Sexuality, Rape, and Mental Retardation

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SEXUALITY, RAPE, AND MENTAL RETARDATION

Deborah W. Denno*

In this article, Professor Denno addresses the question of when sexual relations with a mentally retarded individual should be considered nonconsensual and therefore criminal. The article first explores the early treatment of mental retardation, concluding that throughout history society has viewed mentally retarded persons as either asexual and childlike or hypersexual and at risk of producing offspring "as defective as themselves." Professor Denno then demonstrates how these stereotypes influence the moralism inherent in modern conceptions of consent in rape determinations. Illustrating the point with reference to the Glen Ridge rape case, the article shows how courts applying contemporary rape statutes typically hold mentally retarded individuals to a higher standard of consent than nonretarded individuals. Such a standard is so strict that it can preclude consensual sex with mentally retarded persons under any circumstances. As a result, courts are hurting the very people they are supposed to protect and failing to respect those people's dignity. To remedy this incongruity, Professor Denno proposes that courts making consent determinations apply a contextual approach, which incorporates among other things modern knowledge about the adaptive capabilities of mentally retarded individuals as well as the situational context of the sexual conduct.

Finally, Professor Denno discusses the regulation of sexual relations in the context of institutions and residential homes for mentally retarded individuals. This issue is important for two reasons.

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I am most grateful to the following individuals for their comments on this article: Leigh Buchanan Bienen, Joshua Dressler, Katherine Franke, Paul Goldstein, Keri Gould, Bruce Green, Nancy King, John Monahan, Joseph Perillo, Stephen Schulhofer, George Thomas III, R. George Wright, and Benjamin Zipursky. I give special thanks to my research assistants for their exceptional and invaluable efforts: Dawne Cummings, Michelle Dobrawsky, Michael Kim, Toni Mele, Holly Mitchell, Elena Paraskevas, Robert Renzulli, Marni Roder, and Sona Shah. I also appreciate Yvette LeRoy's characteristically diligent research, the resource advice provided by Dianne Perillo, Samuel DiFeo, and Lorraine Dusky, and the information offered by the many social service providers and mental health professionals who graciously agreed to be interviewed for this article. Fordham University School of Law provided generous research support, for which I am grateful.

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Such regulation demonstrates the maximum extent to which legal standards can infringe upon the rights of mentally retarded individuals, and it illustrates the most complicated dimensions of the contextual approach. This article concludes that most mentally retarded individuals have the capacity to consent to sexual relations, they have the right to do so, and unnecessarily broad and moralistic restrictions infringe upon that right.

I. Introduction

A commendable scholarship suggests that legal analysis should stress the "peculiarities of cases," as well as their factual, moral, and "spiritual" complexities.1 Hence the following facts of the Glen Ridge rape case, one impetus for this article.

On March 1, 1989, "Betty Harris," age seventeen and mildly mentally retarded, accompanied Christopher Archer, age eighteen and a neighbor since childhood, into a dark basement filled with thirteen young men, most of whom she had also known for many years.2 All the men were star athletes at Glen Ridge High School, located in the elite and affluent suburb of Glen Ridge, New Jersey.3 Christopher had told Betty that, if she entered the basement, she could have a date later that night with his older brother, Paul.4 According to Betty the scenario was "romantic because he [Christopher] had his arm around me"5 and she had long endured an attraction to Paul.6 Yet the events

1. See Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 375 (1993) (emphasizing that judgment, or "practical wisdom," derives from experience with human beings and their affairs and that the "decision of a case occurs at the point where the law and the facts meet"); see also Jerome Frank, Law and the Modern Mind 114-15 (1970) (noting that a judge has "minute and distinctly personal biases" that operate "constantly" during a consideration of the facts).

2. See In re B.G., 589 A.2d 637, 638-42 (N.J. Super. Ct. App. Div. 1991) (holding that probable cause existed for charges that juvenile defendants had used force or coercion in committing a sexual assault on a person they knew to be mentally retarded, thereby justifying a waiver of jurisdiction to adult court); Peter Lauffer, A Question of Consent: Innocence and Complicity in the Glen Ridge Rape Case xvii-xviii, 8-9 (1994) (providing a reporter's daily account of the Glen Ridge rape trial and sentencing); Joseph Phalon, It Happened—But Could She Consent?, Nat'l L.J., Dec. 28, 1992, at 8 (discussing the Glen Ridge victim's inability to consent in light of the facts). "Mild" or "educable" mental retardation, which depicts the highest functioning level of the four traditional levels of mental retardation, is defined in the Appendix, Table A. Because the victim's name was not revealed by the press or in the court transcripts made public, it is also not revealed in this article, which adopts the pseudonym Betty Harris that reporter Peter Lauffer created. See Lauffer, supra, at ix, xvii. Because the defendants' names, photographs, and biographies were mentioned continually by the press and throughout the court transcripts, this article will name them accordingly. See id. at xvii. The arguments for and against the media's revealing of the names of victims and defendants have been discussed in detail elsewhere and therefore are not an issue in this article. See Deborah W. Denno, Perspectives on Disclosing Rape Victims' Names, 61 Fordham L. Rev. 1113 (1993).


4. See Lauffer, supra note 2, at 8.

5. Id. at 8, 117.

that followed over the next hour could hardly be characterized as romance.\(^7\)

Soon after entering the basement Betty was positioned on a couch surrounded by chairs “set up,” in her words, “like a movie.”\(^8\) Three of the men asked Betty to remove her clothes, put five fingers up her vagina, and then perform fellatio on one of them, which she did amidst their laughs and chants encouraging her to “[g]o further, further, further.”\(^9\) As six of the men left the basement,\(^10\) the remaining seven gave Betty instructions to spread her legs so that a number of them could insert into her vagina a broomstick covered with a plastic bag and Vaseline.\(^11\) After masturbating her with the broomstick, they next inserted and masturbated her with a similarly coated fungo bat\(^12\) and then an old dowel stick.\(^13\) Betty testified that although all the objects “hurt” her, she never attempted to leave the basement and never asked that the men stop.\(^14\) Rather, the men continued to laugh and cheer, calling Betty a “whore” and discussing how far the objects could go into her body.\(^15\) Two of the men then sucked Betty’s breasts and requested that she masturbate six of the other men, which she did.\(^16\) Finally, the men told Betty that she could leave the basement but that she could not tell anyone what had happened because her mother would find out and Betty would be expelled from school, all of which Betty believed.\(^17\) Indeed, Betty lingered a bit anticipating the date with Paul, which never took place.\(^18\)

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\(^7\) All parties and witnesses in the Glen Ridge case were fairly consistent in depicting what happened to Betty in the basement even though the precise details and order of events vary when comparing the following sources of information: the police report, the text of the indictment, Betty’s and the defendants’ testimony, and the accounts of some of the witnesses who were not charged with any crime. See LAUFER, supra note 2, at 9; see also In re B.G., 589 A.2d at 641-42 (noting inconsistencies among four of Betty’s police reports).

\(^8\) LAUFER, supra note 2, at 9, 118.

\(^9\) Id. at 118-19.


\(^11\) See In re B.G., 589 A.2d at 640-41; LAUFER, supra note 2, at 119-23.

\(^12\) See In re B.G., 589 A.2d at 640-41; LAUFER, supra note 2, at 119-23. A fungo bat is “a lightweight bat that is longer and thinner than the ordinary bat.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 922 (1993).

\(^13\) See In re B.G., 589 A.2d at 641; LAUFER, supra note 2, at 120-24. Initially, Betty said that the stick had been inserted into her rectum. See In re B.G., 589 A.2d at 640; Christopher Kilbourne, Grand Jury Names Four Teens—Indictments Handed Up in the Glen Ridge Sex Case, N.J. RECORD, May 23, 1990, at A1.

\(^14\) See In re B.G., 589 A.2d at 641; LAUFER, supra note 2, at 10, 125-26.

\(^15\) See In re B.G., 589 A.2d at 641; LAUFER, supra note 2, at 10, 119-20.

\(^16\) See In re B.G., 589 A.2d at 641; LAUFER, supra note 2, at 11, 123-24.

\(^17\) See In re B.G., 589 A.2d at 641-42; LAUFER, supra note 2, at 11, 125.

\(^18\) See LAUFER, supra note 2, at 125; A Real Sickness Behind Glen Ridge’s Gang Rape, N.J. RECORD, Mar. 18, 1993, at B6.
The next day, Betty felt pain and saw blood when she urinated.\textsuperscript{19} Two days later she informed her swimming teacher about the basement events.\textsuperscript{20} Her communication was not intended to reveal or punish the men’s behavior, because she still considered them her friends, but rather to learn how to say no if she once again encountered such a situation.\textsuperscript{21} By mid-March, one high school senior had complained to Glen Ridge High School officials that the men involved, who had apparently been bragging about the episode, wanted him to join them for a second session so that he could videotape it.\textsuperscript{22} Confronted by such information and the growing community gossip about the event, the Glen Ridge High School principal finally called the police.\textsuperscript{23}

After a highly publicized six-month trial,\textsuperscript{24} Christopher Archer and two twin brothers were convicted of, among other things, first-degree aggravated sexual assault (rape), while a fourth man was convicted of third-degree conspiracy to rape.\textsuperscript{25} On April 23, 1993, the court agreed to a defense request that the three men convicted of sexual assault remain free on bail\textsuperscript{26} while their lawyers appeal.\textsuperscript{27}

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19. See In re B.G., 589 A.2d at 643; Laufer, supra note 2, at 11, 126; Bernard Lefkowitz, She Saw Blood; For First Time, Glen Ridge Woman Tells Jury of Injuries, N.Y. Newsday, Dec. 17, 1992, at 7; Phalon, supra note 2, at 8.

20. See In re B.G., 589 A.2d at 640 (noting testimony of swimming teacher stating that Betty had told her that “‘the boys asked me to suck their dicks,’ and that ‘it really hurt me because they stuck something really big up my butt and it hurt’”).


22. See In re B.G., 589 A.2d at 642; Laufer, supra note 2, at 20-21.

23. See Laufer, supra note 2, at 21. Because Betty’s parents did not initially believe that the event took place when a social worker informed them about it two weeks earlier, they had declined to make such a call. See id. at 20.

24. The trial never resulted in a published opinion. The appellate division’s decision to transfer the juvenile defendants, ages 16-18, to adult court was published. See In re B.G., 589 A.2d at 637. For this reason, this article relies heavily on the news accounts and commentary about the trial provided by legal reporters who followed the case daily, in addition to the facts and conclusions presented in In re B.G., 589 A.2d at 640-47.

25. See Laufer, supra note 2, at 6, 150. Christopher Archer and Kevin and Kyle Scherzer were convicted of first-degree aggravated sexual assault by force or coercion and second-degree conspiracy to commit aggravated sexual assault. Moreover, Christopher Archer and Kevin Scherzer were convicted of first-degree aggravated assault upon a mentally defective person. Kyle Scherzer was convicted of the lesser included offense of second-degree attempted aggravated sexual assault. The fourth man, Bryant Grober, was convicted of third-degree conspiracy to commit criminal sexual contact and was acquitted of all other charges. See id. The court’s sentence, which could range between 22 months and 15 years, mandated that Christopher Archer and the Scherzer twins serve time in a “campuslike complex for young offenders”; Bryant Grober was sentenced to three years’ probation and 200 hours of community service. Robert Hanley, 3 Are Sentenced to Youth Center over Sex Abuse of Retarded Girl, N.Y. Times, Apr. 24, 1993, at 1 [hereinafter Hanley, 3 Are Sentenced]. In the first half of 1992, Paul Archer and Peter Quigley pled guilty as coconspirators to endangering the welfare of an incompetent person. See Laufer, supra note 2, at 35. Two other teammates were initially indicted but did not stand trial at the request of Betty’s parents who said that further prosecution “would not be in the best interests of their child.” Robert Hanley, One Is Freed in Sex Attack in Glen Ridge, N.Y. Times, Jan. 29, 1994, at 24.

26. See Hanley, 3 Are Sentenced, supra note 25, at 1. The court relied on two guideposts for determining whether convicted criminals can remain free on bail while they are appealing

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The Glen Ridge case appeared to be a relatively clear example of rape because of the number of defendants involved, the vaginal insertion of foreign objects, and the victim's mental retardation. Yet, this article contends that not all rape cases involving mentally retarded victims are so clear, either legally or socially. Indeed, issues concerning sexuality, rape, and mental retardation present a seemingly unsolvable conundrum. On the one hand, evidence suggests that their sentences: whether they "posed serious threats to the community" and whether they "had 'substantial' legal grounds" to request that their convictions be overturned. Id.; see also Lauper, supra note 2, at 89. The court explained that the defendants should not be incarcerated unnecessarily if their convictions were overturned on appeal. See id.; see also Robert Hanley, Glen Ridge Bail Hearing Hinges on Assault Claim, N.Y. Times, May 22, 1993, at 24 (noting that the court allowed Christopher Archer to continue to receive bail despite a Boston College student's sworn affidavit stating that in October 1990, Archer "forced [her] to the ground on the Boston College campus, forcibly removed her clothing and punched her in the vaginal area with a fist"). Archer allegedly thereafter referred to himself as a "rapist." See Lauper, supra note 2, at 33.

27. The court will most likely not hear the appeal for another year. See Telephone Interview with J. Michael Blake, Assistant Deputy Public Defender, Office of the Public Defender, Appellate Division, Newark, N.J. (Aug. 5, 1996). For a recent analysis of the Glen Ridge rape case based on numerous interviews and six years of research, see Bernard Lefkowitz, Our Guys: The Glen Ridge Rape and the Secret Life of the Perfect Suburb (1997).

28. See, e.g., In re B.G., 589 A.2d at 644 (emphasizing the "insertion of foreign objects held by others," the "number of youths in the basement," and the victim's mentally defective status in a decision to waive the juvenile defendants to adult court); Linda R. Hirshman, Moral Philosophy and the Glen Ridge Rape Case, 17 Harv. J.L. & Pub. Pol'y 101, 105 (1994) (contending that, given the context and the "dialogue" between the victim and the defendants, "the defendants justly lost"); Tracy Schroth, "Lolita" Defense Risky in Glen Ridge Sex Trial, N.J. L.J., Nov. 2, 1992, at 1. According to the attorney who prosecuted the New Bedford, Massachusetts "bar room" rape case, "I don't think anyone is going to readily accept the notion that any woman is going to have sex of her own accord with a large number of men at any time . . . [or] in the manner you describe." Id. at 32; see also Karen Houppert, Baseball Bats and Broomsticks: The Glen Ridge Rape Trial Draws to a Close, Village Voice, Mar. 16, 1993, at 29, 33 ("All the usual arguments brought up by rape defendants—she wanted it, she liked it, she was the sexual aggressor—jar even the least enlightened when applied to a 17-year-old mentally retarded girl who had broomsticks and bats shoved up her vagina.").

29. See, e.g., In re B.G., 589 A.2d at 647 (Dreier, J.A.D., concurring) (emphasizing that if the Glen Ridge case had involved a "less stressful situation," such as a lone actor, the victim most likely would not have been considered mentally defective because "a contrary finding would cause virtually all sexual activity with a mildly retarded individual to be considered criminal in the eyes of the law"); Alison Carper, Glen Ridge Sex Lesson Is Tough for Retarded, N.Y. Newsday, Mar. 15, 1993, at 8 (discussing the difficulties of teaching consent and nonconsent to the mentally retarded); Jodi Enda, Advocates for Retarded Seek Double Edge of N.J. Rape Verdict, Phila. Inquirer, Mar. 21, 1993, at E1 (noting that some advocates for the mentally retarded viewed the Glen Ridge rape convictions as a double-edged sword because the public may think that all mentally retarded people cannot consent to sex or, more generally, interact in mainstream society); Jane Frisch, Debating Whether "Yes" Means "No"; Glen Ridge Sex Assault Trial Tests the Defense of Consent, N.Y. Times, Dec. 13, 1992, at 49 (explaining the difficulty of determining the Glen Ridge victim's incapacity to consent irrespective of indications that the notion of consent is "evolving").

30. See State v. Olivia, 589 A.2d 597, 598 (N.J. 1991) (noting the "implications for both mentally-defective persons who are vulnerable and need the special protections of our laws from the sexual intrusions of others and persons whose mental deficiencies need not be an impediment to the enjoyment of a reasonably normal life, including consensual sexual relations"); Paul R. Friedman, Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons, 17 Aziz. L. Rev. 39, 77 (1975) ("Under too lax a standard of competency, persons will be allowed to act in ways which may be viewed as being contrary to their best interests. Under too
many mentally retarded individuals require the law’s protection because of their vulnerability—the Glen Ridge case being one example. Moreover, these individuals are victimized at four-to-ten times the rate of the general population.\(^\text{31}\) Yet others claim that this very protection unconstitutionally limits, or even precludes, the right of mentally retarded persons to have sexual relationships and, consequently, to lead normal lives.\(^\text{32}\) “[T]he mentally retarded person—no more and no less a sexual being than his non-labeled counterpart—is largely deprived of legitimated sexual expression by social and legal attitudes.”\(^\text{33}\)

Although social and legal attitudes have historically dominated the tenor of rape trials in this country,\(^\text{34}\) their impact is most pronounced in rape cases involving mentally retarded victims, particularly females. The consent determination, difficult in any rape case,\(^\text{35}\) is strict a standard, the opportunity for self-determination may be undermined and personal integrity denigrated by the paternalism of the state.”\(^\text{31}\).

31. See infra notes 261-62, 429-36 and accompanying text; see also Righter v. State, 752 P.2d 416, 419 (Wyo. 1988) (emphasizing, with reference to mentally retarded individuals, “a public policy goal of protecting a class of particularly vulnerable citizens from sexual exploitation”); Kate Stone Lombardi, Rape and the Mentally Retarded, N.Y. TIMES, July 25, 1993, at 1 (noting opinions held by experts and counselors claiming that mentally retarded and developmentally disabled individuals “are perfect targets for sexual abuse and assault because they often do not recognize the activity as criminal, they sometimes can’t resist and if they are nonverbal, they cannot tell anything happened”).

32. See generally Robert L. Hayman, Jr., Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent, 103 HARV. L. REV. 1201, 1246 (1990) (discussing the “illegitimation of the mentally retarded person’s sexuality”). The right of mentally retarded individuals to engage in sexual relations may be considered implicit in the constitutional right to privacy. See City of Cleburne v. Cleburne LivingCtr., Inc., 473 U.S. 432, 463 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (emphasizing that mentally retarded persons are entitled to the right to marry and to procreate, one of the “basic civil rights of man”); Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965) (protecting the constitutional right to privacy, which includes certain forms of sexual conduct); Skinner v. Oklahoma, 316 U.S. 535, 540-43 (1942) (protecting the constitutional right to procreate); Olivo, 589 A.2d at 604 (expressing “concern about unenlightened attitudes toward mental impairment and about the importance of according the mentally handicapped their fundamental rights”). Under New York state law, individuals under the jurisdiction of the New York State Office of Mental Retardation and Developmental Disability are allowed to express sexuality “as limited by one’s consensual ability to do so, provided such expressions do not infringe on the rights of others.” 14 N.Y. COMP. CODES R. & REGS. tit. x, § 633.4(a)(x) (1996); see also People v. Onofre, 415 N.E.2d 936, 939-44 (N.Y. 1980) (protecting consensual sexual intercourse under the New York State Constitution).

33. Hayman, supra note 32, at 1246.

34. See William N. Eskridge, Jr., The Many Faces of Sexual Consent, 37 WM. & MARY L. REV. 47, 55 (1995) (explaining that “the issue of legal consent is inherently concerned with legal status and social policy”). For thorough discussions of this issue, see SUSAN ESTRICH, REAL RAPE (1987); HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW (1980); Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977); Leigh Bienen, Rape III—National Developments in Rape Reform Legislation, 6 WOMEN’S RTS. L. REP. 170 (1980).

most challenging when the issue involves a mentally retarded victim’s capacity to consent. Despite the heated debate over this issue, no article has ever thoroughly addressed it.

This article contends that, for a wide range of reasons, mentally retarded females are held to a higher consent standard than their nonretarded counterparts. In some instances, this higher standard reflects less of an effort to protect such individuals than a discredited but long-held view of mentally retarded females as either asexual or hypersexual—perceptions fueled, in part, by fears of their procreation. To address this dilemma, this article proposes a contextual approach to consent that incorporates a range of factors, including modern knowledge about mental retardation, individual attributes beyond the labels of intelligence quotient (IQ) and mental age, and, most importantly, the context of the sexual encounter. It suggests that such an approach would avoid the inappropriate moral judgments inherent in many state consent tests and discourage pejorative perceptions of mentally retarded individuals. A contextual approach also would contribute to a more informed concept of consent that is applicable to any rape victim, thereby accentuating the clear, yet frequently ignored, crossroads between mental retardation and normalcy. Although mentally retarded defendants appear to face similar kinds of social and legal constraints, their circumstances are beyond the scope of this article.

Part II of this article presents a brief history of mental retardation and sexuality, emphasizing that although societies have perceived mentally retarded persons in contradictory ways, they have consistently denied such individuals their sexuality. Part III explains how this denial was perpetuated by genetic explanations for mental retardation. Part IV shows that the remnants of these eugenic beliefs also have been incorporated in some current rape statutes and judicial tests for determining a mentally retarded individual’s capacity to consent to sexual intercourse. Vague and unduly moralistic, such tests strictly judge the consent capacity of mentally retarded females while


37. See infra notes 254-474 and accompanying text.

38. Robert Hayman’s superb article analyzing the social and legal infringements on the rights of mentally retarded parents addresses this issue only briefly. See Hayman, supra note 32, at 1246-47.

39. See infra notes 174, 223 and accompanying text.

40. See infra notes 48-98 and accompanying text.

41. See infra notes 99-142 and accompanying text.

42. See infra notes 143-253 and accompanying text.
failing to control judicial and juror bias toward women and the mentally retarded. Such tests also lack guidance for potential defendants, thereby enhancing the legal uncertainties involved in rape and mental retardation cases.

Part V proposes a contextual approach to consent that emphasizes a mentally retarded individual’s adaptive abilities within the situational context of the particular sexual encounter. This approach holds mentally retarded victims to a standard no higher or lower, and certainly no more moralistic, than that which exists for the nonretarded. Moreover, it discourages the kinds of stereotyping and stigmatization that can occur when the rape victim happens to be mentally retarded. By applying this approach to the facts of the Glen Ridge rape case, part V illustrates how some of the judicial and tactical pitfalls of that case could have been avoided and how the contextual approach would operate in other rape cases. Part VI then demonstrates the extent to which legal standards can infringe upon the rights of mentally retarded individuals, as well as the scope of this contextual approach, by examining the situational context of institutions and residential homes for mentally retarded individuals. Part VI focuses in particular on the ongoing debate between “pro-sexuality” and “conservative-sexuality” viewpoints concerning the sexuality of mentally retarded individuals; it also considers whether mentally retarded individuals can or should be “taught” how to have sex, and what such practical attitudes entail.

In conclusion, this article recommends, among other things, that legislatures eliminate statutory provisions that separate consent determinations for mentally retarded victims from those made for nonretarded victims. Statutory separation not only fuels the stereotypic presumption that mentally retarded individuals generally cannot consent to intercourse, it also encourages an artificially rigid emphasis on IQ and mental retardation labelling. Moreover, a contextual approach would render such statutory isolation unnecessary by regarding an individual’s mental ability as only one of a number of factors that courts would instruct juries to consider.

This article by no means advocates the criminalization of interpersonal cruelty or even an “evolving standard of decency” in the context of sexual relationships. It does contend that most mentally retarded individuals have the capacity to consent to sexual intercourse but that they should also be protected from harm. This stance recognizes that traditional notions of consent may not apply in all circumstances, particularly those involving the most profoundly mentally

43. See infra notes 254-421 and accompanying text.
44. See infra notes 279-402 and accompanying text.
45. See infra notes 422-75 and accompanying text.
46. See infra notes 443-74 and accompanying text.
47. See infra Part VII.
retarded. For this reason, this article proposes a more realistic consent standard that accommodates personal and situational variations. If legislatures and courts ignore such human differences in the name of protection, propriety, or the law, they can ultimately hurt the very people they are supposed to protect and fail to respect those people's dignity.

II. A History of Mental Retardation and Sexuality

Historically, societies have perceived the mentally retarded in contradictory ways—either as harmless or as threats to community welfare. When viewed as harmless, the mentally retarded have experienced a broad span of treatment—tolerance, indifference, amusement, or special consideration as "innocents" and the "children of God." When regarded as threats, however, the mentally retarded have been subjected to penalties ranging from persecution to segregation in various institutions, including prisons and hospitals. Although social perceptions of mentally retarded persons have changed over time, one constant has remained: a resistance to, or denial of, their sexuality.

This part examines briefly the history of mental retardation and sexuality. Such history is critical for understanding how social attitudes toward the mentally retarded are reflected in current rape statutes, standards, and cases, such as the Glen Ridge rape case. It also explains some of the difficulties service providers encounter in institutions or residential homes for the mentally retarded.

