(1), (b)(4), (b)(9) (West 2017)

Aggravated Sexual Assault: TEX. PENAL CODE ANN. § 22.021(a)(2)(C) (West 2017) Definitions:

"Consent": Undefined

"Mental disease or defect": Undefined

"Disabled individual": TEX. PENAL CODE ANN. § 22.021(b)(3) (West 2017)

"Mental health services provider": TEX. PENAL CODE ANN. § 22.011(c)(4)(G) (West 2017) Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense

Affirmative Defenses: Not mentioned

Utah Offenses & Degrees:

Rape: UTAH CODE ANN. § 76–5-402(1) (LexisNexis 2017)

Forcible sexual abuse: UTAH CODE ANN. § 76–5-404(1) (LexisNexis 2017)[288]

Definitions:

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288. This section has more than one version with varying effective dates. The new version will be effective May 8, 2018. There are no substantive changes in the new version.

"Consent": not affirmatively defined; operative language is "without consent of the victim." See

UTAH CODE ANN. § 76–5-406(6) (LexisNexis 2017)[289]

"Mental disease or defect": Undefined

Defendant's Knowledge of Victim's Incapacity to Consent: element of the offense Affirmative Defenses: Not mentioned

Vermont Offenses & Degrees:

Sexual Assault: VT. STAT. ANN. tit. 13, § 3252(a)(1) (West 2018)

Other Sexual Offenses: See, e.g., VT. STAT. ANN. tit. 13, § 3253 (West 2018) (aggravated sexual assault); VT. STAT. ANN. tit. 13, § 1306 (West 2018) (mistreatment of persons with impaired cognitive function) Definitions:

"Consent": VT. STAT. ANN. tit. 13, § 3251(3) (West 2018)

"[W]ithout the consent of the other": VT. STAT. ANN. tit. 13, § 3254(2) (West 2018) Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Virginia Offenses & Degrees:

Rape: VA. CODE ANN. § 18.2–61(A)(ii) (West 2018)

Forcible sodomy: VA. CODE ANN. § 18.2–67.1(A)(2) (West 2018)

Other Sexual Offenses: See VA. CODE ANN. § 18.2–67.3(A)(2) (West 2018) (aggravated sexual battery); VA. CODE ANN. § 18.2–67.2(A)(2) (West 2018) (object sexual penetration)

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289. This section has more than one version with varying effective dates. The new version will be effective May 8, 2018. There are no substantive changes in the new version.

Definitions:

"Consent": Undefined. "against the will" is operative term, also undefined. "Mental incapacity": VA. CODE ANN. § 18.2–67.10(3) (West 2018)

Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentioned

Washington Offenses & Degrees:

Rape (second degree): WASH. REV. CODE ANN. § 9A.44.050(1) (West 2018) Rape (third degree): WASH. REV. CODE ANN. § 9A.44.060(1) (West 2018) Indecent liberties: WASH. REV. CODE ANN. § 9A.44.100(1) (West 2018)

Definitions:

"Consent": WASH. REV. CODE ANN. § 9A.44.010(7) (West 2018)

"Mental incapacity": WASH. REV. CODE ANN. § 9A.44.010(4) (West 2018)

"Person with a developmental disability," WASH. REV. CODE ANN. § 9A.44.010(10) (West 2018) "Person with supervisory authority," WASH. REV. CODE ANN. § 9A.44.010(11) (West 2018) "Person with a mental disorder" WASH. REV. CODE ANN. § 9A.44.010(11) (West 2018)

"Health care provider" WASH. REV. CODE ANN. § 9A.44.010(14) (West 2018)

"Frail elder or vulnerable adult" WASH. REV. CODE ANN. § 9A.44.010(16) (West 2018) "Mentally defective": Undefined

Defendant's Knowledge of Victim's Incapacity to Consent: Element of the offense Affirmative Defenses: In statute

West Virginia Offenses & Degrees:

Sexual assault (third degree): W. VA. CODE ANN. § 61–8B-5(a)(1) (LexisNexis 2018) Sexual abuse (second degree): W. VA. CODE ANN. § 61–8B-8(a) (LexisNexis 2018)

Definitions:

"Lack of Consent": W. VA. CODE ANN. § 61–8B-2(a), (b)(2) (LexisNexis 2018) "Incapable of Consent": W. VA. CODE ANN. § 61–8B-2(c)(2) (LexisNexis 2018) "Mentally defective": W. VA. CODE ANN. § 61–8B-1(3) (LexisNexis 2018)

Defendant's Knowledge of Victim's Incapacity to Consent: Not mentioned Affirmative Defenses: Not mentioned

Wisconsin Offenses & Degrees:

Sexual Assault: WIS. STAT. § 940.225(2)(g), (2)(j), (3), (3m), (4)(b) (2018)

Second degree: WIS. STAT. § 940.225(2)(c) (2018); See also WIS. STAT. § 940.225(3) (2018)

(third degree sexual assault), (3m) (2018) (fourth degree sexual assault)

Definitions:

"Consent": "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subsections (2)(c), (cm), (d), (g), (h), and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of section 972.11(2): (b) A person suffering from a mental illness or defect

which impairs capacity to appraise personal conduct.” WIS. STAT. § 940.225(4)–(4)(b) (2018)

“Mental illness or defect”: Undefined

Defendant’s Knowledge of Victim’s Incapacity to Consent: Element of the offense

Affirmative Defenses: Not mentioned

Wyoming Offenses & Degrees: Sexual Assault:

First degree: WYO. STAT. ANN. § 6–2-302(a)(iv) (West 2018) Second degree: WYO. STAT. ANN. § 6–2-303(a)(vi) (West 2018)[290]

Definitions:

“Consent”: Not defined “Mental illness”: Not defined

“Mental deficiency”: Not defined “Developmental disability”: Not defined

“Position of Authority”: WYO. STAT. ANN. § 6–2-301(a)(iv) (West 2018) Defendant’s Knowledge of Victim’s Incapacity to Consent: Element of the offense Affirmative Defenses: Not mentionedBore, alici blandant la expliant apid qui andandesto blabo. Ga. Ictur? Quiae dus eturi blant, esti tet qui rero quisquibus enis si rempore, sinime nulland ellitem nullutem. Ut eaque volor auditasperia quament.

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290. This section has more than one version with varying effective dates. The new version will be effective July 1, 2018. The new version adds that a person is guilty of sexual assault in the second degree when he subjects a person to sexual contact or sexual intrusion while serving as a health care provider.