Several themes are particularly striking. First, throughout history and up to the present time, mentally retarded individuals have been isolated in terms of their residential and educational facilities or through social shunning by those who deride them. Glen Ridge's Betty Harris is a prime example of both types of isolation. Second, mentally retarded persons, especially women, have always been


49. See Deutsch, supra note 48, at 334-35.

50. See generally Scheerenberger, 1983, supra note 48, at 34-128.

51. See generally Craft, supra note 48, at 13 (tracing current and historical perspectives on the sexuality of mentally retarded individuals); Hayman, supra note 32, at 1246 (discussing the persistent "public prejudice against the sexuality and reproductive interests of the mentally retarded"); Rhodes, supra note 48, at 2 (outlining the centuries-long societal and cultural denial that mentally retarded individuals are sexual).
viewed through a distorted lens—either as asexual childlike innocents who must be protected or as hypersexual eugenic burdens. In the Glen Ridge trial, Betty Harris was depicted both ways by the prosecution and the defense who relied heavily on traditional stereotypes of mentally retarded women. Moreover, even now, social service providers frequently segregate males and females in institutions or residential homes for the mentally retarded in part because of outmoded perceptions of their sexuality. Third, mentally retarded persons continue to be subject to conflicting definitions of the "mentally retarded" label, a circumstance that mirrors the problematic history of classifying mental abilities. Much of the Glen Ridge trial focused on Betty Harris’s IQ level and mental age, the inconsistencies reflected by her test scores and functional capacities, and how these measures pertained to her ability to consent to sexual intercourse. Fourth, throughout history, mentally retarded individuals have typically been evaluated under separate rape statutes and standards that generally provide a higher, and more morally rigorous, consent standard than that applied to the nonretarded. In the Glen Ridge trial, for example, New Jersey’s separate rape provision for mentally retarded victims reflected the legislature’s presumption that mental retardation, standing alone, can preclude ability to consent. This emphasis can override a consideration of other factors that may be far more important in consent determinations, most particularly, the situational context of the sexual conduct. Lastly, an analysis of the institutional setting shows how legal standards can constrain the sexual rights of mentally retarded individuals. In nearly all institutions, such a high consent standard can totally prohibit sexual relations among residents.

In light of this overview, this part describes the treatment of mentally retarded persons during the prehistoric and ancient period. It then examines the eugenics movement and how beliefs espoused at that time are perpetuated in current rape law.

A. The Prehistoric and Ancient Period to the Eighteenth Century

During the prehistoric and ancient period, which spans from the start of human existence to the destruction of Rome and the western Roman Empire (476 A.D.), severely handicapped infants oftentimes did not survive long after birth because this period’s societies commonly practiced infanticide of those who would not be able to hunt or gather food. With the development of Near East urban societies such as Mesopotamia and Egypt, protective attitudes toward the weak

52. See John Gerdz, Introduction: Historical Summary, in Mark McGarrity, A Guide to Mental Retardation 1 (1993). Because there are few historical records during this period, most accounts of life are derived from archaeology and from anthropological studies of comparable hunter and gatherer cultures. There is also archaeological evidence suggesting that some hunter and gatherer groups did support handicapped members who in turn lived full life spans. See Scheerenberger, 1983, supra note 48, at 5-6.
and helpless, including the mentally retarded, began to appear in legal and ethical codes, such as the Code of Hammurabi (around 2500 B.C.) and the Old Testament.\textsuperscript{53} But the rise of Greek culture and society around 1300 B.C., which prized physical and cognitive abilities, further prompted a condemnatory view toward the mentally retarded and other vulnerable individuals. This view is exemplified by Plato’s and Aristotle’s recommendations that deformed children be killed or socially isolated.\textsuperscript{54}

Until the formal adoption of Christianity in the fifth century, Roman society (which commenced around 800 B.C.) generally followed Greek society’s pejorative attitudes toward handicapped children.\textsuperscript{55} With the fall of the Roman Empire in the fifth century, church authorities created orphanages and hospitals across Europe to care for the large number of dislocated children and poor that most likely included many mentally retarded individuals. These medieval facilities, which seemingly constituted the first “mental hospitals,” offered methods of treatment that were both primitive and barbaric; at the same time, however, these methods were no worse than those available for physical diseases.\textsuperscript{56} Yet, the Inquisition, which strived to eliminate any threats to society and dissent from official church doctrine, tended to perceive mental retardation and mental illness as signs of witchcraft. Such “witches,” allegedly possessed by the devil and the cause of all kinds of disasters, were tortured and killed.\textsuperscript{57}

The decline of the medieval period in sixteenth-century western Europe commenced with the Renaissance of ancient Greek and Roman culture accompanied by the political development of nations and

\textsuperscript{53} See Scheerenberger, 1983, \textit{supra} note 48, at 6-11; Gerdtz, \textit{supra} note 52, at 2. The Code of Hammurabi was a vast code of civil and criminal laws which, according to some sources, the Sun God gave to King Hammurabi, the sixth King of the Semitic Dynasty. See Scheerenberger, 1983, \textit{supra} note 48, at 7; see also Robert M. Veatch, \textit{The Foundations of Justice: Why the Retarded and the Rest of Us Have Claims to Equality} 22 (1986) (noting that although the Bible does not specifically discuss mentally retarded persons, an examination of Biblical writings concerning the oppressed, the needy, the sick, and the poor may indicate ways the Judeo-Christian tradition might approach mentally retarded persons).

\textsuperscript{54} See Scheerenberger, 1983, \textit{supra} note 48, at 11-12; Gerdtz, \textit{supra} note 52, at 2.

\textsuperscript{55} See Scheerenberger, 1983, \textit{supra} note 48, at 20-23; Gerdtz, \textit{supra} note 52, at 3-4. Although some records show that a primitive social welfare system of education, orphanages, and hospitals for the poor developed during the Roman Empire, it is unclear whether mentally retarded children or adults benefitted from such programs. Moreover, even though the fifth-century Christian church condemned infanticide—a policy that the state adopted legally—there is evidence to suggest that such a policy may have reflected theory more than actual practice. Regardless, the ancient period’s most pervasive legacy constituted the teachings and philosophies of those individuals who contributed a number of religions and ethical systems benevolent toward mentally retarded individuals—Jesus, Buddha in India, Confucius in China, and Mohammed in the Arab world. See Scheerenberger, 1983, \textit{supra} note 48, at 20-23; Gerdtz, \textit{supra} note 52, at 4.

\textsuperscript{56} See Scheerenberger, 1983, \textit{supra} note 48, at 34-36; Gerdtz, \textit{supra} note 52, at 5-6.

\textsuperscript{57} See Scheerenberger, 1983, \textit{supra} note 48, at 32; Gerdtz, \textit{supra} note 52, at 6. In the Islamic world, however, where mentally retarded individuals were treated more humanely, physicians not only studied and recognized different levels of intelligence, but also suggested that mentally retarded persons be educated. See \textit{id.} at 5-6.
states. Although the Reformation prompted substantial political and cultural change, a number of devastating wars between Roman Catholic and Protestant nations abolished the weak safety net of monasteries and religious houses for the poor. Such developments highlighted, in hindsight, the rather negative perceptions that key religious reformers held toward those with mental retardation. Although it appears that most mentally retarded individuals lived with their families, others resided in horrible workhouses and residences which, during the seventeenth and eighteenth centuries, seemingly provided worse care than those in prior centuries. But there was also progress. Philosophers such as Francis Bacon, Rene Descartes, and John Locke contributed to the creation of scientific methods that would support much of the later work in mental retardation and the differences between it and mental illness.

B. Nineteenth-Century United States

Until the nineteenth century, professionals had little interest in mental retardation. It appears that modern special education began in France in the early nineteenth century when Jean-Marc-Gaspard Itard attempted to educate the child known as “The Wild Boy of Aveyron,” by applying operant conditioning and task analysis techniques that are still popular. Itard’s negative assessment of the child’s abilities was influential. Regardless, by 1818, the Industrial Revolution’s scientific progress spurred Connecticut to offer the first

59. See Scheerenberger, 1983, supra note 48, at 32-33; Gerdtz, supra note 52, at 7. The reformers John Calvin and Martin Luther showed particular disdain toward mentally retarded individuals. See Deutsch, supra note 48, at 336 (explaining that “many people (including Luther and Calvin) regarded [the mentally retarded] with deep hatred as being children of the Devil”); Leo Kanner, A History of the Care and Study of the Mentally Retarded 7 (1964) (recounting Luther’s statements that the feebleminded were “godless”); Scheerenberger, 1983, supra note 48, at 32 (noting that “Luther’s attitude toward [mentally retarded persons] was singularly harsh”); Gerdtz, supra note 52, at 7-8 (emphasizing Calvin’s and Luther’s views “that those who were mentally retarded were not completely human”).
60. See Kanner, supra note 59, at 6 (noting that “[i]t was during the period of ‘enlightenment’ and ‘reform’ that the mental defectives were at their worst”); Scheerenberger, 1983, supra note 48, at 43 (specifying that the death rate for children placed in some of these workhouses was over 90%).
62. See Kanner, supra note 59, at 7-8 (stating that relative to other conditions, such as epilepsy, mental retardation had not been mentioned until relatively recently); Richard C. Woolfson, Historical Perspective on Mental Retardation, 89 AM. J. MENTAL DEFICIENCY 231, 231 (1984) (noting that despite the dearth of early research on mental retardation, there was an attempt by one physician, Montalto, early in the 17th century, to study the topic comprehensively).
64. For a more complete discussion of this issue, see Peter L. Tyor & Leland V. Bell, Caring for the Retarded in America (1984); Philip M. Ferguson, The Social Construction of Mental Retardation, 18 SOC. POL’Y 51, 52 (1987).
65. See, e.g., Tyor & Bell, supra note 64, at 1-43; Ferguson, supra note 64, at 52.
residential and educational program for mentally retarded children in the United States.\textsuperscript{66} The era also marked the start of the scientific community's focus on mental retardation. Scientists designed classification schemes to diagnose mental retardation and its various levels of severity and to demonstrate its differences from mental illness.\textsuperscript{67}

In general, mentally retarded individuals were viewed as a "nuisance" rather than a danger in nineteenth-century United States, a time when individualism and competition were highly valued.\textsuperscript{68} Contrary to Itard's earlier view, scientists focused on the more successful "school-like asylums" for the mentally retarded\textsuperscript{69} as well as on mentally retarded children, who they viewed as more capable of eradicating what they considered bad and vicious habits than mentally retarded adolescents or adults.\textsuperscript{70} One "vicious habit" that greatly concerned reformers was "self abuse" or masturbation, which they believed violated "natural law" and either caused or exacerbated mental retardation in both the masturbators and their progeny.\textsuperscript{71}

In the late nineteenth century, professionals believed that their method of treating mentally retarded individuals through training and education should emphasize instead custodial care and protection, an approach that seemingly better accommodated adults.\textsuperscript{72} Crucial to this change was the creation in 1876 of the American Association on Mental Retardation (AAMR) which, from the time of its founding to the present, has led the effort to understand, define, and classify the

\begin{itemize}
\item \textsuperscript{66} See TYOR \& BELL, supra note 64, at 10; Gerditz, supra note 52, at 10.
\item \textsuperscript{67} See AMERICAN ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 5-10 (Herbert J. Grossman ed., 1983) [hereinafter AAMD]; SCHEERENBERGER, 1983, supra note 48, at 137-47; Patricia T. Cegelka \& Herbert J. Prehm, The Concept of Mental Retardation, in MENTAL RETARDATION: FROM CATEGORIES TO PEOPLE 3, 3-20 (Patricia T. Cegelka \& Herbert J. Prehm eds., 1982).
\item \textsuperscript{68} See DEUTSCH, supra note 48, at 130 (providing examples of society's indifference to mentally retarded individuals).
\item \textsuperscript{69} See Ferguson, supra note 64, at 52. The years between 1850 and 1880 evidenced a large growth in the number of institutions for mentally retarded persons, including the founding of the State Asylum for Idiots in New York in 1851, the Pennsylvania Training School for Feebleminded Children in 1853, the Institution for Feebleminded Youth in Ohio in 1857, and the Connecticut School of Imbeciles in 1858. This growth reflected the belief that mentally retarded individuals could be cured or at least bettered if they received the proper training and education during their youth. See DUANE F. STROMAN, MENTAL RETARDATION IN SOCIAL CONTEXT 103 (1989).
\item \textsuperscript{70} See TYOR \& BELL, supra note 64, at 22-23; Samuel G. Howe, On the Causes of Idiocy, in 1 THE HISTORY OF MENTAL RETARDATION: COLLECTED PAPERS 31, 54-57 (Marvin Rosen et al. eds., 1976) [hereinafter THE HISTORY OF MENTAL RETARDATION]; Rhodes, supra note 48, at 3.
\item \textsuperscript{71} For example, in his 1848 report to the Massachusetts Legislature, Samuel Howe, superintendent of the first training school for mentally retarded persons, emphasized that "ten cases . . . of the] idiocy of the children [could be] manifestly attributable to this sin of the parent." Howe, supra note 70, at 56.
\item \textsuperscript{72} See WILLIAM SLOAN \& HARVEY A. STEVENS, A CENTURY OF CONCERN: A HISTORY OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY 1876-1976, at 19 (1976). According to the President of the American Association on Mental Deficiency in his 1890 Address, the Association's view was "[o]nce feebleminded, always feebleminded, only in a less degree." Id.
\end{itemize}
meaning of mental retardation. From the start, the AAMR broadened its educational agenda to include adults. It also recommended institutions patterned on a community structure reflective of “a great family.” However, “[i]mplicit in this view was an understanding that a sexual life that might enlarge this population was not to be encouraged.” For example, the AAMR made clear that mentally retarded males and females should be segregated.

Twentieth-century reformers have encouraged the notion that mentally retarded individuals are trainable and therefore economically useful, “able and willing to do much of the drudgery of the world, which other people will not do.” Although the definition of economic utility has changed over time, the emphasis on social exclusion of the mentally retarded has remained constant. This theme of isolation permeates the legal and social boundaries in current rape law.

C. The Scientific Construction of Mental Retardation

The history of mental retardation and sexuality necessarily concerns determinations of who is to be labelled “mentally retarded.” According to social construction theory, the conceptual foundation for much of the current commentary on disability reform, “much—if not all—of what we mean by terms such as ‘disability’ and ‘handicap’ is cultural artifact rather than physiological inevitability.” The term “mental retardation,” for example, has no inherent meaning, but rather reflects how others may presuppose certain characteristics of mentally retarded individuals. Hence Robert Hayman’s conclusion.

73. See American Ass’n on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports ix (9th ed. 1992) [hereinafter AAMR]. Prior to 1987, the AAMR was known as the American Association on Mental Deficiency. See 1 Encyclopedia of Associations 1797 (Carolyn A. Fischer & Carol A. Schwartz eds., 30th ed. 1996). This article will refer only to the name AAMR in an effort to avoid confusion and to reflect the current trend rejecting the term “mental deficiency.”

74. See Sloan & Stevens, supra note 72, at 19.


76. See Sloan & Stevens, supra note 72, at 19.

77. See Ferguson, supra note 64, at 52.

78. Henry H. Goddard, Feeblemindedness: Its Causes and Consequences 588 (1920); see also Theodora M. Abel & Elaine F. Kinder, The Subnormal Adolescent Girl 166 (1942) (noting that, with respect to mentally retarded girls in particular, “[s]ociety can . . . emphasize either her potentialities for doing the drudgery of the world or her social liabilities”).

79. See Ferguson, supra note 64, at 54.

80. Id. at 51.

81. For a more complete discussion of this issue, see Robert Bogdan & Steven J. Taylor, Inside Out: The Social Meaning of Mental Retardation (1982); Jane R. Mercer, Labelling the Mentally Retarded (1973); Burton Blatt, The Definition of Mental Retardation, 32 Mental Retardation 71, 71 (1994); Hayman, supra note 32, at 1211-26, 1243-52.
that "[m]ental retardation is not a disease, disorder or disability," but a less-than-satisfactory administrative term used to identify the condition of a broad spectrum of people whose common trait is inadequate cognitive ability to meet the demands of society.82

A striking example of the power of definition stems from scientific determinations of mental retardation, most particularly the early twentieth century creation of IQ tests. IQ tests alone substantially elevated the prevalence of those individuals labelled as mentally retarded mainly because of the leap in the number of individuals in the highest IQ retardation level.83 Then, as now, a debate focused on the propriety of classifying as mentally retarded the higher IQ individuals because most could function relatively independently; low test performance alone justified their new label.84 The growing surge in the testing movement over time only increased the number of persons classified as mentally retarded.85 In 1973, however, the AAMR again changed the scope of the definition and the percentage labelled mentally retarded declined substantially.86

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82. Hayman, supra note 32, at 1213; see also Denise C. Valenti-Hein & Linda D. Schwartz, Witness Competency in People with Mental Retardation: Implications for Prosecution of Sexual Abuse, 11 SEXUALITY & DISABILITY 287, 290 (1993) (emphasizing that "[g]eneralizations about people with mental retardation are particularly problematic because mental retardation, like competency, is a multi-dimensional concept" representing, for example, people with a wide range of IQ scores (from 0 to 80) and abilities (from those who cannot feed, dress, toilet, or speak for themselves to those who reside virtually undetected in the community)).

83. See Deutsch, supra note 48, at 354-86; Scheerenberger, 1987, supra note 48, at 11-36; Stanley J. Vitello & Ronald M. Soskin, Mental Retardation: Its Social and Legal Context 4 (1985). During the first half of the 20th century, the mental testing movement heralded by Alfred Binet, Lewis Terman, and David Wechsler, proposed the term "intelligence" to designate cognitive development. In practice, a person's level of cognitive development depends upon the score that person obtains on an intelligence test (such as the Stanford-Binet or the Wechsler Scales), relative to an arbitrarily defined norm, such as 100. A person whose IQ deviates substantially from that norm is determined to be mentally retarded, while the degree of that person's retardation corresponds to the magnitude of the score's deviation. In the 1900s, for example, mentally retarded or "feebleminded" persons with an IQ score below 25 were categorized as "idiots," those with an IQ score between 25 and 50 were categorized as "imbeciles," and later those with IQ scores between 50 and 70 were categorized as "morons." See Vitello & Soskin, supra, at 4. Although since 1900 educators have used a variety of terms to denote general intellectual incompetence, the term "mental retardation" eventually predominated, mirroring a changing scientific view of mentally retarded persons as educable. See Bernard Farber, Mental Retardation: Its Social Context and Social Consequences 4-5 (1968).

84. See Vitello & Soskin, supra note 83, at 4.

85. For example, before 1959, when the AAMR defined mental retardation in psychometric terms as an IQ of 75 or 1.5 standard deviations below the mean on a test of general intelligence, there existed a 3% incidence of mental retardation in the general population. Yet in 1959, when the AAMR redefined mental retardation as an IQ exceeding one standard deviation below the population mean, the incidence of mental retardation grew to 16%. See Blatt, supra note 81, at 71.

86. See AAMR, supra note 73, at ix (explaining that the 1973 change: (1) redefined mental retardation as two or more standard deviations below the mean (i.e., an IQ of 70 or below), (2) included the word "significantly" before the term "subaverage general intellectual functioning," (3) increased the age of the developmental period from age 16 to 18, and (4) deleted the borderline level of retardation (an IQ of about 70 to 85)); Blatt, supra note 81, at 71 (noting a decline in the number of mentally retarded individuals). But see Robert Perske, Unequal Justice?
Psychometric testing also contributed to the long-held view of the mentally retarded as a homogenous population, thereby perpetuating overly generalized labels and diagnostic stereotypes rather than a classification of specific behaviors and traits.\textsuperscript{87} Because of the growing recognition that intelligence tests reflect only a portion of a wide range of behavior,\textsuperscript{88} in 1959 the AAMR incorporated the concept of “adaptive behavior” into its official definition of mental retardation.\textsuperscript{89} The latest (and substantially changed) AAMR definition of mental retardation has, among other things, extended the concept of adaptive behavior even further.\textsuperscript{90} Currently, mental retardation “refers to substantial limitations in present functioning” that are characterized both by “significantly subaverage intellectual functioning” as well as by “related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.”\textsuperscript{91} Therefore, persons labelled mentally retarded must have some limited adaptive ability irrespective of their IQ level. Although courts also typically refer to a victim’s “mental age” when

\textsuperscript{87} See Farber, supra note 83, at 16; Blatt, supra note 81, at 71; Ferguson, supra note 64, at 52-53; Rhodes, supra note 48, at 22-23; Norman D. Sunberg et al., Toward Assessment of Personal Competence and Incompetence in Life Situations, 29 Annual Rev. Psychol. 179, 181 (1978). Indeed, the 19th century’s characterization of mental retardation as deviance represented an effort to integrate a wide range of social problems, such as poverty, alcoholism, crime, and other conduct that countered social norms. In contrast, with time, a view of mental retardation as incompetence developed as an effort toward social reform and the use of psychological testing to select children who were dysfunctional in ordinary classrooms. See Farber, supra note 83, at 33; see also Leo Kanner, A Miniature Textbook of Feeblemindedness 3 (1949) (noting that psychometry was once praised for its creation of a relative scale on which to judge feeblemindedness).

\textsuperscript{88} See AAMR, supra note 73, at 9; Stephen Greenspan & James M. Granfield, Reconsidering the Construct of Mental Retardation: Implications of a Model of Social Competence, 96 Am. J. Mental Retardation 442, 442-53 (1992). Current commentary has expanded this view even further, contending, for example, that “emotional intelligence” can be far more important than IQ in predicting success in life. See generally Daniel Goleman, Emotional Intelligence: Why It Can Matter More Than IQ (1995) (contending that our current notions of intelligence are too narrow, ignoring those critical abilities or “emotional intelligence” that promote achievement—such as self-awareness, impulse control, persistence, zeal, self-motivation, empathy, and social deftness).

\textsuperscript{89} See AAMR, supra note 73, at 9 (requiring in 1959 that “subaverage intellectual functioning must be reflected by impairment in one or more of the following aspects of adaptive behavior: maturation, learning and social adjustment”). As early as the 19th century, scholars such as Itard emphasized the significance of social competence in diagnosing mental retardation in part because of the epidemiological finding that mental retardation, unlike other nonfatal conditions, declined after adolescence. See Greenspan & Granfield, supra note 88, at 443.

\textsuperscript{90} This change emphasizes even more the interaction between limited intellectual functioning and the environment. See AAMR, supra note 73, at x.

\textsuperscript{91} \textit{Id.} at 1 (noting that mental retardation must occur before age 18).
evaluating rape and mental retardation cases, the AAMR and other commentators consider "mental age," a misleading concept, most particularly because it perpetuates beliefs that the mentally retarded are "forever young" or "childlike."

The AAMR also has recommended replacement of the traditional four-level classification of mental retardation. Because the AAMR's replacement system has not yet been referenced in the rape and mental retardation cases nor in the multidisciplinary literature discussing this issue, this article will continue to refer to the traditional four-level classification. However, this article will rely on the AAMR's other new definitional changes because they have been so widely accepted and because they recently constituted the basis of the U.S. Supreme Court's definition of mental retardation.

92. This estimate of courts' references to "mental age" is based on this article's overview of all rape cases involving mentally retarded persons within the last two decades; see also infra Appendix, Table E. "Mental age" is defined as the chronological age for which performance is "average" or "normal"; determination of [mental age] is based on the examinee's success in passing a series of test items that are ordered in difficulty and represent age levels at which most children are successful with the items; the examinee has been successful with all test items at some level (basal age) below the assigned [mental age] and with none at some higher level (ceiling age).

93. Telephone Interview with Doreen Croser, Executive Director of the AAMR (Aug. 13, 1996); Telephone Interview with Robert L. Schalock, Chairman and Professor, Department of Psychology, Hastings College, Member of the Ad Hoc Committee on Terminology and Classification, AAMR (Aug. 13, 1996).

94. See AAMD, supra note 67, at 33 ("The comparison of [mental ages] of retarded people with the characteristics of children whose [chronological ages] are of similar magnitude is insufficient for describing the course of mental development of retarded children who are still growing."); Greenspan & Granfeld, supra note 88, at 443 (viewing psychometric testing alone is an inadequate measure of mental retardation because the concept of a "mental age" does not sufficiently represent an individual's social functioning); Robert L. Schalock et al., The Changing Conception of Mental Retardation: Implications for the Field, 32 MENTAL RETARDATION 181, 181-93 (1994) (explaining the AAMR's new definition of mental retardation and the exclusion of mental age).

95. See William Fink, Education and Habilitation of the Moderately and Severely Mentally Retarded, in MENTAL RETARDATION: FROM CATEGORIES TO PEOPLE, supra note 67, at 260, 262 (emphasizing that "a major obstacle to designing functional and appropriate programs for moderately and severely handicapped individuals has been the tendency for programmers to focus on the retarded individual's mental age, with relative disregard for the individual's chronological age," a tack that "has resulted in the belief that moderately retarded people remain 'forever young' or 'childlike'").

96. See AAMR, supra note 73, at x. The AAMR has proposed four levels that classify "the intensities and pattern of supports systems" (intermittent, limited, extensive, and pervasive), as substitutes for the four traditional levels (mild, moderate, severe, and profound). See AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39, 40 (4th ed. 1994) [hereinafter DSM-IV]; infra Appendix, Table A. The critiques of the AAMR classification system and the raging debates concerning the proper definition of mental retardation have been addressed elsewhere and are beyond the scope of this article. See generally Steven Reiss, Issues in Defining Mental Retardation, 99 AM. J. MENTAL RETARDATION 1 (1994); Schalock et al., supra note 94, at 181.

97. Most significant, perhaps, is the AAMR's recognition that the label "mental retardation" is scientifically constructed, thereby prompting the AAMR's continuing "attempt to express the changing understanding of what mental retardation is." AAMR, supra note 73, at ix.

III. Society’s Denial of a Sexual Life for Mentally Retarded Individuals: From Eugenics to Normalization

Throughout history, scientific preoccupation with the genetic causes of mental retardation has fueled society’s denial of a sexual life for mentally retarded individuals even though such genetic theories have been discredited. Current research on the intergenerational transmission of mental retardation highlights the preventable or reversible environmental influences that these families share,99 as well as a range of other nongenetic causes, such as head injury.100 Moreover, such research indicates that individuals’ abilities may improve markedly with adequate training and support.101 Social and legal attitudes have not always reflected this modern view, however, following instead the dubious early science of “pseudogenetics.”102 As later sections of this article show,103 these attitudes have been incorporated and retained, either directly or indirectly, in rape statutes and cases.

A. The Eugenics Movement

The twentieth-century eugenics movement was a major factor in initiating the differential treatment of mentally retarded persons.104 Accompanying the notion that mentally retarded persons should be protected was a growing concern that such individuals were dangerous to society. This perception was spurred by the concepts of evolution and natural selection espoused in Charles Darwin’s 1859 publication, Origin of the Species.105

The eugenics movement was appealing to both professionals and the public because it provided a means for explaining a changing and increasingly forbidding industrial society in terms of the genetic trans-

99. See AAMR, supra note 73, at 71.
100. See id. at 69-91; Scheerenberger, 1987, supra note 48, at 37-61; Howard L. Garber & Maurice McInerney, Sociobehavioral Factors in Mental Retardation, in MENTAL RETARDATION: FROM CATEGORIES TO PEOPLE, supra note 67, at 111, 111-45; B.C. Moore, Biomedical Factors in Mental Retardation, in MENTAL RETARDATION: FROM CATEGORIES TO PEOPLE, supra note 67, at 76, 76-110.
102. See AAMR, supra note 73, at 71.
103. See infra notes 143-253 and accompanying text.
105. In 1883, Darwin’s cousin, Francis Galton, used the term “eugenics” (derived from the Greek word “well-born”) to depict “the study of the agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally.” Deutsch, supra note 48, at 357-58. The eugenics movement, which stressed the overarching importance of heredity, likewise encouraged the reproduction of the “socially desirable” (positive eugenics) and discouraged the reproduction of the “socially undesirable” (negative eugenics). Id. at 358.
mission of social problems. This view was enhanced by a number of genealogical "studies" supposedly illustrating the long-term societal effects of "degenerate" families, including those with mentally retarded members. One of the most significant of these studies, Henry H. Goddard's 1912 history of the Kallikak family, concluded that 143 of the 480 descendants of a mentally retarded patient were also mentally retarded and that three-quarters were degenerates. Similarly, many of the scientific and popular works of the nineteenth and early twentieth centuries commonly referred to mentally retarded individuals as "criminals," "prostitutes," "parasites," and other such terms, thereby encouraging the public and professional view that mental retardation was both inherited and linked to social problems. For these reasons, the eugenics movement's push to segregate the "dangerous minority" of mentally retarded persons received widespread support, resulting in vast increases in the number of institutionalized mentally retarded persons.

B. Women and Mental Retardation: A Special Case

Increased institutionalization included a separation of the sexes to prevent sexual activity and its consequent "social burden." Indeed, "[t]he concern about women with mental retardation became something of an obsession among administrators and legislators by the turn-of-the-century." Mentally retarded women were considered to

106. See Rhodes, supra note 48, at 6.
107. One of the most informative of these works was Richard Dugdale's 1877 analysis of the Jukes family, which concluded that generational patterns of criminal conduct could be attributed to bad environmental conditions. See generally Richard L. DUGDALE: THE JUKES: A RECORD AND STUDY OF THE RELATIONS OF CRIME, PAUPERISM, DISEASE AND HEREDITY (3d ed. 1877). Yet Arthur Estabrook's 1915 reexamination of Dugdale's work concluded that one half of the Jukes family were criminals and the other half were mentally retarded. See generally Arthur H. ESTABROOK, THE JUKES IN 1915 (1916). This finding prompted one scholar of the period to observe that "what was regarded in 1877 as primarily a problem in criminal degeneracy, became in 1915, mainly a problem of mental deficiency." Marvin Rosen et al., The Impact of Genetics, in 2 THE HISTORY OF MENTAL RETARDATION, supra note 70, at 145, 145-46. But see Martha Ufford Dickerson, SOCIAL WORK PRACTICE WITH THE MENTALLY RETARDED 10 (1981) (stating that Dugdale found that only one of the 709 subjects he studied was mentally deficient).
108. See GODDARD, supra note 78; see also KANNER, supra note 59, at 132 (noting the influence of Goddard's study).
109. See Gerdtz, supra note 52, at 14.
110. See Rhodes, supra note 48, at 7.
111. See id. at 8-9; Rosen et al., supra note 107, at 146.
112. See TYOR & BELL, supra note 64, at 104; Martin W. Barr, The Imperative Call of Our Present to Our Future, in 2 THE HISTORY OF MENTAL RETARDATION, supra note 70, at 99, 99-104; see also ABEL & KINDER, supra note 78, at 139 ("[M]any, if not most, subnormal girls are easily led. They are suggestive and find it difficult to turn down any invitation a boy may make; they may not even consider declination as a possibility.").
113. See EDWARD T. DEVINE, THE FAMILY AND SOCIAL WORK 44-45 (1912). As Edward T. Devine of the New York Charity Organization Society explained, "[t]he permanent segregation, during the reproductive years of life, of the feeble-minded, the insane, the incorrigibly criminal, and the hopelessly ineffective . . . would enormously reduce the total social burden." Id.
114. Rhodes, supra note 48, at 11-12; see also SCHEERENBERGER, 1983, supra note 48, at 124 (emphasizing that "[t]his obsession was reflected throughout the country").
be not only more sexually promiscuous, but also more fertile, thereby fueling fears that they would bear children "as defective as themselves." 115 Yet such fears also reflected continuing social disapproval of any woman's overt sexuality. 116 Some professionals perceived a causal link between mental retardation and promiscuity, suggesting that the condition of mental retardation itself could be assumed if a female were sexually active outside of marriage. 117 It appears, then, that a number of women were admitted or retained in institutions simply because of their sexual expression rather than their mental deficits. 118

By the 1920s, the eugenics movement had waned and professionals began to regard the mentally retarded not only less harshly but even as "pure minded" and "sweet." 119 Recognizing that the definition of mental retardation had been so expanded that it included individuals who would not have been so labelled a decade or two earlier, professionals started to recommend parole for the more mildly retarded. 120 At the same time, however, there remained a strong eugenic attitude toward the sexuality of the mentally retarded, particularly females. According to Howard W. Potter, director of research at Letchworth Village in New York, males were "far more successful in extra-institutional adaption" 121 because their parole failure

115. See Scheerenberger, 1983, supra note 48, at 124; Sloan & Stevens, supra note 72, at 76; see also Martin W. Barr & E.F. Maloney, Types of Mental Defectives 2 (1921) ("[T]he sexual desires [in mental defectives] are exaggerated in the various grades in proportion to the predominant power of the mere animal over the psychic forces. In all grades, the organs of reproduction are fully developed—in the male frequently enlarged."); G.E. Shuttleworth, Mentally-Deficient Children: Their Treatment and Training 55 (1895) ("Though children in mind, they are very often men and women in wickedness and vice . . ."); Walter E. Fernald, The History of the Treatment of the Feeble-Minded, 20 Proc. Nat'l Conf. of Charities & Corrections 203, 212 (1893) ("[I]f at large, [feebleminded women] either marry and bring forth in geometrical ratio a new generation of defectives and dependents, or become irresponsible sources of corruption and debauchery in the communities where they live.").


117. See Tyor, supra note 116, at 481 (noting that the trustees of a Massachusetts asylum considered whether "inordinate sexual passion on the part of a young woman [is] to be regarded by [us] as sufficient evidence of feeble-mindedness to hold her as an inmate of this institution") (citation omitted).

118. Mildly retarded women were viewed to be the most dangerous. As one superintendent of the mentally retarded warned, "[t]he segregation of this class should be rapidly extended until all not adequately guarded at home are placed under strict sexual quarantine. Hundreds of known cases of this sort are now at large because the institutions are overcrowded.” Sloan & Stevens, supra note 72, at 76-77.


120. See Tyor & Bell, supra note 64, at 110-11; Rhodes, supra note 48, at 14.

121. Howard W. Potter & Crystal L. McCollister, A Resume of Parole Work at Letchworth Village, in 2 The History of Mental Retardation, supra note 70, at 127, 136.
The continuing influence of eugenics and the infeasibility of institutionalizing all mildly mentally retarded individuals forced institutional officials to reconsider their earlier ambivalence toward sterilization.\(^{124}\) Rather than recommending that all mentally retarded individuals be sterilized, officials began to support its selective use, most particularly for the mildly mentally retarded who would be most apt to return to the community.\(^{125}\) In 1927, the Supreme Court in *Buck v. Bell*,\(^{126}\) one of the Court's most "infamous" and "notorious" opinions,\(^{127}\) upheld the constitutionality of Virginia's involuntary ster-

\(^{122}\) Id. at 140.

\(^{123}\) Id. As Potter explained, "[m]any of our paroles would have been considered as having made a satisfactory extra-institutional adjustment if we had disregarded what one might term a normal interest in the opposite sex... [T]he matter of eugenics has made us regard even the rather normal flirtations of our patients with the opposite sex as a sufficient reason for cancelling their parole." *Id.*

\(^{124}\) See *Tytor & Bell*, supra note 64, at 119. There was no clear consensus in the scientific community regarding whether the institutionalized should be sterilized. *Compare* Barr, supra note 112, at 103 (discussing the benefits of sterilization or "asexualization" "to secure at once safety to society, less tension to community life, and greater liberty, therefore greater happiness, to the individual"), and Rudolph J. Vecoli, *Sterilization: A Progressive Measure?*, 43 Wis. Mag. Hist. 190, 196 (1960) ("Sterilization is not nearly so terrible as hanging a man, and the chances of sterilizing the fit are not nearly so great as are the chances of hanging the innocent.") (citation omitted), with Devine, supra note 113, at 46 (opposing sterilization as "a policy of very doubtful expediency"). By 1907, Indiana became the first state to pass a sterilization law permitting the operation on "confirmed criminals, idiots, imbeciles and rapists." *Deutsch*, supra note 48, at 370. By 1917, 14 other states permitted sterilization producing, by 1921, a total of 3,233 sterilizations. *See Tytor & Bell*, supra note 64, at 118-19.

\(^{125}\) See Scheerenberger, 1983, supra note 48, at 190. The largest sterilization effort took place at Sonoma State Home in California where, between 1919 and 1943, 4,310 residents underwent sterilization, "a standard procedure" for those reproductively capable women prior to their parole. *Id.* at 226.

\(^{126}\) 274 U.S. 200 (1927) (Holmes, J.).

ilization statute, which in turn temporarily eased the passage of other sterilization laws. By 1936, twenty-five states had sterilization statutes, all of which could apply to mentally retarded individuals. In any event, sterilization efforts were generally considered a failure for two major reasons: the great majority of mentally retarded individuals were never sterilized and a disproportionate number of sterilizations occurred in areas where the eugenics movement was strongest. The eugenics movement waned further after World War II in light of publicity highlighting the atrocities inflicted by Nazi Germany against the mentally and physically handicapped.

128. See Buck, 274 U.S. at 207 ("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 . . . Three generations of imbeciles are enough."). Although the Supreme Court has never expressly overruled Buck, subsequent cases have brought into question the continuing validity of eugenic sterilization even though they have not gone so far as to regard the mentally retarded as a class warranting strict scrutiny. For example, in Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court struck down an Oklahoma law involving the sterilization of recidivist criminals, holding that strict scrutiny must be applied to state legislation affecting the fundamental right to procreate. See Roe v. Wade, 410 U.S. 113 (1973) (finding a state statute criminalizing abortion an invasion of privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down a state law forbidding the sale of birth control to unmarried persons); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding unconstitutional a law forbidding contraceptive use by married couples). Even in Roe, however, the Court stated that the right to privacy is not absolute and that "it is not clear . . . that one has an unlimited right to do with one's body as one pleases." 410 U.S. at 154. Responding to the shadow of doubt cast by cases like Skinner, the Colorado Supreme Court also recognized the dubious validity of Buck, emphasizing the need for caution in this area and the fact that "[e]ugenics sterilization theories have since [the early 1900's] been largely discredited." In re Romero, 790 P.2d 819, 821 (Colo. 1990). Again, however, the Court has not squarely addressed the issue. As recently as 1995, the Court denied certiorari to a case challenging a Pennsylvania involuntary sterilization statute. See Estate of C.W., 640 A.2d 427 (Pa. Super. Ct. 1994), cert. denied, 115 S. Ct. 1175 (1995).

129. See Deutsch, supra note 48, at 370-71.

130. See id. at 371-72 (noting that a disproportionate number of sterilizations were concentrated in California, where the eugenics movement had substantial financial support).

131. See Rhodes, supra note 48, at 17. In 1924, Adolf Hitler's Mein Kampf proposed that a "pure" German race could be achieved by halting the procreation of the "physically degenerate and mentally sick." Scheerenberger, 1983, supra note 48, at 210. Toward this end, in 1933, sterilization laws required the involuntary sterilization of those with hereditary diseases, including mental retardation. See Gerdtz, supra note 52, at 21. Moreover, the SS and the Wehrmacht (regular army) systematically executed psychiatric patients and started a program (called Aktion T-4) to execute infants and adults with handicaps, including mental retardation. Id. In order to diagnose mental retardation, the Nazi state physicians followed "Form 5A," an arbitrary and unreliable test. See Wayne L. Sengstock et al, The Role of Special Education in the Third Reich, 25 EDUC. & TRAINING IN MENTAL RETARDATION 225, 225-36 (1990). Nazi propaganda suggested that for both humane and economic reasons, handicapped individuals were "better off dead." Gerdtz, supra note 52, at 22-25.
C. **Normalization and Sexual Expression**

During the two decades following World War II, the prosperity of post-war America eluded mentally retarded individuals. Yet a number of social shifts during these years, most particularly the civil rights movement and institutional exposés, propelled the "deinstitutionalization" and "normalization" movements of the 1970s and 1980s that eventually integrated deinstitutionalized mentally retarded persons into mainstream society. Social ideology promoted the view that society's general welfare could no longer justify infringing upon the rights of mentally retarded persons, including their fundamental right to procreate. However, this shift also produced some odd,

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132. See Scheerenberger, 1987, supra note 48, at 224 (noting that the $5.57 per diem provided for the institutionalized in 1964 was considerably less than that spent on zoo animals).

133. See id. at 116-21; Gerdtz, supra note 52, at 31; Bengt Nirje, The Normalization Principle—Implications and Comments, 16 J. Mental Subnormality 62, 62-70 (1970). The deinstitutionalization movement aimed to reduce the number of institutionalized persons by releasing them into the community and by limiting the admission of new persons. See Scheerenberger, 1987, supra note 48, at 116-21. The normalization movement proposed that the deinstitutionalized mentally retarded have the right to "conditions of everyday life which are as close as possible to the norms and patterns of mainstream society." Nirje, supra, at 63. See generally Wolfensberger et al., The Principle of Normalization in Human Services (1972) (explaining normalization of human behavior). For current data documenting the extent of this integration, see Peter David Blanck, Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993, 79 Iowa L. Rev. 853 (1994).

134. Normalization implied self-determination, "manifested by a desire to develop social-sexual relationships that increasingly included marriage and parenthood." Rhodes, supra note 48, at 18-19. According to Robert Edgerton's study in the 1950s, clients discharged from institutions highly valued marriage, which suggested social acceptance and normalcy for them—as well as many mentally retarded individuals today—more than any other life event. See Robert B. Edgerton, The Cloak of Competence 154 (1967); see also Robert Meyers, Like Normal People (1978) (providing a journalist's account of the life and marriage of his mentally retarded brother). Other research suggests that perhaps because of this attitude, the mentally retarded who do marry have durable unions. See Scheerenberger, 1987, supra note 48, at 189. Based on Edgerton's interviews with discharged clients who had eventually married, "it would seem that the sexual and marital lives of these retarded persons are more 'normal' and better regulated than we could possibly have predicted from a knowledge of their pre-hospital experiences and their manifest intellectual deficits." Edgerton, supra, at 126. The ongoing momentum of the 1960s Civil Rights movement also challenged, or made unenforceable, sterilization and the legal prohibition of marriage and parenthood for mentally retarded persons. See Scheerenberger, 1987, supra note 48, at 188.
Catch-22, dilemmas,\textsuperscript{135} and it has failed to halt limits on mentally retarded individuals' expressions of sexuality.\textsuperscript{136}

Among the "psycho-sexual rules" that society applies to all individuals are two that pertain specifically to mentally retarded persons: (1) they should not be sexual; and (2) they should not be allowed "psychosocial-sexual expression and especially sexual intercourse."\textsuperscript{137}

\textsuperscript{135} For example, although many states have removed eugenic sterilization statutes, they have not substituted in their place legislation for voluntary sterilization of mentally retarded individuals, a method of contraception available to most American adults. See Rhodes, supra note 48, at 20; see also A. Carson Irvine, \textit{Balancing the Right of the Mentally Retarded to Obtain a Therapeutic Sterilization Against the Potential for Abuse}, 12 LAW & PSYCHOL. REV. 95, 97 (1988) (contending that "those retarded in need of therapeutic sterilizations have no method by which to obtain one"). In those cases where voluntary sterilization is allowed, but the mentally retarded person is not able to consent to it, a third party must make the decision. Yet "[t]he end result is that without giving consent, the mentally retarded person is denied either her fundamental right to be sterilized or her fundamental right to bear children." Eric M. Jaegers, Note, \textit{Modern Judicial Treatment of Procreative Rights of Developmentally Disabled Persons: Equal Rights to Procreation and Sterilization}, 31 U. LOUISVILLE J. FAM. L. 947, 949 (1992).

Such oddities also pertain to marital rape exemption statutes. For unknown reasons, 30 states have some type of marital exemption relating to rape and other sex offenses for married mentally retarded victims, while there is no such exemption (or a different kind of one), for married nonretarded victims. See National Ctr. on Women & Family Law, Inc., Status of Marital Rape Exemption Statutes in the United States (1996) (on file with the author). It appears that these laws reflect the view that although some mentally retarded women may be able to consent to marriage, they may not always be able to consent to sex within marriage; therefore, their husbands should not be liable for "mistaking" their wives' lack of consent. The laws also may reflect the presumption that the husbands may also be mentally retarded and thus not liable for their acts. Regardless, such exceptions for mentally retarded individuals provide no protection for those mentally retarded who are in fact raped under circumstances that would provide avenues of prosecution for nonretarded women.

Apart from simply legal issues, however, are society's conflicting perspectives toward marriage and parenthood among mentally retarded individuals. In two 1970 opinion polls, 54% of those surveyed objected to mentally retarded persons marrying, and 80% objected to mentally retarded persons dating nonretarded individuals. See Scheerenberger, 1987, supra note 48, at 189. Proponents of normalization contend that mentally retarded persons must be allowed a normal sex life and the right to bear and care for children. Yet this prospect concerns many of the mentally retarded individuals' parents and relatives who believe that parental responsibilities may be too great and ultimately harm the mentally retarded child. See generally Craft, supra note 48, at 13-16 (explaining that both parents and professionals have difficulty confronting the sexuality of mentally retarded persons, in part because they are uncertain about what a child's future adult role should be); Hayman, supra note 32 (discussing the plight of mentally retarded parents); Sharyne M. Robinson, \textit{Experiences of Sex Education Programmes for Adults Who Are Intellectually Handicapped, in MENTAL HANDICAP AND SEXUALITY, supra note 48, at 127, 127-28 (discussing the awkwardness parents feel discussing sexual issues with their mentally retarded children, in part because of their fear of the potential negative consequences of sexual knowledge, such as pregnancy); Christine Bertelson, \textit{Sex Education for the Retarded: Striving to Define Right, Wrong, in ST. LOUIS POST-DISPATCH, Mar. 28, 1993, at 1A (noting the dearth of sex education for mentally disabled persons and the difficulty parents have acknowledging that their children possess sexual feelings and desires, particularly in light of the Glen Ridge rape case).}

\textsuperscript{136} See Rhodes, supra note 48, at 22. Even in the 1960s, for example, courts continued to uphold involuntary sterilizations because of eugenic concerns. See, e.g., \textit{In re Cavitt}, 157 N.W.2d 171, 177 (Neb. 1968) (explaining that "[i]t is an established fact that mental deficiency accelerates sexual impulses and any tendencies toward crime to a harmful degree"), appeal dismissed, 396 U.S. 996 (1970) (case became moot because the Nebraska legislature amended its sterilization laws before the argument).

Such rules ignore evidence that irrespective of their level of mental retardation, all persons possess "feelings, urges, and sexuality."138 Primarily, sex educators must teach mentally retarded individuals to protect themselves from sexual abuse and to recognize those forms of behavior that are socially acceptable.

This article uses as a reference point Rosalyn Monat's proposal of four subgroups of sexual expression among mentally retarded individuals as a means of assessing varying behavioral characteristics and coping abilities.139 The labels for Monat's subgroups correspond to the four traditional classifications of IQ.140 This article focuses on the coping abilities of mildly mentally retarded persons because they are most apt to resemble and interact with the nonretarded community.141 Yet this article also emphasizes the legal issues concerning sexual expression among the most severely and profoundly mentally retarded individuals, whose right to sexual expression has either been dismissed or ignored, most notably under current rape statutes and case law.142

IV. THE LAW'S DENIAL OF A SEXUAL LIFE FOR MENTALLY RETARDED INDIVIDUALS: FROM STATUTES TO STANDARDS

This part analyzes legislatures' and courts' treatment of mentally retarded rape victims in light of modern mental retardation research which is either rarely mentioned or incorrectly deciphered, the Glen Ridge rape case being a striking example. It then proposes a contextual approach to determining consent that incorporates new knowledge about mental retardation and provides greater decision-making guidance for both courts and juries.

138. Id. at 23; see also LOUS HESHUSIUS, Research on Perceptions of Sexuality by Persons Labelled Mentally Retarded, in MENTAL HANDICAP AND SEXUALITY, supra note 48, at 35, 47 (explaining that a review of several studies on mentally retarded persons' perceptions of sexuality concluded that "[s]ensual and sexual behavior was for the greater part seen as desirable and was looked forward to or engaged in with a sense of excitement and joy. Sensual and sexual experiences were clearly seen as an integral part of life.").

139. See MONAT, supra note 137, at 3-4.

140. See infra Appendix, Table A.

141. According to Monat, mildly mentally retarded individuals can be regarded in much the same way as the nonretarded because they experience comparable psychosocial-sexual behavior in exploring, adapting, and controlling sexual impulses. Yet, mildly mentally retarded persons can still face a range of difficulties that hinder their social integration. For example, some individuals can be relatively unaware of birth control, venereal disease, sexual intercourse, marriage, and parenthood. Although they seek psychosocial-sexual relationships, they may often engage in sexual encounters without realizing the long-term consequences. See MONAT, supra note 137, at 3-6. Perhaps most problematic, however, mildly retarded persons "have sexual urges and desires but have not learned the social amenities that will allow them to meet these needs without being abusive to themselves or others," Id. at 6. Because they interact on a "very concrete language level," they have difficulty learning "the subtleties of sexuality" that the nonretarded acquire through observation. Id. Lastly, mildly retarded individuals are likely to act "instinctively more than rationally"; if a sexual encounter is pleasurable, "they are not likely to stop to analyze the appropriateness of the act and then decide whether to act or not." Id.

142. See infra notes 422-75 and accompanying text.
Although state law definitions of rape vary widely, most contain, implicitly or explicitly, five primary elements: (1) the act of sexual intercourse; (2) the victim's lack of consent to intercourse; (3) the defendant's mens rea regarding an intention to engage in intercourse; (4) the defendant's use of force in achieving intercourse; and (5) the victim's resistance to intercourse, a "floater" element that becomes more or less important depending on the jurisdiction. Certain classes of people are prohibited from giving their consent to sexual intercourse: children up to a certain age, individuals who are related, and those who are so mentally incapacitated that they cannot provide consent.

Lack of consent to intercourse has constituted an element of the crime of rape since 1900 B.C., when the first rape law was established in the Code of Hammurabi. Although frequently referred to as the "consent defense," the absence of consent is an element of the crime that the prosecution must prove beyond a reasonable doubt. In most state statutes, there are, among other things, two circumstances that can negate an individual's consent: (1) the person is asleep or unconscious; or (2) the person is too young, in a drugged condition, or mentally incapacitated. In either circumstance, there is a presumption that intercourse occurred by force and against the will of the victim. There are two other factors that the prosecution typically must show: (1) the victim's mental condition actually precluded consent; and (2) the accused was aware of the victim's mental incapacity. Because an accused must exhibit a wrongful state of mind, or mens rea, the defendant's good faith belief that the victim was consenting can, in many states, negate the nonconsent element of the crime and

143. For more on this issue, see Leigh Bienen, Rape IV, 6 Women's Rts. L. Rep. 1 (1980); infra Appendix, Tables B and C.
144. See Joshua Dressler, Understanding Criminal Law 531-56 (2d ed. 1995); Bienen, supra note 143, at 1; infra Appendix, Tables B and C. The elements of force and consent frequently merge and change over time. For various discussions of force and consent, see Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev. 1780 (1992); Donald Dripps et al., Panel Discussion: Men, Women and Rape, 63 Fordham L. Rev. 125 (1994); Schulhofer, Taking Sexual Autonomy Seriously, supra note 35, at 35; Robin L. West, Legitimating the Illegitimate: A Comment on Beyond Rape, 93 Colum. L. Rev. 1442 (1993).
147. See Dressler, supra note 144, at 538-43; Brody, supra note 146, at 116.
produce an acquittal.\textsuperscript{150} Alternatively, the defendant's mistaken belief can become a defense that prohibits conviction, typically only if it is reasonable.\textsuperscript{151}

\section*{A. State Statutes}

Statutory determinations of a mentally retarded individual's capacity to consent to intercourse are based on a wide range of predominantly gender-neutral\textsuperscript{152} state sex offense statutes, which typically are both vague and dated. As Appendix, Table C shows, for example, only six states provide any statutory definition of consent,\textsuperscript{153} the most important element to analyze when the victim is mentally retarded. Appendix, Table B demonstrates that every state, except Georgia, has one or more of ten different statutory terms or categories that can include a mentally retarded individual.\textsuperscript{154} "Mentally defective" is the most common term that states use either singly\textsuperscript{155} or in conjunction with other terms to incorporate a mentally retarded person.\textsuperscript{156}

\begin{table}[h]
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\hline
State & Statutes listed in Appendix, Table C, supra note 144, at 1.
\hline
Arkansas & (sexual intercourse defined, Ark. Code Ann. § 5-14-101(9) (Michie 1993)); rape, id. § 5-14-103(a)(4); carnal abuse in the second degree, id. § 5-14-105(a));
Indiana & (rape, Ind. Code Ann. § 35-42-4-1(3) (Burns 1994));

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\caption{State Statutes}
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\textsuperscript{150} See Dressler, supra note 144, 545-46; Bienen, supra note 143, at 1.
\textsuperscript{151} See Dressler, supra note 144, at 545-46; Leigh Bienen, Mistakes, 7 Phil. & Pub. Aff. 224 (1978); Husak & Thomas, supra note 35, at 95; Schulhofer, Taking Sexual Autonomy Seriously, supra note 35, at 35; Wright, supra note 35, at 1997.
\textsuperscript{153} These six states are California, Florida, Minnesota, Missouri, Vermont, and Washington. Because Appendix, Table C details all statutes for this discussion, such documentation will not be repeated here.
\textsuperscript{154} These 10 terms or categories are: (1) "mentally defective," (2) "mentally disabled," (3) "mentally retarded," (4) "mentally incapacitated" or "mental incapacity," (5) "mental disease or defect," (6) "developmental disability," (7) "unsoundness of mind," (8) "without consent," (9) "multiple terms or categories," and (10) "other terms or categories not used elsewhere." Because Appendix, Table B details all statutes and case law for this discussion, such documentation will not be repeated in this section.
\textsuperscript{155} These states include Connecticut, Florida, Hawaii, Mississippi, New Hampshire, New Jersey, South Carolina, and Tennessee.
\textsuperscript{156} These states include Alabama, Arkansas, Maryland, Montana, New York, North Carolina, Oregon, and West Virginia.
There are serious problems with some of these terms, which mirror the historical hazards of scientifically constructing and legally labelling mental retardation. First, for nearly a decade the term “mentally defective” has been prohibited from use by the AAMR, which in 1987 changed its name from the American Association of Mental Deficiency for the sole purpose of eliminating any reference to a label it considered “outmoded” and “pejorative.” The mere fact that states use this label so widely is troublesome, as is Louisiana’s particular retention of “idiocy” and “imbecility,” terms regarded as problematic for nearly a century. Moreover, states incorrectly define “mentally defective” very broadly—typically referring to a “mental disease or defect which renders a person incapable of appraising the nature of their conduct”—closely resembling the definitions applied by those states using the terms “mental incapacity” or “mentally incapable.” Therefore, in the majority of states, regardless of the term they use, mentally retarded individuals are conceptually placed with individuals who are either mentally ill or who possess any other kind of “disease or defect” that impairs their ability to consent.

Such terminology encourages the perception that mental retardation is a static condition. It also contradicts research characterizing mental retardation in terms of a close balance between “individual capabilities and the demands and constraints of specific environments” because “virtually all” mentally retarded individuals “improve in their functioning as a result of effective support and services.” A few states have incorporated the AAMR’s definition of mental retardation or have applied another modern term. Yet

157. See supra notes 79-98 and accompanying text.
158. Telephone Interview with Doreen Croser, supra note 93. See AAMD, supra note 67, at 183 (defining “mental deficiency” as “(1) mental retardation; (2) sometimes used to distinguish the group of persons having demonstrable organic basis for their intellectual deficits”).
159. Because of the pejorative effect of labels such as “idiot,” “imbecile,” and “moron,” and the difficulties resulting from their imprecision, efforts began as early as 1908 to provide a more appropriate definition of mental retardation that relied on social incompetence, rather than simply organic pathology, as a major diagnostic criterion. See Cegelka & Prehm, supra note 67, at 4. By 1925, the 1916 version of the Stanford-Binet Intelligence Scale was in wide use, introducing a new terminology and classification system designed to displace the “negativism” associated with the earlier tripartite division. See AAMD, supra note 67, at 9-10; Scheerenberger, 1987, supra note 48, at 11-12.
160. See infra Appendix, Table B.
161. For example, six states refer specifically to mental illness in their definitions: Delaware, Kentucky, Michigan, Oklahoma, Vermont, and Wisconsin.
162. AAMR, supra note 73, at 12.
163. Id. at 7.
164. Only three states (Kentucky, Michigan, and Vermont) have incorporated portions of the AAMR’s definition of mental retardation. Although Massachusetts is the only state that singly uses “mentally retarded” as its term to designate victims not able to consent, it provides no specific definition.
165. See, e.g., California, infra Appendix, Table B (“incapable of consent” because of a “developmental disability”).
as the following sections indicate, this article recommends that a statute refer only to an individual’s “inability to consent,” without further specification, for two reasons: the ongoing controversy regarding the correct definition of “mental retardation,”166 as well as the frequently detrimental repercussions resulting from the statutory isolation of mentally retarded individuals in the context of rape law.

B. Judicial Standards

When courts test a mentally retarded person’s capacity to consent to sexual activity, they engage in far more than simply a legal venture. Rather they often dictate whether that individual can ever legally engage in a consensual sexual relationship. Many states criminalize the conduct of the nonretarded sexual partner of a mentally retarded person if that partner either knew or had reason to know of the person’s mental retardation status167 or if that partner engaged in sexual conduct irrespective of such knowledge.168

According to some advocates for the mentally retarded, these rules constitute legally enforced celibacy for mentally retarded persons and overzealous moralizing about who can and cannot engage in sexual relations and why.169 As one scholar explains, “[o]nce the law of consent is understood as a regulatory regime, it becomes more coherent. The key regulatory policy is procreative companionate marriage . . . .”170 Because of concerns over eugenics and the “sanctity of the family unit,” courts constrain the sexual lives of certain classes of people, including the mentally retarded.171 Rape statutes and judicial standards become proxies for these regulatory goals. In State v. Wyman,172 for example, the Connecticut Supreme Court in 1934 made clear that the mentally retarded victim’s capacity to consent to sexual intercourse was not the issue in convicting the defendant of rape.

166. See Greenspan & Granfield, supra note 88, at 442; Reiss, supra note 96, at 1; Schalock et al., supra note 94, at 181. The AAMR notes that even many developmentally disabled individuals disagree about the continuing use of the term “mental retardation,” which they perceive as “stigmatizing” and “frequently mistakenly used as a global summary about complex human beings.” AAMR, supra note 73, at xi.

167. See infra Appendix, Table C.

168. See, e.g., State v. Sullivan, 298 N.W.2d 267, 273 (Iowa 1980) (“The fact an erroneous judgment by an offender may still subject him or her to criminal sanction if the partner in fact does not possess the requisite mental capacity does not make the statute unconstitutional. This crime does not require knowledge or intent. . . . [T]he policies in support of protecting those who suffer mental incapacities outweigh the danger of mistake.”).

169. See infra notes 460-75 and accompanying text.

170. Eskridge, supra note 34, at 55.

171. Id. at 56; see also Hayman, supra note 32, at 1246 (“The illegitimation of the mentally retarded person’s sexuality may . . . reflect a more pragmatic prejudice against the reproductive interests of mentally retarded persons. The Malthusian nightmare of a world overrun by mental defectives may well linger in the public consciousness, and may explain at least part of the desire that these people not reproduce.”) (citation omitted).

172. 173 A. 155 (Conn. 1934).
Rather, the concern was whether she was in a class of individuals for whom intercourse and marriage were prohibited for eugenic reasons. The history of the statute [General Statutes sec. 6277, providing that “any man who shall carnally know any female under the age of forty-five years who is epileptic, imbecile, feeble-minded or a pauper shall be imprisoned”] shows the classification to be sound, its moving purpose being to check the increase of mental defectives and abnormal persons in the community which results by inheritance from defective parents. . . . In view of the purpose of the statute in question (section 6277), it is of less importance whether the woman has sufficient mental capacity to know the distinction between right and wrong. She may be able to draw these distinctions and yet be “epileptic, imbecile [or] feeble-minded,” and so within the prohibited class, for either marriage or carnal intercourse.\(^{173}\)

The courts are no longer as explicit as Wyman in their efforts to control the sexual lives of mentally retarded individuals. However, the next section suggests that current judicial standards can enforce a result similar to the Wyman court’s, albeit less directly.

1. Testing the Capacity to Consent to Sexual Conduct

Based in part on state statutes, courts have created six tests to serve as standards for determining a mentally retarded individual’s capacity to consent to sexual activity.\(^{174}\) These tests reflect a continuum ranging from the most expansive definition of incapacity (the morality test) to the most narrow one (the nature of the conduct test).\(^{175}\) Each of these tests is laid out in more detail in the Appendix.\(^{176}\) Courts define these six tests as follows:

1. Morality. New York\(^{177}\) and six other states\(^{178}\) require that the mentally retarded individual have an understanding of the nature and

\(^{173}\) Id. at 156 (emphasis added).

\(^{174}\) Three of these tests were outlined in State v. Olivio, 589 A.2d 597, 602 (N.J. 1991). See also Sundram & Stavis, supra note 149, at 451 (referring to the “morality” test, the “nature and consequences” test, and the “nature of the conduct” test). Some of these tests are comparable in some respects to those used to assess an accused’s mental capacity for the purpose of determining criminal liability when insanity, or a similar disorder, is raised as a defense. See K. H. Larsen, Annotation, Rape or Similar Offense Based on Intercourse with Woman Who Is Allegedly Mentally Deficient, 31 A.L.R. 3d 1227, 1231 n.10 (1970 & Supp. 1996). Courts have rarely compared the inverse circumstances of victims and defendants. See id. One exception is Lee v. State, 64 S.W. 1047, 1047-49 (Tex. 1901) (holding that the same test of mental capacity should be used for both victims and defendants).

\(^{175}\) See Olivio, 589 A.2d at 602; Paul F. Stavis, Recent Developments in Law and Recent Data on Sexual Incidents: Policy Considerations for Providers, QUALITY OF CARE, Apr.-May, 1996, at 6.

\(^{176}\) See infra Appendix, Table D.

\(^{177}\) People v. Cratsley, 653 N.E.2d 1162, 1165 (N.Y. 1995); People v. Easley, 364 N.E.2d 1328, 1332-33 (N.Y. 1977). These New York cases contain the most detailed and explicit discussion of this test.
consequences of the sexual conduct as well as an appreciation of the moral dimensions of the decision to engage in such conduct.

2. *Totality of the Circumstances.* Illinois's 178 recent test expands upon the nature and consequences portion of its morality test. 180 Prior consideration only of the act, its nature, and consequences did not sufficiently address either the victim's particular situation at the time of the crime or the perpetrator's intent. 181

3. *Nature and Consequences.* Iowa 182 and twelve other states 183 require that the mentally retarded individual comprehend the nature of the sexual activity and its potential consequences, such as pregnancy and disease. This nature and consequences test is incorporated into the morality test and Illinois's totality of the circumstances test.

4. *Judgment.* Georgia 184 and Minnesota 185 apply a scant test that refers to whether the victim can exercise judgment regarding consent to sexual activity.

5. *Evidence of Mental Disability.* Nine states 186 have no explicit test, but rather discuss evidence of the victim's mental disability as a means of determining capacity to consent.

6. *Nature of the Conduct.* New Jersey 187 and eighteen other states 188 require only that the mentally retarded individual understand the sexual nature of the conduct and is voluntarily able to participate. These states do not require that the individual understand the mo-

178. These states are Alabama, Colorado, Hawaii, Idaho, Illinois, and Washington. Illinois also has recently introduced a "totality of the circumstances" test. See infra notes 179-81 and accompanying text.


181. See Whitten, 647 N.E.2d at 1066.

182. See State v. Sullivan, 298 N.W.2d 267, 272-73 (Iowa 1980). Iowa is the only state to render its state sex offense statute unconstitutional because of its reference to a morality test, substituting instead a nature and consequences test. See id. at 271-73.

183. Although some states, such as Alaska, use the term "nature or consequences," these states have been included in this generic category because their analyses of the facts and circumstances in competency to consent cases are comparable to those states following the "nature and consequences" test. In addition to Iowa, these 12 states are: Alaska, Arizona, Arkansas, Indiana, Kansas, New Mexico, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and Wyoming.


186. These states are Connecticut, Maryland, Massachusetts, Michigan, Mississippi, Missouri, South Dakota, West Virginia, and Wisconsin.

187. See State v. Olivio, 589 A.2d 597, 599 (N.J. 1991) (holding that a person is "mentally defective" if "he or she 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 such conduct with another").

188. New Jersey's test has not been followed explicitly by other courts in that they do not directly cite Olivio. Indeed, only one state court has cited Olivio in the sexual capacity context, and that court adopted the nature and consequences test. See Adkins v. Virginia, 457 S.E.2d 382, 388-89 (Va. Ct. App. 1995) (referring to the mentally retarded person's need to understand the "nature and consequences" of the act). In addition to New Jersey, 18 states rely on a nature of the conduct test devoid of any mention of the consequences: California, Delaware, Florida, Kentucky, Louisiana, Maine, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, and Utah.
rality or the nature and consequences of the act and New Jersey makes these omissions explicit. 189

The morality test, exemplified by the New York Court of Appeals in People v. Easley 190 and reaffirmed in People v. Cratsley, 191 has been most avidly critiqued by some commentators contending that its broad standard would per se prohibit sexual activity by many mentally retarded individuals. 192 Yet, both the Easley and Cratsley courts appear to reflect modern views of sexuality and mental retardation. Although the courts insist they would not "adopt the fiction that all persons are mentally or judgmentally equal," 193 they also would not "presume" that a mentally retarded person was incapable of consent to sexual intercourse. 194 Indeed, "[t]he requisite degree of intelligence necessary to give consent may be found to exist in a person of very limited intellect." 195 This presumption suggests that "proof of incapacity must come from facts other than mental retardation alone," 196 most importantly, "how such a person actually functions in society." 197

The controversial issue in Easley concerned the meaning of the trial court's instructions to the jury that the victim be able to understand the moral quality of the act of intercourse. The appellate court explained that knowledge of the "moral quality" went beyond simply understanding the act's "physiological nature"; rather "[a]n appreciation of how [intercourse] will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important." 198 Therefore, a court must determine whether the victim is able to "appraise the nature of the stigma, the ostracism or other noncriminal sanctions which society levies for con-

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189. See Olivo, 589 A.2d at 604-05.
190. 364 N.E.2d 1328, 1330-31 (N.Y. 1977) (affirming the rape conviction of the nonretarded defendant, a family friend and neighbor of the victim, a 20-year-old moderately mentally retarded woman with an IQ range of 45-54 and the estimated sexual knowledge of an eight-year-old).
191. 653 N.E.2d 1162, 1163-64 (N.Y. 1995) (upholding the rape conviction of the nonretarded defendant who admitted to having intercourse with the 33-year-old victim who he knew was mentally retarded, noting that although the victim socialized with a "steady boy-friend," she was unable to cook for herself, handle money, engage in daily tasks requiring capabilities beyond her IQ of 50, and did not understand the link between intercourse and pregnancy).
192. See infra notes 460-75 and accompanying text.
194. See Cratsley, 653 N.E.2d at 1165.
196. Cratsley, 653 N.E.2d at 1165 n.3 (noting that, in contrast, New York penal law "creates an irrebuttable presumption" that a child age 16 or below cannot consent to sexual intercourse with an adult age 21 or older).
197. Easley, 364 N.E.2d at 1331.
198. Id. at 1332.
duct it labels only as immoral even while it ‘struggles to make itself articulate in law.’”\(^{199}\)

The *Easley* court cautioned that an understanding of society’s view of the “moral quality” of intercourse was separate from a victim’s “personal sense of morality.”\(^{200}\) “The object is not to probe the degree of her conformity or nonconformity to the norms of society. A knowing defiance of social mores, a mere yielding to temptation or passion, even an inclination to vice, these are not the concern of this statute.”\(^{201}\) The *Cratsley* court further warned that “care must be taken not to restrict the freedom of persons with mental retardation who are capable of knowing consent to a sexual relationship by confusing deliberate failure to adhere to a particular set of values with lack of understanding that values exist.”\(^{202}\)

Regardless of this attempt at caution, the morality test has been adopted in only seven states in part because of courts’ concerns with its scope.\(^{203}\) In *State v. Sullivan*,\(^{204}\) for example, the Iowa Supreme Court rendered unconstitutional a state statute prohibiting sexual activity with a person “suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong in sexual matters.”\(^{205}\) The court insisted that “no matter how carefully circumscribed in a jury instruction,” the statute will produce convictions “based not on the jury’s view of the facts, but on its view of the morality of certain sexual conduct.”\(^{206}\) Emphasizing that the words “right” or “wrong” should reflect their “legal” and not their “moral” meaning, the court highlighted the “futility” of “pretend[ing] that our society maintains a consensus on moral questions beyond what it writes into its laws.”\(^{207}\) Even philosophers and theolo-

\(^{199}\) *Id.* at 1333 (quoting BENJAMIN N. CARDOZO, PARADOXES OF LEGAL SCIENCE, 17, 41-42 (1928)). In *Easley*, the victim appeared to lack both physiological and normative knowledge. A psychologist testified that although the victim was able to “respond sexually if stimulated” as well as engage “in the concrete act of sexual intercourse,” she was unable to comprehend the other consequences of intercourse even though she understood that it could result in “having a baby.” *Id.* at 1331. Similarly, the victim’s grandmother emphasized that her repeated attempts to discuss the subject of sex had revealed her granddaughter’s “almost total incomprehension” of the subject matter. *Id.*

\(^{200}\) See *id.* at 1332.

\(^{201}\) *Id.*

[T]o flaunt society or to arraign [sic] oneself against its views is entirely different from having an understanding, or the capacity to understand, that one is doing so. Whether there is an awareness of the social or other cost of one’s conduct is a legitimate area of inquiry in determining whether one is so mentally defective that the protective shield [of the penal law] is invoked.

*Id.*


\(^{203}\) See *State v. Olivio*, 589 A.2d 597, 603 (N.J. 1991) (referring to those states “eschewing such expansive applications of the statutory concept of mentally defective”).

\(^{204}\) 298 N.W.2d 267 (Iowa 1980).

\(^{205}\) *Id.* at 269 (quoting IOWA CODE § 709.4(2) (1979) (emphasis provided)).

\(^{206}\) *Id.* at 271 (“Sexual conduct, qua conduct, is not proscribed.”).

\(^{207}\) *Id.* at 272; see also People v. Easley, 364 N.E.2d 1328, 1333 (N.Y. 1977) (noting that “[t]he law does not mirror all prevailing moral standards”).
gians fail to agree on society's "general mores," rendering "the moral 'right' and 'wrong' test" an "unfit tool" in assessing an individual's mental competency to consent to sexual conduct in the same way that it was unfit for measuring insanity.\textsuperscript{208} Regardless, the Sullivan court upheld the remainder of the statute delineating a nature and consequences test.\textsuperscript{209}

The Sullivan court never cited Easley; nor did it acknowledge the Easley court's qualification that Easley's brand of morality did not mirror exactly what the Sullivan court feared. Rather, the Sullivan court's warning reflected a more general concern over explicitly using morals as any guide for assessing competency. In State v. Olivio,\textsuperscript{210} the New Jersey Supreme Court went even further, proposing a nature of the conduct test that qualified a victim as "mentally defective" only if "at the time of the sexual activity, the mental defect rendered him or her unable to comprehend the distinctly sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another."\textsuperscript{211} Consistent with the concerns of Sullivan, the Olivio court explained that the New Jersey legislature had substituted the word "understanding" for the word "appraising" because "appraise" entailed determining if the conduct was "either morally right or wrong."\textsuperscript{212} Noting that New York's "expansive view" was "overly protective of mentally handicapped persons," the Olivio court emphasized that it specifically excluded "value judgments" or "morality" because such concepts do not provide "a workable standard or definition" of mental defectiveness.\textsuperscript{213}

The Olivio court also eschewed the nature and consequences test, stating that a victim's knowledge of the sexual conduct pertains "only to the physical or physiological aspects of sex."\textsuperscript{214} It does not include the victim's "awareness that sexual acts have probable serious consequences, such as pregnancy and birth, disease, infirmities, adverse psychological or emotional disorders, or possible adverse moral or social effects."\textsuperscript{215} In order to avoid confusion or misunderstanding, however, a trial court should instruct the jury that the alleged victim's ca-

\textsuperscript{208} See Sullivan, 298 N.W.2d at 272 (emphasizing that "[a]pplication of the 'right' and 'wrong' dichotomy in the legal context would require the victim to analyze his or her own mental capacity to assent to a sex act").

\textsuperscript{209} See id. at 272-73.

\textsuperscript{210} 589 A.2d 597, 599-605 (N.J. 1991) (upholding conviction when there was sufficient evidence that the victim was mentally defective and that the defendant knew of her condition and admitted to having sexual intercourse with her; the 16-year-old victim was enrolled in a high school special education class, her IQ range was 40-65 (68 using a Spanish language test), and she functioned socially at the level of a seven- or eight-year-old).

\textsuperscript{211} Id. at 605 (emphasis added).

\textsuperscript{212} Id. at 601 (emphasizing that "consensual sexual activity should not generally be criminal").

\textsuperscript{213} Id. at 603.

\textsuperscript{214} Id. at 605.

\textsuperscript{215} Id.
pacity to consent to "sexual conduct must be considered in the context of all of the surrounding circumstances in which it occurred."\(^2\!\!^2\!\!^1\!\!^6\)

2. **Morals but No Guidance**

As part V of this article more thoroughly demonstrates, all three of the most widely used tests just discussed have drawbacks, irrespective of their stated purpose and language, because courts apply them in ironically similar ways.\(^2\!\!^1\!\!^7\) Most striking is that all tests appear to judge mentally retarded victims under a higher consent standard than nonretarded victims.\(^2\!\!^1\!\!^8\)

This dilemma is fueled by courts' willingness to establish tests without providing any guidance for applying them. By requiring that mentally retarded individuals know the possible social taboos and stigma of sexual intercourse, for example, the morality test courts follow a heavily value-laden standard that presumes there are morally inappropriate forms of intercourse that warrant social ostracism. In light of the continuing double sexual standard that society still applies to men and women,\(^2\!\!^1\!\!^9\) this stance, amorphous as it is, becomes most stringent for mentally retarded women, countering feminists' efforts to eliminate courts' and society's tendency to become women's "sexual judges."\(^2\!\!\!^2\!\!^0\) By definition, the test also presumes that nonretarded men and women could "pass" it, although there are no data available to support this view,\(^2\!\!^2\!\!^1\) particularly among young people.\(^2\!\!^2\!\!^2\) The Sulli-

\[\text{\footnotesize{216. Id. at 606.}}\]
\[\text{\footnotesize{217. Rather than applying its own nature of the conduct test to the facts, for example, the Olivio court relied on the outcomes and analyses of cases using the morality and nature and consequences tests in supporting the defendant's conviction. See id. at 605-07.}}\]
\[\text{\footnotesize{218. See infra notes 254-421 and accompanying text. See generally Hayman, supra note 32, at 1201 (contending that mentally retarded parents also face a relatively higher standard of parenthood, thereby easing courts' attempts to remove their children).}}\]
\[\text{\footnotesize{219. Whereas societal views continue to associate early, frequent, and aggressive sexual encounters with masculinity, and therefore reward such behavior for young men, such behavior is not viewed as acceptable for young women. See Timothy Beneke, Men on Rape—What They Have to Say About Sexual Violence 13 (1982); Myriam Miedzian, Boys Will Be Boys: Breaking the Link Between Masculinity and Violence 39-74 (1991); Sanday, supra note 116, at 142-44, 191-207; Robin Warshaw, I Never Called It Rape—The Ms. Report on Recognizing, Fighting, and Surviving Date and Acquaintance Rape 53-92 (1988); Robin Warshaw & Andrea Parrot, The Contribution of Sex-Role Socialization to Acquaintance Rape, in Acquaintance Rape: The Hidden Crime 73, 73-82 (Andrea Parrot & Laurie Bechhofer eds., 1991); see also Denno, supra note 116, at 133-34 (discussing cases, such as the "Spur Posse" episode, where defense tactics relied on the "boys will be boys" and "testosterone theory" defenses to explain the "normal" sexual aggression of young male defendants).}}\]
\[\text{\footnotesize{220. See Susan Brownmiller, Against Our Will 397 (1975); Berger, supra note 34, at 3 n.12; Bienen, supra note 34, at 171. See generally Tracy E. Higgins, "By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice, 80 CORNELL L. REV. 1536 (1995) (critiquing feminist theory in the law).}}\]
\[\text{\footnotesize{221. Debates abound regarding the appropriate standards for consent in rape law, irrespective of available data on what people know about sexuality or what behavior would constitute "social ostracism." See Dripps, supra note 144, at 1780; Dripps et al., supra note 144, at 125; Estrich, supra note 35, at 1087; Husak & Thomas, supra note 35, at 95; Schulhofer, Feminist Challenge, supra note 35, at 2170-84; West, supra note 144, at 1442. Normative data on social standards for consensual sexual activity are lacking, apart from a few exceptions. See Charlene}}\]
van court's worst fears are thus potentially realized: courts' pretense of a societal moral consensus encourages judges and juries to determine consent not on the basis of facts and law but rather on the basis of their moral view of the world.

This proclivity is illustrated by courts' attitudes toward adultery when the nonretarded defendant is married but the mentally retarded victim is not.\(^\text{223}\) Although adultery is still a crime in half of the states,\(^\text{224}\) it is rarely prosecuted\(^\text{225}\) and popular politicians have admit-

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222. See Michelle Oberman, Turning Girls into Women: Re-evaluating Modern Statutory Rape Law, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994) (analyzing modern statutory rape law); see also ANDREA PARROT, COPING WITH DATE RAPE & ACQUAINTANCE RAPE 37 (1991) (stating that teenagers, often unsure of their self-esteem or their sexuality, "struggle through their relationships hoping to do the right thing, without knowing what the right thing is or how to accomplish it").

223. In nearly all rape cases involving mentally retarded victims, the defendants are not mentally retarded. See Clarence J. Sundram & Paul F. Stavis, Sexuality and Mental Retardation: Unmet Challenges, 32 MENTAL RETARDATION 255, 260 (1994). Occasionally, courts will refer to a defendant's mental limitations. See infra Appendix, Table E (Defendant's Mental Abilities). The closest parallel to a rape case between two mentally retarded individuals are those cases involving mentally retarded adult defendants and nonretarded child victims. In People v. Burt, 492 N.E.2d 233 (Ill. App. Ct. 1986), for example, the Appellate Court of Illinois held that, as a result of mental incapacitation, the defendant did not possess the mental state required for three counts of criminal sexual assault involving two acts of penetration with a seven-year-old girl and one act of penetration with an eight-year-old girl. Id. at 236. Because the defendant functioned at the level of a seven-year-old, the appellate court determined that he was unable to fulfill the state's requirement that he know that "the victim was unable to understand the nature of the act or was unable to give effective consent." Id. at 234-35. Burt demonstrates the difficulties of establishing the elements of a crime during the prosecution of a mentally retarded person. Although the government prosecutes some mentally retarded defendants for sexual acts with victims who are unable to consent, such defendants must be able to meet the competency requirement. See generally Ballou v. Booker, 777 F.2d 910 (4th Cir. 1985) (upholding prosecution of a defendant bordering on mental retardation for rape of an 11-year-old girl); Blacklock v. Texas, 820 S.W.2d 882 (Tex. Ct. App. 1991) (reviewing conviction of mentally retarded defendant found competent to stand trial for aggravated sexual assault of a child under age 14); In re D.C., 618 A.2d 1325 (Vt. 1992) (sentencing mildly mentally retarded 27-year-old man for attempted sexual assault). Courts have difficulty determining the capacity of a mentally retarded defendant, particularly when dealing with questions of knowledge and consent. See In re Grady, 405 A.2d 851, 855 (N.J. Super. Ct. Ch. Div. 1979). Furthermore, prosecution of a mentally retarded defendant may conflict with the current trend of encouraging normal lifestyles and interaction within the mentally retarded community, especially when dealing with sexual relations between two mentally retarded individuals. See id. at 856.


225. See Siegel, supra note 224, at 49 (emphasizing that in 1955 the American Law Institute dropped the offense of adultery from its Model Penal Code, explaining that the adultery laws were "dead-letter statutes" that invaded "personal liberty" and drained law enforcement resources).
ted their marital infidelities, thereby suggesting that at least this form of "immoral" conduct generally does not result in social ostra-
cism. Even so, several recent, significant cases have required victims to know of the wrongfulness of adultery as a basis for their ability to consent to sexual activity on any level. The moral inverse of this re-
quirement, of course, is that married defendants appear to be pun-
ished as much for their infidelities as they are for their sexual acts with
mentally retarded females.\textsuperscript{227} In \textit{People v. Cratsley},\textsuperscript{228} for example, the New York Court of Appeals emphasized that not only was there "no suggestion" that the victim's and defendant's sexual conduct "arose out of an \textit{emotional bond}," but also that the victim "displayed
no understanding that defendant was married, or that engaging in sexual
conduct with him might be considered inappropriate."\textsuperscript{229} Likewise, in \textit{People v. Whitten},\textsuperscript{230} the Appellate Court of Illinois explained the defendant's conviction by highlighting, among other things, that
"he knew that he was a married man, who should not be having sexual
relations with persons other than his wife"; although the defendant's adultery and other acts "standing alone, might be insufficient to support
a conviction, taken together they are certainly evidence of defendant's malice aforethought."\textsuperscript{231}

Such attitudes appear to be exacerbated when the mentally retarded victim is married but the nonretarded defendant is single. In \textit{State v. Soura},\textsuperscript{232} for example, the unmarried, nonretarded defendant commenced a social relationship resulting in several acts of intercourse with the mentally retarded victim, whose husband was also mentally retarded.\textsuperscript{233} The Supreme Court of Idaho acknowledged the victim's legal capacity to consent to marriage and sexual relations

\textsuperscript{226} For example, during his 1992 campaign, then-Governor Bill Clinton did not deny "unspecified instances of marital infidelity" when interviewed on the CBS News program, 60 Minutes. See Gwen Ifill, \textit{The 1992 Campaign: Democrats; Clinton Attempts to Ignore Rumors}, N.Y. Times, Jan. 28, 1992, at A16. He also explained that he had experienced "rocky passages in his marriage," thereby "allowing the public to draw its own conclusions." See R.W. Apple, Jr., \textit{For the Front-Runners, Crucial Days Are Here}, N.Y. Times, Jan. 28, 1992, at A16. Regardless, an ABC News poll conducted the next day reported that 73% of the 790 adults surveyed said that they "agreed with Gov. Bill Clinton that the question of whether he had had an extramarital affair was between him and his wife." Ifill, supra, at A16. In turn, 66% stated that they could "vote for a Presidential candidate who had had an extramarital affair," while 80% said that "the accusations should not be an issue in the campaign." \textit{Id.}

\textsuperscript{227} See Eskridge, supra note 34, at 55.
[There is an] intimate connection between consent and status. . . . What is recognized as a valid \textit{choice} cannot, even in a liberal society, be separated from the \textit{status} of the chooser(s) and the chosen. The connection between choice and status is not an historical accident, the chance perpetuation of status categories in the modern regulatory categories of consent. Instead, status and consent are both conceptions serving a larger cultural script. \textit{Id.}

\textsuperscript{228} 653 N.E.2d 1162 (N.Y. 1995).
\textsuperscript{229} \textit{Id.} at 1166 (emphasis added).
\textsuperscript{230} 647 N.E.2d 1062 (Ill. App. Ct. 1995).
\textsuperscript{231} \textit{Id.} at 1066.
\textsuperscript{232} 796 P.2d 109 (Idaho 1990).
\textsuperscript{233} See \textit{id.} at 110.
within marriage, as well as her ability to consent to the termination of her parental rights, resulting in the removal of her infant daughter.234 Yet the court drew a clear distinction between the victim's sexual relations within and outside of marriage not because of her inability to consent to intercourse, but rather on the basis of society's "favorable" views toward marriage and its unfavorable views toward intercourse outside of it.235 Thus, the defendant's conviction rested in large part on the victim's marital status.

Courts also point a moral finger at nonmarital sexual relations involving mentally retarded women in general. In applying the morality test, for example, they have inquired specifically whether an unmarried mentally retarded woman has the "capacity to appraise the nature of the stigma, ostracism, or other noncriminal sanctions associated with sexual intercourse outside of marriage . . . components of the normal woman's decision to participate in sexual intercourse."236 In Adkins v. Commonwealth,237 a Virginia appellate court dismissed the defendant's rape conviction and twenty-year sentence in light of the trial court's apparent attempt to punish him when it was clear that the mildly mentally retarded victim, a young single woman, took the initiative in having sex.238 The court recounted the victim's testimony concerning her active participation in the conduct. When she first met the defendant at a mall "she did so on her own initiative" and gave him her telephone number; she then "called [him] with the idea of having sex with him, and she asked him to meet her"; while at his apartment she "made love' with him twice," adding that "it was 'mostly' her idea to have sex"; she "knew that she could get pregnant from 'making love' and could 'catch AIDS';" she had taken sex education classes in school; she "used the words 'penis' and 'vagina' when

234. See id. at 114.
235. See id. As the court explained, the laws reflect a certain favorability toward creating and maintaining stable and harmonious marriages. The same cannot be said about non-marital sexual relations which are not considered by society in a favorable light, in part because of the difficult consequences that may follow, e.g., unplanned pregnancy, single parent families, divorce, venereal disease and AIDS. The laws reflect this societal attitude against non-marital sexual intercourse and aim to protect those most vulnerable, due to unsoundness of mind or immaturity, from incurring some of the resulting difficult consequences.

Id. The court analogized this situation to the law's treatment of juvenile women, noting that a man is allowed to have sexual relations with a 15-year-old female within the institution of marriage, but not outside of it. See id. But, as this article makes clear in part V, it is inappropriate to treat a mentally retarded woman on the same level as a juvenile female. See infra notes 332-53 and accompanying text. The law acknowledges that at some point in her life, the juvenile female will reach an age when she can decide whether she wants to engage in sexual relations outside of her marriage. The mentally retarded woman will never reach such an age. Nor are the two women equivalent in their social and life experiences given the differences in their chronological age, which varies substantially from whatever "mental age" the court might ascribe to the mentally retarded woman.

238. See id. at 388-89.
describing the act of sexual intercourse”; she knew “how to take care of herself, how to call 911, and how to go shopping”; she “knew that her mother did not want her to talk with or to see [the defendant]” but lied to her mother about her whereabouts when she left to meet him; and she hid in the defendant’s apartment when the police arrived (at her mother’s request) “because she did not want to go home.”

Courts have also stressed the particular “moral” ramifications of homosexuality in determinations of consent. In one case involving a nonretarded male defendant, for example, the court noted that although both mentally retarded male victims understood “the difference between having sexual intercourse with a woman as opposed to a man, and to some degree the social stigma often associated with homosexual relations, neither victim was considered to be capable of making adult rationalizations or decisions about the activity itself.”

Moreover, although one of these victims “would be able to repeat society’s negative views of those who engage in homosexual activity, if he heard them,” a psychologist testified that he “would seriously question the victim’s ability to understand those views.”

3. Tests but No Guidance

The dilemma involving morals and lack of guidance also pertains to other judicial tests. As the next part of this article demonstrates, morals, the victim’s knowledge of the nature and consequences of her acts, and a range of typically nonlegal issues pervaded the Glen Ridge rape trial even though the trial court relied on the most narrow competency standard, State v. Olivio’s

Olivio did not meet attorneys’ expectations that the New Jersey Supreme Court would provide a ruling “that explicitly defines the factors to be included in the instructions to a jury in future prosecutions” involving mentally retarded victims. Although the Olivio court’s

239. See id. at 384-85, 389. As the court emphasized, the rape “statute was not designed to unfairly punish the sexual partners of those mentally impaired or mentally retarded persons who have a basic understanding of the act and consequences of sexual intercourse and are capable of making a volitional choice to engage or not engage in such conduct.” Id. at 388.

240. See generally Eskridge, supra note 34, at 47 (explaining the impossibility of divorcing consent from context and social policy).

241. See Righter v. State, 752 P.2d 416, 421 (Wyo. 1988) (emphasis added); see also People v. Howard, 172 Cal. Rptr. 539, 540-41 (Cal. Ct. App. 1981) (“Because of [the victim’s] mental retardation, the acts of sodomy and oral copulation meant nothing to him. He was not aware of the nature of these acts. He liked the defendant, wanted to please him and actually liked it when the defendant [sodomized him]. This is unconsciousness of the nature of the act.”); infra Appendix, Table E.

242. Righter, 752 P.2d at 421 (emphasis added).


244. Ronald J. Fleury, Justices Poised to Redefine Rape of Mentally Disabled, N.J. L.J., Nov. 29, 1990, at 1. The Olivio court’s lack of guidance is puzzling in light of its awareness of the problem and apparent wish to remedy it.

[During their discussion of Olivio some justices] questioned whether a mentally retarded victim’s failure to comprehend the potential consequences of sexual intercourse—notably

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charge to the jury incorporated the legislature's definition of "mentally defective" and instructed that the jury consider any circumstances of the case that would have rendered the victim "temporarily" incapable of consent,245 the court did not indicate what those circumstances should be. This approach contradicted the court's warning that "an instruction solely in terms of the language of the statute will not give sufficient guidance to the jury."246 The court's instruction also gave no guidance to the prosecuting attorneys.247 Although attorneys expected that the Glen Ridge rape case would "gradually fill in the details,"248 the Glen Ridge jury was also instructed amorphously.249

The other capacity tests share similar types of problems. Some mental health professionals decry the nature and consequences test because of its vagueness,250 emphasizing research showing that determinations of a victim's volition and her knowledge of the nature and

venereal disease and pregnancy—would be sufficient to invoke the statute's protection. Some lawyers agreed it would.

But [one justice] remarked that many young people without mental defects might suffer from the same ignorance, while [one] defense attorney emphasized that the statute's purpose is to protect the retarded against rape, not venereal disease or pregnancy.

The justices kept coming back to their criticism of instructions that leave juries guessing about the standards to apply. "The statutory language is sufficiently broad that you could have widely disparate results from different juries."

Id. at 20.

245. See Olivio, 589 A.2d at 599-601 (referring to N.J. STAT. ANN. § 2C:14-1(h) (West 1983), which defines "mentally defective" as a "condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including but not limited to, being incapable of providing consent").

246. Id. at 606.


[w]hen the [Olivio] case was tried we had nothing to work with. . . . They're saying use the statute but plug in the facts. I can see judges giving [jurors] an instruction on capacity to consent and telling them the factors they should consider are the following, A, B, C, D, etc., which would have to be hammered out with both attorneys before the jury is charged.

Id. at 23.

248. Id. (quoting Assistant Passaic County Prosecutor Steven Braun's expectation that "future cases—like the Glen Ridge case—will gradually fill in the details").


250. See Parker & Abramson, supra note 127, at 262. As the authors explain, determining a mentally retarded victim's understanding of the nature and consequences "is far more ambiguous" than determining that victim's understanding of volition:

Specifically what, and how much, information must a person with mental retardation provide about sexual activity in order to pass this "test"? Do they have to know that a woman can get pregnant? That both men and women can get diseases? Must they know the names of the diseases? Should they be able to tell us why people have sex? Should they be able to tell us who are the "right" partners to have sex with? . . . Perhaps, to compensate for this deficiency, there is a tendency to deemphasize nature and consequences and rely on volition—at least in ambiguous cases—when attempting to determine the consent capability of a person with mental retardation.

Id.
consequences are not made independently.\(^\text{251}\) The judgment and evidence of mental disability tests fail to provide even conceptual guidance, much less direction on the details of a case. Although Illinois's totality of the circumstances test is conceptually commendable, it too lacks sufficient specificity, going little beyond a two-sentence description.\(^\text{252}\) Moreover, no test accommodates or even acknowledges the more serious consensual conduct problems confronted by mental health professionals working with the institutionalized retarded.\(^\text{253}\)

V. Rape, Mental Retardation, and Context

This part proposes a contextual approach to determining a mentally retarded victim's capacity to consent, thereby offering the kind of guidance that courts and legislatures have so far shunned. It applies this approach to the facts of the Glen Ridge rape case and shows how some of the problems and pitfalls of that case could have been avoided. This part also illustrates how such an approach may be used in future rape cases, including those involving the institutionalized mentally retarded as well as the nonretarded.

A. Foundations of the Contextual Approach

Mental health professionals voice two consistent concerns about rape standards for mentally retarded persons. The first is that mentally retarded individuals should not be judged from a higher consent standard than nonretarded individuals.\(^\text{254}\) The second is that consent

\(^{251}\) See id. Upon reporting the results of their study of professionals' determinations of whether a victim can pass the nature and consequences test, the authors stated that professionals do not necessarily independently evaluate both of the concepts required for consent (i.e., understanding of nature and consequences and acting with volition). For example, the presence or absence of volition appears to have a greater impact on evaluations of nature and consequences than the reverse. . . .

Perhaps this finding is understandable when one considers investigations of rape or sexual assault involving people without mental retardation. In such cases, investigators are more commonly concerned with the question of volition than with whether the victim understood the nature and consequences of the sexual act. Thus, because investigators are likely to have more experience addressing questions of volition, it is perhaps not surprising that they would focus on this concept in the present study when attempting to determine consent.

Id.

\(^\text{252}\) See People v. Whitten, 647 N.E.2d 1062, 1067 (Ill. App. Ct. 1995) ("[W]e believe that the courts should broaden their inquiry in cases involving the inability to give knowing consent to more than just focusing on the IQ or mental ability of the alleged victim. All of the circumstances, including those facts that demonstrate control and its misuse by defendant over the exercise of complainant's free will, are germane to the issue of whether a particular complainant gave knowing consent.").

\(^\text{253}\) See John M. Niederbuhl & C. Donald Morris, Sexual Knowledge and the Capability of Persons with Dual Diagnoses to Consent to Sexual Contact, 11 SEXUALITY & DISABILITY 295, 304 (1993) (noting the dearth of clear, professional standards for mental health professionals for determining a mentally retarded individual's ability to consent to sexual conduct).

\(^\text{254}\) See id. This includes those nonretarded individuals who barely meet the legal age of consent. Assuming that age 17 is the point when individuals are legally capable of consenting to sexual intercourse, the authors, who are mental health professionals, noted that they
Determinations should be considered within the context in which they occur rather than according only to the attributes of a particular individual, an approach taken in other areas of the law. Legal proceedings, for example, can be highly contextualized and normative; a mentally retarded person may be deemed capable of making one kind of decision but incapable of making another, even during the same proceeding. Some scholars apply this concept of “situational competency” to the realm of sexual relationships, contending that a mentally retarded individual “may be capable of consenting to some forms of sexual contact with a certain individual in a particular setting but not to other forms of sexual contact with the same, or other, individuals in other settings.”

Variations in mentally retarded persons’ abilities to consent based upon the particular situation are not typically reflected in the legal system, which oftentimes presumes incompetency in key areas, for example, the ability to provide accurate and valid testimony. This

often considered how a [mentally retarded] client’s understanding of sexual contact, its nature, possible outcomes, and social/moral context compared with that of a 17-year old who had never had a sex education course. Such a person is presumed capable: it is rare that anyone seeks to limit his/her freedom of sexual expression based on lack of consensual ability. Id. Therefore, “drawing on their personal knowledge of local standards,” the authors “tried not to apply a higher standard to [mentally retarded] individuals served than many people living in the community and presumed capable would be able to meet.” Id. at 304.

255. See id. at 305 (emphasizing that “[s]pecific, rather than general, determinations of capability are the rule in other domains”).

256. See Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 133 (1995) (noting that the “[c]apacity to make a will is governed by a different legal test and requires less competency than the power to make a contract or a gift”); Stephen J. Anderer, Symposium, Integrating Legal and Psychological Perspectives on the Right to Personal Autonomy, 51 Vill. L. Rev. 1563, 1567 (1992) (discussing the numerous legal, psychological, and contextual issues concerning competency decisions, and concluding that competence “varies with the complexity and importance of the subject matter of the proposed decision”); Thomas Grisso & Paul S. Appelbaum, The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments, 19 Law & Hum. Behav. 149 (1995) (discussing the implications of research on the patterns of deficits affecting competency decisions to various psychiatric and medical treatments); Symposium, The Law of Competence, 47 U. Miami L. Rev. 539 (1993) (exploring the varying laws and contexts of competence concerning, for example, criminal defendants, the disabled, the mentally ill, and women).

257. For a thorough discussion of this issue, see Richard J. Bonnie, The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense, 81 J. Crim. L. & Criminology 419 (1990), and Norman G. Poythress et al., Client Abilities to Assist Counsel and Make Decisions in Criminal Cases, 18 Law & Hum. Behav. 437 (1994).

258. See Bonnie, supra note 257, at 428-29 (noting that courts have acknowledged that defendants considered “competent to stand trial” may not be capable of engaging in more specific determinations, such as the decision to raise an insanity defense or to decline submitting mitigating evidence in a capital case). But see Godinez v. Moran, 509 U.S. 389, 398 (1993) (rejecting an argument that a defendant’s “competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the [competency standard for standing trial]”).

259. Niederbuhl & Morris, supra note 253, at 305.

260. See Valenti-Hein & Schwartz, supra note 82, at 289 (contrasting the American Bar Association’s statement that alleged childhood victims of sexual abuse should be considered competent to serve as a witness, with the Association’s failure to propose a comparable recom-
presumption is especially injurious in sexual abuse cases because estimates suggest that mentally retarded individuals are sexually victimized at four-to-ten times the rate of the nonretarded and that this disparity is greatest for those who are institutionalized.

To address these concerns, this article proposes a contextual approach to determining consent that focuses on the situational context and particular circumstances of each case in light of current research on mental retardation. This approach is derived, in part, from a wide range of case law and multidisciplinary literature:

1. Rape cases involving mentally retarded victims that considered in their decisions the “totality of the circumstances,” the “surrounding circumstances,” a “blend” of factors, or “situational” factors;

2. Rape cases involving mentally retarded victims that were prosecuted under only the “force and coercion” subsections of the rape statutes and not the subsections encompassing the mentally retarded, but that included the victim’s mental ability among the “totality of the circumstances” or the number of factors considered in their decisions;

recommendation for mentally retarded persons); infra Appendix, Table E (Testimony of Experts/Laypersons).

261. See Ruth Luckasson, People with Mental Retardation as Victims of Crime, in The Criminal Justice System and Mental Retardation: Defendants and Victims 209, 209-21 (Ronald W. Conley et al. eds., 1992); Dick Sobsey & Tanis Doe, Patterns of Sexual Abuse and Assault, 9 Sexual & Disability 243, 244 (1991); Sundram & Stavis, supra note 223, at 256; Valenti-Hein & Schwartz, supra note 82, at 291.

262. See infra notes 422-75 and accompanying text.


264. See State v. Olivio, 589 A.2d 597, 606 (N.J. 1991) (“The trial court’s instructions should inform the jury that the alleged victim’s capacity to understand and consent to the proffered conduct must be considered in the context of all of the surrounding circumstances in which it occurred.”).

265. See People v. Easley, 364 N.E.2d 1328, 1333 (N.Y. 1977) (insisting, with reference to the “morality” instruction objected to by the defendant, that “[i]n the context of the others and the effect was to present a blend of all these considerations. This encouraged the jury to more freely decide the weight to be accorded to each factor against the perspective of the total picture.”).

266. See infra Appendix, Table E; see also In re B.G., 589 A.2d 637, 647 (N.J. Super. Ct. App. Div. 1991) (Dreier, J.A.D., concurring) (noting the “stressful situation,” the “situational confusion,” and the “situational inability of the victim to cope with a sexual situation”); State v. Ortega-Martinez, 881 P.2d 231, 238-39 (Wash. 1994) (explaining that a jury could consider, among other things, “a victim’s ability to translate information acquired in one situation to a new situation,” a victim’s “ability to understand the nature and consequences at a given time and in a given situation”); Fleury, supra note 249, at 3 (noting that the panel’s decision in In re B.G., 589 A.2d at 637, was “the first in which a New Jersey court has used the stress of the situation as the measure of a rape victim’s ability to consent” and that it “may have wider ramifications”).

267. See Salsman v. Commonwealth, 565 S.W.2d 638, 641-42 (Ky. Ct. App. 1978) (noting that in determining whether the victim submitted to forcible compulsion, “the jury was entitled to consider a number of factors,” including the victim’s mental retardation, her deafness, her difficulty understanding the communications of others, her aloneness in the house, defendant’s disregard of her physical resistance and “repeated indications that she did not wish to have sex with him,” and his physical act of pulling her from the chair; considering “all of the circumstances,” the jury could believe that the victim “was terror-stricken at the time” of the sexual acts); People v. Kline, 494 N.W.2d 756, 758-59 (Mich. Ct. App. 1992) (rejecting defendant’s claim...
3. Relevant key factors considered by courts in determining rape cases involving mentally retarded victims regardless of the type of test the court applied;\(^{269}\)

4. Rape cases involving nonretarded victims that considered in their decision making “situational constraints”;\(^{270}\)

5. “Situational competency” parallels involving mentally retarded defendants;\(^{271}\)

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that the introduction of evidence concerning the complainant’s mental capacity “changed the charge against him at trial because he was charged under the ‘force and coercion’ subsection of the [rape] statute, and not the ‘incapacity of the complainant’ subsection,” noting that such complainant evidence was necessary “to show that the complainant may have had a somewhat diminished capacity to consent” and “that such diminished capacity may have made her more susceptible to defendant coercion”; therefore, “the complainant’s mental capacity was a part of the totality of the circumstances surrounding the issue whether defendant compelled the complainant to participate in sexual intercourse by the use of force or coercion”); Barnett v. State, 820 S.W.2d 240, 242 (Tex. Ct. App. 1991) (applying a “totality of the circumstances” analysis, incorporating the victim’s mental incapacity, in determining the victim’s lack of consent under the “physical force or violence” subsection of the rape statute); Ortiz v. State, 804 S.W.2d 177, 179 (Tex. Ct. App. 1991) (“Based on the totality of the circumstances, the jury could infer that appellant’s overall conduct reasonably placed the [mentally retarded victim] in fear of death or serious bodily injury.”).

268. See People v. Herring, 25 Cal. Rptr. 2d 213, 216 (Cal. Ct. App. 1993) (emphasizing that even though the defendant “was not prosecuted under the section which alleges sexual intercourse with a person incapable of giving legal consent due to unsound mind or incapacity,” evidence of “[t]he victim’s ability to perceive and recollect were still at issue”); State v. Hawkins, 778 S.W.2d 780, 782 (Mo. Ct. App. 1989) (noting that evidence of the victim’s “limited mental capacity” would affect her ability to consent and that “[e]vidence that a twenty-year-old woman could not read or write has at least some arguable bearing on the issue of mental capacity”).

269. Courts typically focus on similar kinds of factors when determining whether a defendant should be convicted of rape of a mentally retarded woman. See Sundram & Stavis, supra note 223, at 259. Factors that courts find particularly important include the following: the victim’s IQ and level of mental retardation; the difference between the victim’s chronological age and mental age; the victim’s capacity to function, such as the ability to read, engage in household chores, use public transportation, manage or count money, be employed; the victim’s residence in an institution, or attendance at a school, for the mentally retarded; the victim’s knowledge and understanding of the physiological act of sexual intercourse; the victim’s knowledge and understanding of the nature and consequences of sexual intercourse, such as pregnancy and diseases, and the ability to specify certain diseases, such as AIDS; degree of passivity; the defendant’s chronological age; the difference between the defendant’s and victim’s IQ or capacity to function; the relationship between the defendant and the victim—for example, whether the defendant is a caregiver, family member, friend, neighbor, or stranger; and the victim’s personal situation at the time of the offense, e.g., social isolation. See id.; see also infra Appendix, Table E (detailing factors that courts consider).

270. See, e.g., State v. Rusk, 424 A.2d 720, 728 (Md. 1981) (considering a wide range of factors in upholding a rape conviction, including lateness of the hour, the victim’s geographical isolation and immobilization (removal of her car keys), as well as “light” choking); Commonwealth v. Sherry, 437 N.E.2d 224, 227-34 (Mass. 1982) (emphasizing the victim’s geographical isolation, number of the defendants, and the “entire atmosphere” of the situation in upholding rape convictions); see also Susan Stefan, Silencing the Different Voice: Competence, Feminist Theory and Law, 47 U. Miami L. Rev. 763, 799 (1993) (favoring a case where a court does not have to justify a nonretarded victim’s incapacity to consent “by reference to some pathology or defect within her, but finds her incapacity in the constraints of her situation”).

271. See supra notes 257-58 and accompanying text.
6. "Totality of the circumstances" or "situational" parallels utilized in contract law\textsuperscript{272} and other civil law areas involving incapacitated individuals;\textsuperscript{273}

7. Recent research on mental retardation within and outside of the institutional context.\textsuperscript{274}

8. Legal and multidisciplinary literature emphasizing that legal decisions consider the factual, moral, and contextual aspects of each case\textsuperscript{275} as well as social science research in general;\textsuperscript{276}

9. And the philosophical concept of "dignity of the risk," introduced at the start of the normalization movement, which encourages the mentally retarded and nonretarded to be treated as similarly as possible by allowing (within bounds) the mentally retarded to assume the same kinds of life risks as the nonretarded.\textsuperscript{277} However, there is no dignity in treating people as though they possess capacities that they do not in fact have.\textsuperscript{278}

\textsuperscript{272} See James D. Sears, Mental Retardation and Unconscionability, 13 Law & Psych. Rev. 77 (1989). Noting that the Uniform Commercial Code (UCC) lacks specific provisions for the mentally disabled individual as a contracting party, James Sears recommends an individualized, "totality of the circumstances" approach in analyzing contracts and contracting parties using the UCC's unconscionability provisions. See id. at 84-85. This approach provides "each case an independent reading taking into consideration the degree of mental retardation and the circumstances of the writing of the contract at the time the contract was written." Id. at 84. Circumstances warranting consideration include the individual's ability to read and write, whether the contract contained terms that were unfair or surprising, and whether there was evidence of oppression due to the imbalance in bargaining power between the parties. See id. As Sears concludes, "The total circumstances standard allows consideration beyond the statement of the fact of the presence of mental retardation in one of the parties to the contract," emphasizing that "[t]here are some circumstances where the contract is made unconscionable only because of the cumulative impact of all of the variables that are present in a very specific situation." Id. at 89.

\textsuperscript{273} See generally Stefan, supra note 270 (discussing, among other things, factors influencing a mentally incapacitated woman's competence to enter divorce and separation agreements, to consent to the adoption of a child, and to decide to have children).

\textsuperscript{274} See generally AAMR, supra note 73; Hayman, supra note 32 (discussing a mentally retarded woman's ability to raise children); infra notes 422-75 and accompanying text.

\textsuperscript{275} See Kronman, supra note 1, at 375; see also Eskridge, supra note 34, at 48 (emphasizing "the impossibility of divorcing consent from context and social policy"); Hirshman, supra note 28, at 105 ("A person's identity is a dialogue. The roles of the person as narrator, and other people as reader-revisionists of her life, will ebb and flow depending on the context.").


\textsuperscript{277} Wolf Wolensberger, the most prominent early proponent of normalization, emphasized that all handicapped individuals, especially the mentally retarded, should be integrated into community life as much as possible, as well as face the same risks as any other person who lives in the community. Wolensberger's concept, "dignity of risk," was premised on his philosophy that there is a certain "dignity" in allowing mentally retarded individuals to assume the same risks as nonretarded individuals. See Wolfensberger et al., supra note 133, at 194-205; see also Peter R. Johnson, Becoming Real: A Developmental Approach to Relationship Education, in Mental Handicap and Sexuality, supra note 48, at 62, 81-82 (contending that "our society oppresses people with a handicap, by denying their reality in order to prevent the formation of sexual relationships").

\textsuperscript{278} See Wright, supra note 35, at 1397.
B. Applying the Contextual Approach

This section discusses the facts and flaws of the Glen Ridge rape case and how the case would have developed differently using a contextual approach. It contends that the Glen Ridge rape trial itself is best viewed in terms of a series of judicial mistakes that inadvertently defied the legislature's intent to constrain nonlegal influences. The trial also illustrates the consequences of a court's stereotypic ignorance of the capabilities of a mildly mentally retarded victim and of too rigidly applying New Jersey's two-part standard requiring the prosecution to show that (1) the victim was mentally retarded and that (2) the defendant knew or should have known this.279

1. The Facts of the Glen Ridge Rape Case

The New Jersey Supreme Court accepted expert testimony classifying Betty Harris as mildly or "educably" mentally retarded based upon her general IQ score of 64, a verbal IQ of 70, and a performance IQ of 59280 results fitting the AAMR's requirement of "significantly subaverage intellectual functioning."281 Experts estimated that Betty's mental age was equivalent to that of an eight-year-old.282 Although Betty had been officially classified as mentally retarded only two years preceding the sexual assault, she had long been a special education student and was also considered neurologically impaired.283

Furthermore, Betty showed "related limitations" in nearly all of the ten AAMR-designated adaptive skill areas.284 According to witnesses, for example, Betty's comprehension of math and reading

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279. The Code of Criminal Justice, N.J. Stat. Ann. § 2C:14-2(c)(2) (West 1995), criminalizes the sexual penetration of a person who is "mentally defective," rendering such an act to be sexual assault: "An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under . . . the following circumstances: (2) The victim is one whom [sic] the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated." Id. "Mentally defective' means that condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent." Id. § 2C:14-1(h).


281. See AAMR, supra note 73, at 5.

282. See In re B.G., 589 A.2d at 645; Lauffer, supra note 2, at 8.

283. See In re B.G., 589 A.2d at 640; Lauffer, supra note 2, at 20; Robert Hanley, 4 Are Convicted in Sexual Abuse of Retarded New Jersey Woman, N.Y. Times, Mar. 17, 1993, at A1; Bernard Lefkowitz, Reported Victim's IQ 49, N.Y. Newsday, Dec. 24, 1992, at 31. On December 15, 1987, the Glen Ridge School system found Betty's tested IQ of 49 sufficiently low to justify moving her educational classification from "neurologically impaired" to the more serious "educable mentally retarded." See Lefkowitz, supra, at 31. Betty entered special classes for the educable mentally retarded at nearby Columbia High School and West Orange High School because such classes were not offered in Glen Ridge. See Lauffer, supra note 2, at 20. In June 1992, at age 21, she finally left high school because she was no longer eligible for public education. See Hanley, supra, at A1. Her psychological evaluations preceding the Glen Ridge trial showed an IQ of 64. See Lefkowitz, supra, at 31.

284. See AAMR, supra note 73, at 38-41.
never excelled much beyond that of an eight-year-old. She could not understand what coins equaled a dollar, had difficulty reconciling change at a store after a purchase, and could not comprehend the mechanics of a bank account. She could not name four American presidents, believed that the United States had five states, and referred to its major political parties as “public” and “primary.” She could not take public transportation by herself or participate in a credible job interview. She could not cut a pie in half, cook or understand a recipe, wash the family dishes alone, or comprehend the plots of popular television dramas. As the prosecution explained, “What Betty was never able to understand is how could a character be shot and killed one day and be alive again on another day in another TV program, walking around as if nothing had happened.”

Testimony indicated that Betty was always vulnerable socially. Betty’s sister recounted, for example, that when they were young Betty was the only one to comply with a command from a group of girls to eat mud pressed into the shape of a chocolate bar. As an adolescent, Betty played on the Glen Ridge High School basketball and softball teams even though she attended special education classes elsewhere. Yet a high school guidance counselor explained that she was socially isolated. Students “ridiculed and taunted” her, no one wanted to be seen with her, and her need to be liked and accepted made her vulnerable to manipulation.

Because of such vulnerability and her ignorance about sex, all the high school counselors were “concerned about her being a victim of a sexual attack.” For example, Betty did not comprehend the meaning of sexual intercourse or her right to say “no” when a classmate

286. See Lauper, supra note 2, at 39.
287. See id. at 99; Hanley, supra note 283, at B4.
288. See Wendy Lin, Rape Victim Was “Childlike,” N.Y. Newsday, Mar. 17, 1993, at 35. According to the prosecution, Betty “wouldn’t be capable of getting on a bus, knowing where to get on, get off, what route to take, couldn’t take a train or think about getting on an airplane by herself.” Lauper, supra note 2, at 39.
289. See Lauper, supra note 2, at 39.
290. See id. at 99; A Real Sickness Behind Glen Ridge’s Gang Rape, supra note 18, at B6.
291. See Lauper, supra note 2, at 39.
292. See id. at 99.
293. See id.
294. See id. at xviii.
295. See id. at 28.
296. See id. at xviii (referring to the testimony of Carol Bolden, a counselor at Columbia High School, who met with Betty daily during her sophomore year and who explained that Betty “had a real need to do anything she felt would make a friend”); Bernard Lefkowitz, Case Depends on Her, N.Y. Newsday, Dec. 9, 1992, at 23 (“Most of the students around her knew something was wrong,” the counselor testified. “They either teased her or ignored her. She was in her own little world. It was very sad.”).
297. Lefkowitz, supra note 296, at 23.
fondled her breasts. She "knew nothing of birth control, nothing of venereal disease, nothing of pregnancy. She did not understand the concept that . . . her body was very private." Those witnessing Betty's testimony or testifying on her behalf described her as "childlike" or "infantile" in her communication skills, demeanor, and depictions of sexual conduct. As the defense painfully revealed, Betty also either did not comprehend, or denied, her mental retardation.

Betty and the three primary defendants, Christopher Archer and twins Kevin and Kyle Scherzer, had known each other since childhood, having attended the same kindergarten class. Their childhood interactions predicted those in adolescence. When Betty was age five, the Scherzers and other boys convinced her to eat dog feces; when she was age eleven, Christopher Archer was among a number of youths who called her "retard" and "stupid"—names and a reputation that followed Betty throughout the Glen Ridge area. Testimony also made clear, however, that as she grew older Betty became enamored with the popular young athletes and considered them good friends.

2. How the Defense Depicted the Facts

The facts of the Glen Ridge case would not be complete without including at least some of the ways the court allowed the defense to

298. See id. at 23 (quoting the testimony of Carol Bolden). According to Bolden, "[Betty] would use sexual terms, but when you asked her what they meant she had no understanding." Id. Although Bolden and other counselors attempted to explain what "sexual intercourse meant," Betty still did not understand, responding "I know, it's when you bend over and someone pokes you." Id.

299. Id. (quoting the testimony of Carol Bolden).

300. See LAUFFER, supra note 2, at 112-44 (describing Betty's in-court testimony and demeanor); Lefkowitz, supra note 296, at 23 (depicting Betty as "childlike" and "infantile"); Christine Schaack McGoe, When "Regular Guys" Rape: The Trial of the Glen Ridge Four, On the Issues, Fall 1993, at 13 (noting that Betty's "face registered emotions in response to questions with the kind of directness and intensity typical of children").

301. According to the prosecution, "If you ever were to tell Betty that she is mentally retarded, she wouldn't believe that. She wants to be normal, and she wants to be accepted." LAUFFER, supra note 2, at 40. The defense, however, approached this issue differently by questioning Betty directly:

Q: "Some people say you're retarded, but that's not true is it?" asked [the defense].
A: "A lot of people call me that at school," [Betty] answered, hanging her head.
Q: "But you're not retarded. . . . If you were retarded you couldn't answer these questions, right?"
A: [Betty] vehemently agreed.
Q: [The defense] then pointed to the prosecutors. "Those people," he told [Betty], "the ones you think are your friends, they're telling 'the whole world' that you are retarded."

McGoey, supra note 300, at 14.

302. See LAUFFER, supra note 2, at xvii.
303. See id. at xviii.
304. See id.; see also id. at 31 (noting commentary that the word "retarded" frequently accompanied Betty's name).
305. See generally id. at 112-44 (recounting testimony).
depict Betty based on her past sexual history. The press and commentators considered this part of the trial the most controversial. Perhaps most striking, however, is the extent to which the defense relied nearly exclusively on a broad range of sexual stereotypes of all women, and mentally retarded women in particular, in lieu of factual evidence.

Despite Betty's lack of sexual knowledge, she had engaged in some sexual activity and her past sexual life was discussed in detail. Witnesses were asked whether she ever mentioned "boys or sex," swore, smoked cigarettes, or "display[ed] any 'other' immoral behavior." The court allowed the defense to introduce evidence that, since age twelve, Betty had been "sexually active," yet it disallowed prosecution evidence showing that this "activity" was actually sexual molestation that occurred two weeks before Betty's twelfth birthday. The defense's unprecedented access to all of Betty's medical, psychological, and gynecological records fed accusations that her use of birth control pills proved promiscuity; yet Betty's mother described a daily regime of hiding the pills in Betty's food when Betty's vulnerability to sexual assault became clear.

Defense attorney Michael Querques used Betty's history extensively to fuel his defense. In his eyes, Betty was a "full breasts," "devious," "sexually aggressive," "Lolita," "who liked 'to see

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306. See McGoe, supra note 300, at 13. For example, a psychologist for the prosecution stated that Betty had informed her that she was sexually experienced, that boys offered her money for masturbating them, and that she had tried twice to have sexual intercourse with Christopher Archer. See Laufer, supra note 2, at 46. Defense counsel were allowed to admit into court evidence that Betty had been expelled from school for sexual misbehavior, that she had bared her breasts while in school, and that she had engaged in intercourse in a school tower. Betty's mother countered, however, that she had not been expelled, only transferred because she needed special classes; she had not bared her breasts but, like a small child, had difficulty removing pullover shirts without the underlying T-shirts lifting; and she had only been "touched" in the school tower. See Christopher Kilbourne, Rape Trial Break Gives Both Sides Time for Strategy: Glen Ridge Accuser Testifying, N.J. Record, Dec. 12, 1992, at A3; McGoe, supra note 300, at 13.


308. See id.

309. See Bernard Lefkowitz, Prosecution Gagged; Judge Rules '83 Molestation of Girl Cannot Be Introduced, N.Y. Newsday, Nov. 7, 1992, at 8 (noting court's rejection of a prosecution attempt to introduce evidence that Betty was sexually molested when she was age 12, particularly in light of the exception made under the rape shield law regarding her past sexual history).

310. See infra note 354 and accompanying text.


312. Schroth, supra note 28, at 28.


315. Laufer, supra note 2, at 52 (noting Querques's comment that "[a]ll girls are not the same. There are some girls who are Lolitas. Do you know Lolitas, fourteen, fifteen, and dress up like they are eighteen and nineteen, to entice and attract?"); Christopher Kilbourne, Defense Blames Accuser's Mom; Fiery Summation in Glen Ridge Case, N.J. Record, Feb. 10, 1993, at A5 (highlighting the "Lolita" defense).
the joy on a boy's face when he ejaculates' and hungered for sex the way a starving person hungers for food." According to Querques, she was "ready, willing, able, and anxious" to engage in the acts at the time and "would do it again," thereby endangering the defendants who needed to be protected from her. Moreover, Betty's mental retardation supposedly made her sex drive even more uncontrollable than "normal." "She thrived for affection," Querques stated. "[B]ut she also thrived for the kissing, she craved the caressing, she craved the embracing, she craved the euphoria because her brain functioned in that way." He emphasized further, "You may very well find, in the condition she had, her feelings for sex and her drive, her genitals' signals, are greater than normal." "No matter how she tests on an IQ test, when the trigger goes off, you do it."

In pursuing evidence of Betty's promiscuity, Querques even referred to the physical features of other women—his daughters' different breast sizes, for example, and the "pretty" but "cold to the touch" female police detective. These accounts placed Betty, whom he viewed as "used merchandise," in some frame of reference relative to the sexuality of all women.

Querques also attributed the defendants' actions to "out-of-control hormones and a society obsessed with sex." Yet they, in contrast to Betty, were simply going through a "rite of passage," "a time of experimentation," engaging in sexual acts that could "best be de-

316. Schrot, supra note 28, at 28.
318. See Schrot, supra note 28, at 28. As Querques explained, "[Betty] wasn't kept home. She was normal as far as she was concerned, and the parents let her be as normal as she wanted to be, and if somebody else thought she was normal, too, and they did something with her, they are not criminals. . . . Everybody, but everybody needs protection." Id.
319. LAUFER, supra note 2, at 51.
320. Id. (emphasis added).
321. Id. (emphasis added); Hanley, supra note 314, at 31 (emphasis added). Another defense attorney shared Querques's characterization of Betty. "She knew what she was doing," adding that, "[w]e don't know fully what lies behind the psychological makeup" of the victim. Robert Hanley, Glen Ridge Defense Summary: Immoral, but Not a Crime, N.Y. TIMES, Feb. 1, 1993, at B15. "This is the way she operated normally in her life." Id. But see LAUFER, supra note 2, at 57-58 ("Even calls I made to the providers of a wide range of sexual services who advertise in the back pages of America's sexually explicit tabloid newspapers failed to locate a subculture where broomsticks and baseball bats play a role in consensual sex.").
323. According to Querques, "Girls will be girls. There are some girls who are like nerdy boys, very bashful. I have a daughter, big-breasted girl, walks this way to hide her breasts. Her sister is flat, she sticks it out, what little she has got, so I know what I am talking about." Schrot, supra note 28, at 28.
324. The female police detective who testified about investigating the case was never addressed by her name; rather, she was referred to as "the pretty one." Querques warned, "Pretty and all doesn't matter. Doesn't matter what she looks like. You can't feel the heat of a woman until you touch her. You can't tell till you touch her she's ice cold." Houppert, supra note 28, at 31.
325. Id. According to Querques, "You can tell from her testimony that this car is not brand new. They turned the speedometer back on this car." Id.
scribed as a very brief moral indiscretion.\footnote{327} “Boys,” he explained, “will be boys. Pranksters. Foolarounds. . . . Are men going to forget, ‘hey, I got a girl who is loose, do you want to join me?'”\footnote{328} In other words, Betty Harris, the quintessential “available” woman, would be hard for any young man to resist sexually.

It is beyond this article’s scope to discuss the ethical issues pertaining to stereotype-laden defense tactics,\footnote{329} except to make two parting notes: Aside from their controversy, such tactics are frequently unnecessary (typically the facts speak for themselves), and they can backfire.\footnote{330} From all accounts, Querques’s tack only hindered his client’s defense.\footnote{331} The contextual approach rests on the principle that stereotype-laden tactics will decline when courts are appropriately trained in the subjects raised by their cases and are provided sufficiently specific standards to guide them.

3. Evaluating the Glen Ridge Rape Case

A contextual approach to the Glen Ridge case would attempt to ensure, first, that Betty Harris would not be held to a higher consent standard than her nonretarded counterpart and, second, that her ability to consent would be considered within the context in which it oc-

\footnotetext{328}{Manegold, supra note 10, at B4; see also Christopher Kilbourne, Protestors: “Lolita Excuse Won’t Work”, N.J. RECORD, Oct. 25, 1992, at A3 (describing how Querques’s statements initiated a demonstration of about 200 people in Glen Ridge yelling, “Boys will be boys, men will be men, that excuse won’t work again.”); Robert Lipsyte, Must Boys Always Be Boys?, N.Y. TIMES, Mar. 12, 1993, at B7 (noting that “we’ll really need the second trial, on the moral issues of a culture of violence . . . that shrugs and smirks and says that boys will be boys”).}

\footnotetext{329}{See Eva S. Nilsen, The Criminal Defense Lawyer’s Reliance on Bias and Prejudice, 8 GEO. J. LEGAL ETHICS 1, 1 (1994) (“Criminal defense lawyers are frequently required to utilize legal strategies that are morally repugnant because they perpetuate racial, gender, or cultural stereotypes”; yet “legal and factual argument often persuades to the degree it piggybacks on the existing prejudices of a listener.”); see also Gregory M. Matosian, Reproducing Rape: Domination Through Talk in the Courtroom 19 (1993) (suggesting that rape law reform has focused on statutes and trial outcomes while ignoring the more subtle, yet perhaps more important, linguistic mechanisms that attorneys use to frame what juries hear; indeed, “[c]ourtroom talk captures the moment-to-moment enactment and reproduction of rape as criminal social fact”). See generally Bruce A. Green, Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law, 69 N.C. L. REV. 687 (1991) (emphasizing the weaknesses inherent in the ethical codes pertaining to criminal defense attorneys); Russell G. Pearce, The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. REV. 1229, 1229 (1995) (tracing the changes in the legal profession and offering a paradigm that focuses on a “community ethic of commitment to the common good”).}

\footnotetext{330}{See Denno, supra note 116, at 145.}
\footnotetext{331}{See Enda, supra note 29, at E2. After the verdict, the Glen Ridge jurors claimed they could not believe that any woman would consent to the acts that had been described. See id. “‘Boys can be boys at times,’ juror Mario Tolentino said, citing another of Querques’s arguments. ‘But not by using instruments on another person’s body.’” Id.; see Schroth, supra note 28, at 28 (noting that “[t]he chief problem with [Querques’s] strategy, other than the danger of offending jurors’ sensibilities, is that painting the retarded victim as a sexually active and even promiscuous teen-ager could tend to support prosecutors’ arguments that she was incapable of exercising judgment or understanding that she could refuse to engage in sex”).}
occurred rather than only according to her particular attributes. In reaching these goals, the Glen Ridge case would take a substantially different route than the one the New Jersey court followed.

a. IQ and Mental Age

First and foremost, the contextual approach, as well as this article's proposed elimination of the separate statutory section for mentally retarded individuals, would curtail the extent to which Betty's IQ and mental age could be used by either the prosecution or the defense in their arguments. 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 and may mischaracterize an individual's adaptive abilities, particularly when it is used by inexperienced evaluators. Although courts also typically refer to a victim's "mental age," it too is considered misleading and controversial.

The Glen Ridge trial showed that these concerns are warranted. Despite the substantial evidence presented on Betty's limited adaptive abilities, for example, even the prosecution mischaracterized and stereotyped her and all mentally retarded individuals by exaggerating the significance of her "IQ of 64"—a label that failed to account for both her strengths and weaknesses. This effect was heightened by discussions of Betty's mental age. "At age eight, [Betty] became frozen in

332. See infra notes 403-21 and accompanying text.
333. This estimate is based on this article's overview of all rape cases involving mentally retarded persons within the last two decades; see also infra Appendix, Table E (IQ).
334. See AAMR, supra note 73, at 5-19; Hayman, supra note 32, at 1213-16; Telephone Interview with Robert Schwartz, Ph.D., clinical psychologist in private practice, New York City (July 15, 1996). Dr. Schwartz was the Chief Consulting Psychologist for Project L.I.F.E., Inc., where he provided assessment, counseling, and referrals for developmentally disabled participants, as well as weekly staff supervision and staff training in the area of developmental disabilities.
335. See Parker & Abramson, supra note 127, at 261. In one study of the extent to which three different professional groups (law enforcement officers, licensing personnel, and sex educators/counselors) relied on legally relevant criteria (such as the nature and consequences test) when examining the sexual abuse of a mentally retarded individual, researchers found that "whatever personal or professional biases exist, the assessments appeared to be fairly consistent across the three groups and often within the parameters of the law." Id. At the same time, however, the study found that law enforcement and licensing professionals were more likely to rely on the victim's IQ in their evaluations of possible sexual abuse, in part because sex educators/counselors "are generally more attuned to the sexual needs and rights of their clients" and "possess a much more intimate knowledge of their clients' abilities to understand and desires to engage in sexual relationships." Id. In turn, one recent study showed that an interdisciplinary team of professionals working at a state-operated facility relied on similar factors to determine the capacity for mentally retarded individuals to consent to sex: the individual's sexual knowledge, diagnosed level of mental retardation, social adaptive age, participation in a sex education course, psychiatric diagnosis, and consensual ability in other areas. See Niederbuhl & Morris, supra note 253, at 301-02.
336. See supra notes 93-95 and accompanying text.
337. See Houppert, supra note 28, at 32.
time,” the prosecution explained, depicting her as “incapable of having any sexual desires of her own” and only mimicking sexual words and behaviors from her peers or television. Betty’s school counselor agreed, describing her as “someone with the body of a woman and the mentality of a first-grader.”

The prosecution also stressed Betty’s isolation in a stereotypical and derisive way. Noting that Betty “wanted to be someone who could go out on dates like normal teenage girls do . . . [i]n reality, [she] had almost no friends. . . . How could Betty Harris go out on a date with an ordinary teenager,” the prosecution asked the jurors, “when she couldn’t really carry on a normal conversation?” Even “feminists” depicted Betty as “pathetic,” with a “plain, pudgy face.”

According to advocates for the mentally retarded, the Glen Ridge prosecution’s comments fueled long-held public images of the mentally retarded as abnormal, asexual, “perennial” children. Yet unlike mentally retarded adults, eight-year-olds cannot work, marry, procreate, or engage in romantic love. As Leslie Walker-Hirsch, president of the AAMR’s special interest group on sexual and social concerns has noted, “there is a belief that, when a person is mentally retarded everything else is at the same level of advancement as the intellect, when really the body is very on target with the age.” Mentally retarded persons merely demonstrate “a developmental lag” because their social skills and biological development are not commensurate.

338. See Laufer, supra note 2, at 37.
339. See Houppert, supra note 28, at 32; see also Laufer, supra note 2, at 49 (noting a prosecution psychiatrist’s testimony: “I had a feeling she was quite asexual. It was an activity without gratification or great joy.”).
340. See Houppert, supra note 28, at 32.
341. Lefkowitz, supra note 296, at 23.
342. Laufer, supra note 2, at 40 (emphasis added).
343. See id. at 36 (noting the comment of New Jersey’s NOW chapter president, Myra Terry, that “[t]his is a pathetic eight-year-old in a woman’s body. How could she consent?”).
345. See Houppert, supra note 28, at 32 (quoting Celine Glagola, Director of Public Relations for the New Jersey chapter of the Association for Retarded Citizens); see also All Things Considered (National Public Radio broadcast, Mar. 16, 1993). According to Douglas Biklen, Professor of Special Education at Syracuse University, “The message that the [Glen Ridge] prosecution sent out was that adults who are classified as mentally retarded are really like children. And I think that’s an old stereotype that we put aside a number of years ago but which has been reinvigorated by this case.” Id.
346. As Liz Moore, a spokeswoman for The Arc, a national organization for mentally retarded persons commented, “In many areas of their life, [the mentally retarded are] definitely adults. That’s the problem with saying that a person has the mental ability of an eight-year-old.” Alison Carper, When Is Yes a No? Glen Ridge Trial Hinges on Woman’s Competence, N.Y. Newsday, Jan. 25, 1993, at 19.
347. Houppert, supra note 28, at 32.
348. See id. According to Houppert, “Walker-Hirsch’s explanation could do much to reconcile [Betty’s] exploitative sexual gestures—remember the boy’s penis she asked to see at summer camp? the fellow special-ed classmate she had sex with? the way she bared her breasts in cho-
Of course, the prosecution used its stereotypical tack to support its contention that Betty could not consent to or encourage the defendants’ behaviors. Yet a contextual approach incorporating current research on mental retardation would emphasize other issues. For example, a more accurate and seemingly more convincing stance would emphasize that Betty experienced sexual desire and a need for consensual sexual relationships like anyone else her age but that men could still sexually assault her. Due to the court’s circumvention of the rape shield statute, Betty’s past sexual experiences, her interests in men, and her knowledge of sex were discussed throughout the trial. Irrespective of any concerns over stereotyping, the prosecution was perhaps ineffectively disingenuous with a jury that needed guidance in reconciling Betty’s past or present sexual life with her sexual assault. In sum, treating a mentally retarded individual differently from a nonretarded individual in the same situation could potentially weaken a prosecution’s stance in a case where the trappings for conviction are less clear.

In line with Walker-Hirsch’s recommendation, the prosecution should have put the basement assault in the context of Betty’s “relatively uneven social skills.” To do this, the prosecution would explain to the jury that even though Betty could intellectually comprehend that she could have said “no” in the basement (as she testified she could)—and may even have said so to her mother’s past request that she eat her spinach—Betty may not have “internalized” this ability. This limitation explains why Betty could say she realized her choice to say “no” and yet be unable to exercise that right in a dark basement filled with thirteen male companions. As the psychiatrist testifying in the Glen Ridge juvenile court waiver hearing explained when asked about Betty’s ability to consent, “there is no particular reason to believe that there is consistency in her refusal, just as there is no particular reason to believe that there is consistency in her consent.”

b. Sexual History

In light of this emphasis on the situational aspects of Betty’s ability to consent, the contextual approach would also render unnecessary the Glen Ridge court’s most controversial ruling—to admit evidence

349. See infra notes 354-59 and accompanying text.
350. Houppert, supra note 28, at 32.
351. See id. As Walker-Hirsch explained, “People with mental disabilities, if they’ve learned something in one setting, can know it there, and appear to process it but can’t really translate it into general knowledge that they can apply in a different setting.” Id.
of Betty’s sexual history under New Jersey’s rape shield statute\(^{354}\) (once again illustrating the frailties of the \textit{Olivio} court’s “narrow” nature of the conduct test). Contending that “the need to protect the woman was outweighed in this case by the right of the defendants to a fair trial,”\(^{355}\) the court determined that the jury should consider Betty's sexual history for two reasons: to decipher the prosecution’s claim that she was mentally defective and incapable of consent\(^{356}\) and to evaluate the defense’s arguments that she voluntarily participated, understood the acts, and could make “sexual choices.”\(^{357}\) Yet the court’s stance was seriously flawed for a range of reasons: it was atypical even compared to other rape and mental retardation cases;\(^{358}\) it defied current science and knowledge of sexual consent among the mentally retarded; and it permitted gender stereotypical prosecution and defense tactics that relied most heavily on the stereotypes of mentally retarded women. Indeed, the ensuing outrage over the defense’s tactics immediately prompted the New Jersey legislature to narrow its rape shield statute.\(^{359}\)

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356. \textit{See id.}

The judge said one reason for his admitting the woman’s sexual history was the state’s reliance on it to bolster its arguments before the grand jury and in pretrial hearings that she was mentally defective and had shown in previous sexual encounters that she was incapable of understanding them or exercising her right to say no to them. \textit{Id.}

357. \textit{See} Phalon, \textit{supra} note 2, at 8 (noting the court’s desire to admit past sexual history evidence to ensure defendants’ right to a fair trial); \textit{see also} Lauffer, \textit{supra} note 2, at 64 (explaining that the court’s impression was “that the rights of the defendants included the opportunity to use some evidence of Betty’s sexual past to try to prove that she functioned well enough to make sexual choices”).

358. \textit{See infra} Appendix, Table E (Prior Sexual Behavior).

359. \textit{See} Lauffer, \textit{supra} note 2, at 64; Robayo, \textit{supra} note 354, at 306-08; Tamar Lewin, \textit{Rape and the Accuser: A Debate Still Rages on Citing Sexual Past}, \textit{N.Y. Times}, Feb. 12, 1993, at B16; Ivette Mendez, \textit{Shielding the Victim}, \textit{N.J. Star Ledger}, Aug. 12, 1994, at A1. On August 11, 1994, A. 677 was signed into law amending \textit{N.J. Stat. Ann.} \$ 2C:14-7, New Jersey’s prior rape shield statute, to reflect issues raised by the Glen Ridge rape case. Subsection (c) of \textit{N.J. Stat. Ann.} \$ 2C:14-7, was redrafted to eliminate the admission of prior sexual conduct with individuals other than the defendant as material to “negating the element of force or coercion” and also to prohibit any evidence of prior sexual conduct “by any lay witness or expert witness.” \textit{N.J. Stat. Ann.} \$ 2C:14-7(c) (West 1995). Subsection (d) was added to restrict the admission of evidence of prior sexual conduct with the defendant. Such evidence was considered relevant only “if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.” \textit{Id.} \$ 2C:14-7(d). The definition of “sexual con-
able to consent to sexual intercourse under any circumstances, the court's ruling also ensured that she would be judged from a higher consent standard than her nonretarded counterpart.

c. "Nature and Consequences" and Morality

Critical to the prosecution's case, however, was the related issue of whether Betty understood the nature and consequences of sexual intercourse—\(360\)—an ironic disregard of the \textit{Olivio} court's express condemnation of the morality and nature and consequences tests.\(361\) With a contextual approach, a victim's knowledge of the nature and consequences of sexual intercourse may become relevant but only within the confines of the situation. In no situation, however, would a contextual approach require that the victim know the moral and social consequences of her conduct, the key feature of the morality test. Not only is there evidence to suggest that a substantial portion of mentally retarded individuals, including Betty, would not be able to fulfill the morality test under the best of circumstances (such as a consensual sexual relationship), but the test once again holds mentally retarded persons to a higher consent standard than the nonretarded. As this article earlier showed,\(362\) courts may use the morality test either to prohibit sexual intercourse among the mentally retarded altogether or to enforce highly questionable moral norms.

The nature and consequences test also may prohibit consensual sexual intercourse among even the mildly mentally retarded, such as Betty, who did not meet the test's most basic requirements (e.g., knowledge of pregnancy and disease). As this article has discussed, knowledge of the nature and consequences is so amorphous that even a substantial portion of nonretarded individuals may not be able to pass the test. Therefore, a contextual approach would consider nature...
and consequences only when it appeared likely that an individual may be vulnerable to serious bodily harm. For example, if Betty seemed susceptible to having intercourse with an individual (either mentally retarded or nonretarded) who had AIDS, and evidence suggested that she could not comprehend the consequences of her sexual conduct with that individual, then her knowledge of the nature and consequences would be relevant to determining her ability to consent. On the other hand, a blanket requirement that she know the dangers of AIDS would most likely prohibit her from having any kind of a sexual life.

d. Defendant's Knowledge

A contextual approach would consider not only the victim's particular situation at the time of the crime, but also the defendant's knowledge in relation to the victim's ability to consent.\(^363\) Although a comprehensive discussion of defendant's knowledge is beyond the scope of this article, it warrants mention that defendant's knowledge also has been amorphously defined and inconsistently treated in rape statutes and case law.\(^364\) As Appendix, Table C shows, for example, the category "defendant's knowledge of victim's capacity"\(^365\) is either incorporated as part of the consent element, or constitutes an explicit element of the sex offense itself, in thirty-six states.\(^366\) However, it is statutorily defined in only six states.\(^367\) Other states variously treat defendant's knowledge as an element of the offense or as an affirmative defense.\(^368\)

\(^{363}\) This is a feature of the Illinois totality of the circumstances test. See People v. Whitten, 647 N.E.2d 1062, 1066 (Ill. App. Ct. 1995) (proposing a "totality of the circumstances" test).

\(^{364}\) In the Glen Ridge rape case, for example, the defense contended that experts had offered conflicting reports about Betty's mental abilities over the years, emphasizing that their clients were "in no better position" to assess her abilities "than any of these people." See LAUFER, supra note 2, at 49.

\(^{365}\) This category refers only to those state statutes that explicitly mention the defendant's knowledge of the victim's condition as a factor or prerequisite to a conviction based upon the literal language of the statutes. Thus, under these statutes, the defendant must know that the victim is mentally retarded (or defective, etc.) and therefore unable to consent, understand, or appraise the nature of his or her conduct.

\(^{366}\) These states are: Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See infra Appendix, Table C.

\(^{367}\) These states are: Arizona, Delaware, Texas, Utah, Vermont, and Virginia. See infra Appendix, Table C.

\(^{368}\) As Appendix, Table C shows, of the 14 states that do not incorporate defendant's knowledge as an element, five allow it as an affirmative defense if the defendant, for example, "reasonably believed" that the victim was capable of consent or did not know of the victim's condition (Arkansas, Connecticut, Kentucky, New York, Washington). Two states have the "defendant's knowledge of victim's capacity" as both an element of the offense and as an affirmative defense (Missouri and West Virginia). Whether the defendant's knowledge is an element of the offense or an affirmative defense can be crucial given that the prosecution has the burden of proof in the former instance (as in the Glen Ridge case), whereas the defense has the burden of
The lack of statutory and judicial guidance allows courts considerable discretion in the extent to which they will rely either on the defendant's own mental abilities in determining his mens rea or on characteristics of the victim that have no officially recognized association with mental retardation. One of the more controversial factors, for example, concerns the tendency for some courts to emphasize the victim's actual physical appearance while testifying, oftentimes signifying a court's presumption that, with regard to mental retardation, "they know it when they see it" and therefore the defendant should "know" too. In State v. Soura, for example, the Idaho Supreme Court highlighted the victim's "facial expressions consist[ing] of a 'sagging jaw, mouth open,'" and tendency to "stare off into space," as evidence of her mental retardation. This prompted a heated retort from one Justice: "If I did not know better, I would have thought that the day was long gone when a person's intelligence was judged by a person's appearance." A contextual approach would require courts to be educated about matters relating both to consent and mental retardation in an effort to discourage their reliance on such inappropriate physical attributes.

More appropriate is a court's consideration of the victim's relationship to the defendant. Although this factor is important in all rape cases, it becomes a major issue in cases involving a mentally retarded victim because it bears on whether the defendant knew or should have known that the victim was capable of consent in a particular situation. Indeed, Betty's mental retardation status accentuated some of the social and cultural scenarios evident in the defendant and victim relationships characteristic of the rape of nonretarded teenag-

proof in the latter instance. For example, in New Jersey the prosecution has the burden of proving that the victim was mentally defective, that she could not consent, and that the defendant knew she could not consent. In New York, however, the prosecution's claim that a victim could not consent due to mental defectiveness is an affirmative defense to be proven by the defendant, that is, that he had no knowledge of the victim's incapacity. For an interesting discussion of these differences in the context of the Glen Ridge rape trial, see Judith A. Zirin, What If It Were Glen Ridge, N.Y.?, N.Y. L.J., Apr. 7, 1993, at 1.

369. See infra Appendix, Table E.
371. Id. at 115.
372. Id. at 116 (Bistle, J., concurring).
373. A recent planning and educational seminar held for 35 judges on issues related to genetics and genetics research provides a model for educating judges on issues related to consent and mental retardation. See Sandra Blakeslee, Genetic Questions Are Sending Judges Back to Classroom, N.Y. TIMES, July 9, 1996, at Cl. During the six-day genetics seminar run by the Einstein Institute for Science, Health and the Courts, judges were trained by 20 scientists who offered instruction on tasks ranging from hands-on laboratory work to round-table debates on the kinds of cases or ethical dilemmas that judges would soon be confronting. See id. at C9. Judges could engage in a similar type of multidisciplinary seminar on mental retardation and rape so that they would be better prepared to handle evidentiary problems and provide more precise and accurate jury instructions.
374. For a more thorough discussion of this issue, see Feild & Bienen, supra note 34, at 102-43; Dripps et al., supra note 144, at 125.
ers. Like most rape victims, for example, Betty knew her offenders, "gang acquaintance rapists," and trusted them in a way she would not trust a stranger. Betty and her offenders, all teenagers, represented that age group most apt to commit and be victimized by acquaintance rape. Lastly, gang acquaintance rapists typically select victims who are incapacitated in some way, either through alcohol, drugs, or mental impairment. All these factors should bear on a jury's consideration with a contextual approach.

e. Situational Context and the “Dignity of the Risk”

With a contextual approach, the situational context of the sexual conduct is the most critical factor for courts to consider. Although the situational context was relatively underplayed by the Glen Ridge prosecution, which focused on Betty's mental ability, it was key to convicting the defendants for aggravated sexual assault (rape) by force or coercion. The Glen Ridge trial court’s opinion was never published but in In re B.G., the appellate division emphasized the stress of the situation in holding that probable cause existed for charges that the juveniles used force or coercion when committing a sexual assault on a person they knew to be “mentally defective,” thereby supporting a waiver of jurisdiction to adult court. According to the B.G. court, Betty was rendered at least temporarily incapable of consent due to an accumulative set of circumstances indicating force or coercion, including: (1) one defendant’s act of pushing Betty’s head down to his lap after he requested that she perform fellatio, (2) the vaginal “insertion of foreign objects held by others”,

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375. See Dripps et al., supra note 144, at 136; see also Linda A. Fairstein, Sexual Violence—Our War Against Rape 129 (1993) (stating that more than 50% of victims who report rapes know their assailants).

376. Betty’s rape has been characterized as “gang acquaintance rape.” See Lauffer, supra note 2, at 55. “Acquaintance rape is forced sexual intercourse (or other sexual act) that occurs between two people who know each other. . . . Gang rape is forced sexual intercourse by more than one assailant.” Parrot, supra note 222, at 23-24.


378. See Parrot, supra note 222, at 36.

379. See Warshaw, supra note 219, at 103. Scholars suggest that an individual who engages in acquaintance or date rape is attempting to get what he feels he deserves after a sexual rejection. See Parrot, supra note 222, at 25. A gang rapist is attempting to affirm his masculinity within the group. See Warshaw, supra note 219, at 101.

380. See N.J. STAT. ANN. § 2C:14-2a(5)(a) (West 1995) (aggravated sexual assault by force or coercion); Fleury, supra note 249, at 3 (explaining that although the prosecution focused on the victim's inability to consent due to mental deficiency, the Appellate Division's ruling in In re B.G. indicated that "it really doesn't matter: The situation was so overwhelming—and the nature of the conduct committed against her so foul—that the victim was rendered at least temporarily incapable of saying no").

381. See supra note 24 and accompanying text.


383. See id. at 638-48.

384. See id. at 641-42.

385. Id. at 644.
(3) the number of men in the basement; (4) threats to tell Betty's mother about the incident and threats that she might have to leave school; (5) the men's use of Betty's "known attraction" to Paul Archer as "enticement"; and (6) Betty's "history of believing in the sanctity of secrets in relation to peer acceptance."

The situational factors in the Glen Ridge case closely parallel those occurring nearly four years later in Troutman, North Carolina. In Troutman, five young men, between the ages of sixteen and eighteen, engaged in sexual intercourse two times in two days with a nineteen-year-old, mildly mentally retarded woman. On the second day, the men penetrated her with a broom handle, a pipe, and a candle, while videotaping it all in color and sound. Like Betty, the Troutman victim had limited educational ability. She also occasionally dated before the incidents and was enrolled in a neighborhood school where she mixed and socialized with the general school population. Like Betty, the Troutman victim believed that on the days in question, the men, whom she had known for years, were going to take her on a date, particularly because she had previously dated one of them. Like Betty, the Troutman victim claimed that she had never felt threatened by the men. She went out with them more than once and did not resist them because she thought she would "get to go home and it would be all over." Yet unlike the Glen Ridge case, the Troutman case ended with four of the five men pleading guilty, and one pleading no contest, to various counts of second-degree rape and second-degree sex offenses. Under the plea bargain agreement,
the men received prison terms ranging from five to fifteen years.\textsuperscript{396} Moreover, the victim's sexual past was never revealed.\textsuperscript{397}

Relative to the Glen Ridge case, the Troutman case placed far less emphasis on the victim's mental abilities and sexual history than on the situational context of the conduct. This approach comports with the recommendations of mental health specialists who critiqued the Glen Ridge prosecution's stereotypical focus on Betty's mental retardation over and above the situational facts and circumstances.\textsuperscript{398} As part VI of this article further discusses,\textsuperscript{399} the situational context takes on even more importance when an individual resides in an institution or group home.

With a contextual approach, the situational stress factor also can be critical for ensuring fairness for defendants and sexual freedom for victims. For example, if Betty Harris had engaged in "normal" sexual intercourse with one of the defendants in the basement, that defendant should not be prosecuted if there was no evidence of situational stress or other indications of force and if Betty had satisfied the consent requirements applicable to nonretarded individuals. The defendant should not be prosecuted even if he were to boast later about the act and make cruel and derisive comments to Betty. Exposure to emotional cruelty is a risk that all individuals take when deciding to engage in any kind of sexually intimate relationship, most particularly among the young.\textsuperscript{400} To so zealously protect Betty from the possibility of such cruelty under the guise of a rape statute would hold her to a far higher consent standard based only upon her particular intellectual attributes. It would also deny her the "dignity of the risk," one principle of the normalization movement premised on the belief that there is a certain dignity in allowing the mentally retarded to assume

\textsuperscript{396} See Beverly James, 4 Teens Sentenced in Rape Case That Drew National Attention Ends with Guilty Pleas for Sex Acts with Retarded Woman, CHARLOTTE OBSERVER, Oct. 17, 1995, at 1C. Two of the men were sentenced to five years in prison followed by five years probation. A third man, previously convicted for beating a handicapped person, received a nine-year prison sentence followed by five years probation. The fourth man was sentenced to 45 days in jail and five years probation. The fifth man, who had agreed to testify against the others, pled no contest and was sentenced to 15 years in prison. Id.

\textsuperscript{397} One legal result of the Troutman case was the Supreme Court of North Carolina's holding that a trial judge is not authorized to order a victim to submit to a psychological examination, even when the victim's mental status is an element of the crime charged. Instead, the defendant can submit evidence rebutting the victim's mental status, for example, by employing a health expert to evaluate and interpret studies already conducted on the victim. See Horn, 446 S.E.2d at 54.

\textsuperscript{398} See All Things Considered, supra note 345 (interview with Douglas Biklen, Professor of Special Education at Syracuse University):

I think in any situation like this, one has to look at the particular facts and ask, in this case, could she make a judgment? Did she know what was going on? Was she outnumbered? Was she vulnerable? There are a whole lot of questions that come up before one gets to the issue of mental retardation.

\textsuperscript{399} See infra notes 422-75 and accompanying text.

\textsuperscript{400} See Oberman, supra note 222, at 15.
the same risks in life as the nonretarded.\textsuperscript{401} This principle presumes, however, that there is no dignity in treating people as though they possess capacities that they do not in fact have.\textsuperscript{402}

\textbf{C. Consent, Degrees of Offenses, and Jury Instructions}

Some commentators find it troublesome that, in a number of states, the more general consent statutes fail to distinguish the mentally retarded from those unable to consent for other reasons\textsuperscript{403}—the intoxicated or comatose, for example.\textsuperscript{404} On the face, this objection seems reasonable, particularly in light of mentally retarded individuals’ situational variations in their capacity to consent and the evolving nature of their condition. Yet as this article has shown,\textsuperscript{405} first-step assessments of whether a victim is in fact “mentally retarded” in an effort to determine his or her capacity to consent, necessarily fuel an artificially rigid emphasis on IQ and mental retardation labelling.

With a contextual approach, evidence of mental retardation would constitute only one of a series of factors at issue in a rape case. Because these other factors typically are not specified in rape statutes, it would be consistent to exclude from statutory specification “mental retardation” or any other pejorative label currently encompassing it. Such exclusion would also appropriately foster the presumption that most mentally retarded individuals are able to consent to sexual relations under most circumstances, in contrast to the comatose or heavily intoxicated who cannot consent in any situation. At the same time, however, a contextual approach requires that when mental ability does become relevant in a rape case specific jury instructions should designate how it should be weighed in light of current knowledge and definitions, such as those used by the AAMR.

If, as this article proposes, the specific terms encompassing mental retardation are removed in those state statutes that currently have them, mentally retarded individuals would then be encompassed under the general sex offense statutes applicable to the nonretarded. This aggregation would render irrelevant the statutory differences in degrees and penalties applicable to sex offenses incorporating mentally retarded victims in most states.\textsuperscript{406} For example, under the Model Penal Code, rape is ordinarily a felony of the second degree; however, it is a felony of the first degree if “the actor inflicts serious bodily injury upon anyone” or the “victim was not a social companion and

\textsuperscript{401} See supra note 277 and accompanying text.
\textsuperscript{402} See generally Wright, supra note 35, at 1397 (discussing the role of consent in the law and its relationship to human dignity).
\textsuperscript{403} See infra Appendix, Table B.
\textsuperscript{404} See LAUFER, supra note 2, at 8.
\textsuperscript{405} See supra notes 143-253 and accompanying text.
\textsuperscript{406} See infra Appendix, Table C (Offenses & Degrees).
had not previously permitted him sexual liberties."\textsuperscript{407} Yet a male who engages in sexual intercourse with a female other than his wife commits not rape but "gross sexual imposition," a felony of the third degree, if "he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct."\textsuperscript{408} The latter category arguably would encompass a mentally retarded woman.

The Model Penal Code's degree distinction does not mean, of course, that an actor who inflicts serious bodily injury on a mentally retarded woman could not be prosecuted for rape as a first-degree felony. But the degree distinction does create an artificially separate category for mentally retarded individuals that promotes stereotypes and a presumption of consensual incapacity. Oddly enough, it also provides an additional statutory hurdle that could potentially preclude a rape conviction in a case involving a mentally retarded victim in a way that it would not if the victim were nonretarded, assuming the facts are the same. In State v. Ortega-Martinez,\textsuperscript{409} for example, the defendant appealed a conviction for second-degree rape under the following jury instruction: "A person commits the crime of rape in the second degree when that person engages in sexual intercourse with another person by forcible compulsion OR when the victim is incapable of consent by reason of being mentally incapacitated."\textsuperscript{410} Even though the jurors unanimously agreed on a conviction, the defendant contended that the jurors failed to specify which of the two alternative means of committing a rape applied in his case.\textsuperscript{411} The defendant did not dispute the sufficiency of the evidence suggesting he committed second-degree rape by forcible compulsion, given the victim's injuries and vaginal trauma. Rather, he claimed there was insufficient evidence to show that the victim was mentally incapacitated and therefore unable to give consent.\textsuperscript{412} Although the Supreme Court of Washington ultimately held that there was sufficient evidence to suggest that the victim was incapacitated and could not consent,\textsuperscript{413} Ortega-Martinez makes clear that determining a victim's capacity can be far more difficult than estimating a defendant's use of force.\textsuperscript{414}

\textsuperscript{407} Model Penal Code § 213.1(1) (1962).
\textsuperscript{408} Id. § 213.2(2)(b).
\textsuperscript{409} 881 P.2d 231 (Wash. 1994).
\textsuperscript{410} Id. at 234 (emphasis added). In other states, the degree of the offense differs according to whether the element of the offense is determined by forcible compulsion as opposed to incapacity to consent. See Salsman v. Commonwealth, 565 S.W.2d 638, 640 (Ky. Ct. App. 1978) (noting that, in Kentucky, forcible compulsion is rape in the first degree whereas incapacity to consent is rape in the second degree).
\textsuperscript{411} See Ortega-Martinez, 881 P.2d at 234.
\textsuperscript{412} See id. at 234-35.
\textsuperscript{413} See id. at 237-39.
\textsuperscript{414} See, e.g., People v. Kline, 494 N.W.2d 756, 758-59 (Mich. Ct. App. 1992) (declining defendant's contention that the introduction of evidence at trial concerning the plaintiff's mental
Part of this difference in difficulty may be due to the ambiguity involved in assessing a mentally retarded victim's capacity to consent.\textsuperscript{415} In \textit{Righter v. State},\textsuperscript{416} the Supreme Court of Wyoming rejected the defendant's claim that, because the state's first-degree statutory section pertaining to mentally retarded victims was so vague, it should carry instead a third-degree status and penalty similar to that applied by the Model Penal Code and other states.\textsuperscript{417} Although the court listed those states that offered the same first-degree penalty as that applied in Wyoming,\textsuperscript{418} the defendant's argument highlights the vulnerability of a statutory section separating the mentally retarded from the nonretarded. Ironically, these separate statutes mirror the way the mentally retarded always have been viewed—as isolated and segregated individuals perpetually warranting different standards.

This part concludes that a contextual approach would render such statutory isolation unnecessary. Indeed, this article's proposed test was derived in part from totality of the circumstances analyses applied to mentally retarded victim cases prosecuted only under the force and coercion sections of general sex offense statutes. In those cases, an individual's mental retardation status constituted only one of a number of factors that the courts and juries considered in determinations of consent.

In order to curtail any potential vagueness inherent in the contextual approach, courts must provide specific instructions detailing to juries (1) which factors they should consider in their determinations of a victim's consent, (2) if necessary, how those factors should be defined (e.g., mental disability), and (3) the weight such factors should be accorded relative to one another (e.g., situational context should carry the most weight). The factors that courts could instruct a jury to consider include many of those listed in Appendix, Table E,\textsuperscript{419} those used by prior courts with the approval of mental health professionals,\textsuperscript{420} and those that most courts have yet to incorporate sufficiently, such as situational stress and the victim's ability to consent under

\footnotesize{capacity should change the charge against him from one coming under the “force and coercion” subsection of the statute to one coming under the “incapacity of the complainant” subsection).}

\textsuperscript{415} See generally Parker & Abramson, supra note 127, at 257. As empirical research has indicated, for example, the standards that courts use for determining a victim's capacity to consent can oftentimes divert a court’s attention away from those factors that it considers most important in rape cases involving nonretarded victims—such as volition—and toward those factors that are far more amorphous, difficult to gauge, and, for a nonretarded victim, totally irrelevant—such as nature and consequences and knowledge of society's morals. See id.

\textsuperscript{416} 752 P.2d 416 (Wyo. 1988).

\textsuperscript{417} See id. at 418-19. According to the defendant, the Model Penal Code “accepts this vagueness because the punishment is lowered precisely because the vagueness is balanced against the need of society to protect mental deficient.” \textit{Id.} at 419.

\textsuperscript{418} See id.

\textsuperscript{419} A number of factors listed in Appendix, Table E, however, should no longer be used in consent determinations because they are now considered to be outmoded (“mental age”) or irrelevant (“appearance of disability” and “prior sexual behavior”).

\textsuperscript{420} See supra note 269 and accompanying text.
other circumstances. In general, courts should instruct juries to weigh victims' adaptive abilities over and above their particular IQ.

VI. SEX AND THE INSTITUTIONALIZED MENTALLY RETARDED: FROM DENIAL TO DESIGNATION

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. This issue is important for two reasons. Such regulation demonstrates the maximum extent to which legal standards can infringe upon the rights of mentally retarded individuals, and it illustrates the most complicated dimensions of the contextual approach. Institutions not only frequently house the more severely mentally retarded, they can also isolate their residents from community norms and interaction to a far greater extent than the separation experienced by the noninstitutionalized mentally retarded. This part emphasizes that the problems of institutionalized mentally retarded individuals constitute the core of the sexual consent issue.

Liability for the rape and sexual abuse of mentally retarded individuals placed in institutions or residential homes does not typically rest with the mentally retarded adults who may be the perpetrators. Rather, liability falls on the victims’ service providers who are legally and ethically responsible for protecting their clients from all harm, including nonconsensual sexual conduct. Such service provider liability stems from four potential sources: constitutional law, criminal law, tort law, and the government licensing of professionals and

421. See supra notes 263-74 and accompanying text.
422. Rape or sexual abuse cases involving mentally retarded adults are unlikely to be prosecuted because such persons may be found incompetent to stand trial, or lack criminal responsibility by reason of “mental disease or defect.” See supra note 223 and accompanying text.
423. See Stavis, supra note 175, at 6-7; Sundram & Stavis, supra note 223, at 261.
424. See Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (holding a state and its professionals liable for any “substantial departure from accepted professional judgment, practice, or standards” that fails to protect persons in their custody from harm); Shaw v. Strackhouse, 920 F.2d 1135, 1144-50 (3d Cir. 1990) (holding that, in the case of a state institutionalized, profoundly mentally retarded man who was sexually assaulted twice in 12 days by an unknown assailant, service providers’ “failure to increase [victim’s] security or transfer him to another location after . . . [the first assault] constituted a failure to exercise professional judgment”); Wyatt v. Stickney, 325 F. Supp. 781, 782-86 (M.D. Ala.) (discussing the boundaries of a constitutional right to treatment by detailing the civil rights applicable to all patients), amended, 324 F. Supp. 1341 (M.D. Ala. 1971), supplemental op., 344 F. Supp. 373 (M.D. Ala. 1972), aff'd in part and rev'd in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Michael L. Perlin, Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 520-37 (1993-94) (analyzing the development of patients’ sexual rights and the general public’s attitudes toward their sexuality). Less clear is the extent of professional liability for a constitutional claim of a failure to protect from harm those individuals occupying facilities that are not directly state-run. See Sundram & Stavis, supra note 149, at 454.
425. See Sundram & Stavis, supra note 149, at 453 (noting that a provider could be charged with facilitation of a statutory rape or sodomy if that provider either permits or encourages mentally retarded clients to engage in sexual relations when they are incapable of consenting to
programs.\textsuperscript{427} It is beyond the scope of this article to analyze the complex and problematic issues surrounding service provider liability. Instead, this part describes briefly some of the controversies these issues have raised and why a mentally retarded person's institutional or residential status is critical for inclusion in a contextual approach. Most clear is the extent to which the conflicting obligations of service providers (to allow clients their sexual rights yet safeguard them from harm) mirror the confusion that exists when mentally retarded individuals reside within the community.\textsuperscript{428}

\section*{A. The Fine Line Between Denying and Designating a Sexual Life}

Although all mentally retarded individuals are susceptible to sexual harm,\textsuperscript{429} for a number of reasons those residing in institutions or residential homes are particularly vulnerable. First, the institutionalized experience a disproportionate incidence of sexual abuse or assault,\textsuperscript{430} especially if they are women or children.\textsuperscript{431} Second, much of them, and even if those clients perpetrating the conduct lack the mental capacity to be held responsible for it).

\textsuperscript{426} See \textit{id.} at 454 (emphasizing that tort liability can result from client injury caused by "the carelessness or negligence of a professional or program to follow established laws, regulations, professional standards or societal norms," including "a failure to provide education or other protection from pregnancy or sexually transmitted diseases, or a failure to protect incapacitated persons from sexual assaults"); \textit{see also Shaw}, 920 F.2d at 1144-50 (noting the potential for negligent supervision or professional malpractice in a case involving a mentally retarded person who was unable to consent to sexual conduct but was so inadequately supervised that he was sexually assaulted); \textit{Foy v. Greenblott}, 190 Cal. Rptr. 84, 92-95 (Cal. Ct. App. 1983) (discussing the potential for a violation of a per se rule designed to protect the mentally disabled, such as a failure to provide proper sex education and make available birth control and disease protective devices).

\textsuperscript{427} \textit{See Youngberg}, 457 U.S. at 323 (explaining that both the civil and criminal laws defer to responsible clinical judgment); \textit{Sundram & Stavis, supra} note 149, at 454 (stating that "[p]rofessionals are required to comply with the law, regulation and policies of the jurisdiction in which they practice" and that professionals employed by state programs "are obliged to implement the policies of the state agency which licenses the programs").

\textsuperscript{428} \textit{See Perlin, supra} note 424, at 520 (emphasizing that the subject of sexuality among the disabled "forces us to consider the extent to which rules that appear intended to protect individuals with mental disabilities by limiting or subordinating their sexual autonomy are actually the product of a patronizing paternalism toward persons with mental disabilities in institutions"); \textit{Stavis, supra} note 175, at 6 (explaining that state guidelines firmly suggest that licensed programs for mentally retarded persons should create their own sexual policies, focusing on two conflicting obligations: to develop the freedom and abilities of mentally retarded persons who live in their residential programs and, at the same time, to prevent such persons from being exposed to sexual harm).

\textsuperscript{429} \textit{See supra} notes 261-62 and accompanying text.

\textsuperscript{430} \textit{See Sundram & Stavis, supra} note 223, at 256. For example, in 1992, 3321 allegations of abuse or neglect from developmental disability programs were reported to the New York State Commission on Quality of Care for the Mentally Disabled: 28% (670 cases) were reported from state institutions and 80% (2651) were reported from community programs. \textit{Id.} Cases involving sexual conduct (sexual assaults, supervisory neglect leading to resident-to-resident interaction, fondling, intercourse, etc.) constituted a substantial subset that comprised 16% of the 670 state institution cases and 21% of the 2651 community program cases. \textit{Id.} The New York legislature mandates that all allegations of abuse or mistreatment of residents of mental hygiene facilities be reported to the New York State Commission. \textit{Id.} The enhanced vulnerability of mentally retarded individuals to sexual harm may be due to a number of factors, including deficient communication skills, social isolation and powerlessness, perceived asexuality, lack of sex education,
this sexual abuse or assault is directly attributable to the victim’s institutional or residential home placement, given that over one-third of the assaults are committed by the service providers themselves or their employees.342 Third, victims in this context perceive themselves as especially inferior and devalued; therefore, they are less able and willing to report offenses.343 Fourth, others believe these victims do

and dependence on professionals and other caretakers who are most apt to abuse them. See Anne Berkman, Professional Responsibility: Confronting Sexual Abuse of People with Disabilities, 7 Sexuality & Disability 89, 90 (1984); Charles K. Stuart & Virginia K. Stuart, Sexual Assault: Disabled Perspective, 4 Sexuality & Disability 246, 246-53 (1981); Valenti-Hein & Schwartz, supra note 82, at 291.

431. See Sobsey & Doe, supra note 261, at 251. Sexual offenses against disabled individuals are demographically similar to those found among nonretarded individuals (e.g., predominantly male offenders and female victims, similarity of relationships of offenders to victims in many cases). However, the overall incidence of sexual offenses is greater, particularly for women and children who are more likely to be isolated with potential offenders in institutions or residential communities. See id. at 251-52. Moreover, cultural and social beliefs make disabled women and children “doubly attractive” victims; not only are they perceived as being more weak and passive in society generally, they may have been trained that way in rehabilitation and education programs. See id. “There is a special relationship between sexuality and aggression for offenders who abuse disabled women and children. The dynamics between the offender and victim are shaped by cultural and societal expectations.” Id. at 252. Walker-Hirsch claims that because women in general are often only valued “as a sexual object,” this view is even more pronounced for mentally retarded women because “they don’t have the intellectual support and emotional support that we all have when we do meet people who devalue us and want us to only be sex objects.” LAUFER, supra note 2, at 172.

432. See Berkman, supra note 430, at 89 (“Most sexual abuse is committed by caretakers, people who are known to the victim, seldom by strangers.”). Sobsey and Doe’s study of 166 sexual assault reports from disabled victims for offenses occurring between 1960 and 1990, found the following:

In 56% of the cases, abusers had a relationship to the client similar to those commonly found among non-disabled victims of abuse [e.g., natural family members, acquaintances, baby sitters, strangers, dates, step-family members]. In another 44% of the cases, the abusers had a relationship with the victim that appeared to be specifically related to the victim’s disability. Disability service providers (e.g., personal care attendants, psychiatrists, residential care staff) comprised 27.7% of the abusers, specialized transportation providers comprised 5.4%, and specialized foster parents comprised 4.3% [constituting a total of 37.4%]. Another 6.5% was comprised of other disabled individuals, typically clustered with the victim in a specialized program. Based on the percentage of offenders that are associated with specialized services, it would be reasonable to expect risk to increase by an additional 78% due to exposure to the “disabilities service system” alone. The extent of this elevation of risk would be adequate to explain most of the findings of increased incidence among individuals with disabilities.

Sobsey & Doe, supra note 261, at 248-49. See Berkman, supra note 430, at 90; Stuart & Stuart, supra note 430, at 246-53; Valenti-Hein & Schwartz, supra note 82, at 291-92. As Berkman notes, society’s equation of sex with privacy can also be detrimental. See Berkman, supra note 430, at 90. “In the sexual arena traditional policy has been based on respect for privacy. Sex has been seen as a personal matter. Unfortunately, this policy has also promoted the secrecy which allows sexual abuse to flourish, hidden under a rock of silence.” Id.; see also Sundram & Stavis, supra note 223, at 256 (addressing privacy issues).

433. See Sobsey & Doe, supra note 261, at 252-55 (noting that “[t]his internalized devaluation may be the most insidious and destructive form and help to explain some of the perceived passivity and reluctance to report among victims with disabilities”). See generally ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) (suggesting that stigmatized individuals frequently allow themselves to be victimized because of their perceived devaluation in society). Such feelings are evident among mentally retarded individuals at all levels of functioning, including the mildly mentally retarded. Lacking social competence as well as self-worth, the mildly mentally retarded person is more apt to be manipulated and co-
not desire or need sex education, even though sexual behavior is a significant problem in institutionalized care. Finally, these victims evidence substantially less sexual knowledge than the community-integrated mentally retarded, and the extent of sexual knowledge they do acquire declines the longer they are institutionalized.

These drawbacks have prompted greater efforts to integrate mentally retarded individuals into the community, where the risks of abuse are substantially lower than those risks they encounter in institutions. But for those individuals who must remain institutionalized, a significant number of agencies have responded to incidences of sexual abuse by prohibiting sexual activity altogether either through forced into abusive or inappropriate behavior, oftentimes unaware that their body is a private part of their self. See Monat, supra note 137, at 8-9. For example, residential facilities commonly have an informal bartering system in which a mildly mentally retarded person may provide sex in exchange for a trivial item, such as a soda, while not comprehending the incongruity of the transaction, the right to say "no," and the concept that friendship and sex need not be purchased. See id. at 8.

434. See Paula J. Hepner, Sexual Expression and the Mentally Retarded: The Lawyer's Role, 2 Sexuality & Disability 38, 42 (1979) (explaining that the subject of sexuality and the mentally retarded is associated with "two important myths: first, that the retarded are not functioning at an intellectual or emotional level high enough for them to want or need sex education, and second, that the retarded 'know nothing about sex and it will not hurt them to remain ignorant'"); Sundram & Stavis, supra note 223, at 256 (noting that "[m]isconceptions about the asexuality of people with developmental disabilities often have been responsible for depriving them of access to sex education, which increases their vulnerability to exploitation by others and resultant harm"). Whether or not mentally retarded persons have "sexual rights" to such education is beyond the scope of this article, although some commentators have urged that such rights should exist. See, e.g., Winifred Kempton & Emily Kahn, Sexuality and People with Intellectual Disabilities: A Historical Perspective, 9 Sexuality & Disability 93, 101 (1991) (outlining one version of "sexual rights" that includes the right to "receive training in social-sexual behavior that will open more doors for social contact with people in the community" and the right to "enjoy loving and being loved by either sex, including sexual fulfillment"). As the United Nations Declaration on the Rights of Mentally Retarded Persons has declared, mentally retarded persons have a right "to such education, training, rehabilitation and guidance as will enable [them] to develop [their] ability and maximum potential." United Nations, Human Rights: A Compilation of International Instruments 141 (1993); see also Heshusius, supra note 138, at 53 (noting that although sex education in institutions for mentally retarded individuals has improved recently, such education emphasizes providing factual information about sex in general and does not teach that sex can be a pleasant and intimate experience).

435. In one nationwide survey of 82 private and public residential institutions, results showed that of the 84 individuals responding (such as superintendents), 67% stated that "sexual frustration contributed to a significant or major degree to most retarded people's problems of adjustment." Thomas J. Mulhern, Survey of Reported Sexual Behavior and Policies Characterizing Residential Facilities for Retarded Citizens, 79 Am. J. Mental Deficiency 670, 672 (1975). Regardless, most respondents were quite strict with the type of public and private expressions of sexuality that they allowed. Id.

436. See Monat, supra note 137, at 51 (noting that mentally retarded individuals are less likely to have peer and family interactions where sexuality is discussed); Judy E. Hall & Helen L. Morris, Sexual Knowledge and Attitudes of Institutionalized and Noninstitutionalized Retarded Adolescents, 80 Am. J. Mental Deficiency 382, 382-87 (1976) (reporting results based on the questionnaire responses of 61 noninstitutionalized and 61 institutionalized mentally retarded adolescents showing that institutionalized adolescents report substantially less access to information on sexuality and that they therefore may be more vulnerable to sexual exploitation and the infringement of their rights when they are released back into the community).

437. See Sobsey & Doe, supra note 261, at 255.
mal policies or informal procedures, such as curtailing privacy.438 Either way, many institutions ultimately deny the sexuality of all residents by failing to make available sex education and training and by effectively constraining sexual activity "to furtive and secret encounters" whenever residents find the opportunity.439

Recently, a number of professionals have contended that such policies not only unconstitutionally limit the fundamental rights of many mentally retarded individuals, they collide with the professional obligation to help clients achieve, as fully as possible, "normal" lives.440 These professionals also have debunked the primary judicial tests for capacity to consent, contending instead that even the severely and profoundly mentally retarded are sexual and can consent to sexual activities.441 Unfortunately, this stance often has neglected to de-

438. See Hepner, supra note 434, at 40 (emphasizing the "paucity of judicial comment on the issue of the sexual isolation of the retarded"); Sundram & Stavis, supra note 223, at 256-57; see also Craft, supra note 48, at 22 (discussing the results of a British study finding that one quarter of nurses in institutions and one-fifth of staff in hostels felt that adult residents should be discouraged from developing sexual relationships); Robert W. Deisher, Sexual Behavior of Retarded in Institutions, in HUMAN SEXUALITY AND THE MENTALLY RETARDED 145, 145-52 (Felix F. de la Cruz & Gerald D. LaVeck eds., 1973). According to Deisher's study of sexual behavior in institutions, 94% of caregivers felt that masturbation was normal and that they were indifferent to it; yet, 37% said that they would stop clients they found masturbating, and 12% would punish them for such behavior. Deisher, supra, at 148. In addition, 65% of the attendants would not allow heterosexual behavior except that which was solely of a social nature, and 50% would stop clients from kissing and hugging. Id. at 148-49. Indeed, caregivers reported that they were more likely to stop such behavior if it was done in private rather than in public. Id. at 149. For more on this issue, see Emily N. Coleman & William D. Murphy, A Survey of Sexual Attitudes and Sex Education Programs Among Facilities for the Mentally Handicapped, 1 APPLIED RESEARCH IN MENTAL RETARDATION 269, 269-76 (1980) (finding that although most staff members approved of sex education and private masturbation, many did not approve of sexual behavior involving partners); Lynda Mitchell et al., Attitudes of Caretakers Toward the Sexual Behavior of Mentally Retarded Persons, 83 AM. J. MENTAL DEFICIENCY 289, 295 (1978) (reporting that a large percentage of staff members in three residential facilities felt that no sexual behavior among clients at all was acceptable, even simple physical contact); Gerald J. Murphy, The Institutionalized Adolescent and the Ethics of Desexualization, in SEXUAL PROBLEMS OF ADOLESCENTS IN INSTITUTIONS 27, 31 (David A. Shore & Harvy L. Gochros eds., 1981) (observing that in institutions for mentally retarded persons, "[g]estures of mutual affection and caring among residents are strongly discouraged, and such behaviors as touching, holding hands, hugging, kissing, and/or being alone with a friend are generally held in check by the effective use of group pressure and a prevailing sexist attitude toward appropriate male/female behavior.")

439. See Sundram & Stavis, supra note 223, at 256-57; see also Hepner, supra note 434, at 43 ("It is not possible, without professional guidance, to make a successful transition from a sexually isolated environment, whose outlets for sexual release are restricted to brief public and private kissing or masturbation, to full sexual experience that may result in marriage or the birth of children. . . . [T]he institutionalized retarded must begin by participating in coeducational and 'supervised dating' activities where acceptable sexual behavior in nonthreatening social settings can be learned.").

440. See Hepner, supra note 434, at 39-40 (stating that the freedom of sexual expression among mentally retarded individuals should not be diminished in priority relative to their other rights).

tail explicit guidance to service care providers to deal with the resulting questions and problems: What are the privacy rights of adult residents who want to engage in sexual relationships? What are the rights or obligations of staff to curtail sexual activity between residents who lack the capacity to consent? What should be the standard for making sexual capacity determinations, and should it differ from that applied to the community-integrated mentally retarded? How can a balance be struck between normalization and the requirement for staff to report the sexual conduct of their residents? What are the appropriate kinds of sex education and training programs? \(^{442}\)

Lastly, where is the line to be drawn between "denying" a sexual life for the institutionalized mentally retarded and "designating" it? This last question can be more fully understood in the context of recent proposals to essentially train the institutionalized mentally retarded on how they should have sex.

1. Team Monitoring of Sexual Behavior

Mental health professionals have taken several approaches in their attempts to provide guidelines to regulate sexual behavior among institutionalized mentally retarded individuals. Some guidelines are far more controversial than others. For example, Thomas-Robert Ames and Perry Samowitz have proposed "an inclusionary standard" for evaluating the sexual consent of a wide range of the mentally retarded population along with a Sexuality Rights and Advocacy Committee to review all such clinical determinations. \(^{443}\)

Their two-category proposal for determining informed consent considers the client’s (1) "knowledge, intelligence, and the ability to make a voluntary decision through verbal expression" and (2) ability to communicate "through responsible interpersonal behavior." \(^{444}\) In suggesting various indices for making an informed consent determination, the authors explicitly exclude any reliance on morality or the New York morality test. \(^{445}\) Yet, despite their noble efforts, the authors’ proposals

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\(^{442}\) See Sundram & Stavis, supra note 223, at 256-57.

\(^{443}\) See Ames & Samowitz, supra note 36, at 265.

\(^{444}\) Id. at 265-66.

\(^{445}\) These indices are based, in part, on a modification of those indices originally published by the New York State Office of Mental Retardation and Developmental Disabilities. The authors’ primary modification resulted in the elimination of a section focused on “morality,” which
and indices look strikingly similar to the nature and consequences test, and even contain some facets of the morality test. Moreover, the authors emphasize that staff members "continuously monitor" the mentally retarded person's "responsible" sexual conduct and consent "[e]ven when...[that] person demonstrates the ability to commun-

the authors replaced with a section on "legality." See id. at 266. "It is our opinion that assuming that there is a single standard of morality for any community is bound to adversely affect those whose values and lifestyles might not be congruent with the presumed current norm in that community." Id.; see also Telephone Interview with Perry Samowitz, Project Director, Young Adult Institute, New York, N.Y. (June 28, 1996) (critiquing the implications of the morality test).

446. Among the indices the authors recommend for determining informed consent in the first category of individuals are the following:

---The person's awareness of the nature of the sexual act under consideration and the choice to engage in or to abstain from the type of sexual conduct under consideration; . . .

---The person's understanding of how to prevent an unwanted pregnancy and the diseases that are sexually transmitted;

---The person's understanding of the need for the restriction of sexual behavior as to time, place, or type of behavior (e.g., public behavior, private behavior, leisure time vs. programming time, holding hands vs. genital touching, etc.); and

---The person's understanding of being at risk in a potentially harmful, abusive, or exploitative sexual situation and being capable of making a reasonable plan for removing himself or herself from the situation.

Ames & Samowitz, supra note 36, at 266.

With regard to the authors' second category, which includes individuals who "do not demonstrate the ability to communicate or do not have the intellectual capacity to fully understand many of the indices required" in the first category, the authors suggest "a responsible sexual behavior standard or communication demonstrating a practical understanding of those indices in which the following reasonable questions should be viewed and evaluated in each and every type of situation":

Voluntariness—Is each of the parties able to make a voluntary decision free from coercion? What is the person's history with regard to making voluntary decisions? Can a person demonstrate by his or her behavior the ability to discriminate with whom she or he wants, or does not want, to have sexual relations? . . .

Avoidance of Exploitation—Are any of the parties in a situation in which others are using them in a way that they could not be consenting to? Usually, this would involve someone of a higher level of functioning than the possibly "exploited" party. Also, anyone who has any type of power or official status (i.e., a staff member) should automatically be considered exploitative. This does not mean that a person who has mental retardation could not choose to be with someone of average intelligence, which is their right, but such a situation must be examined to determine whether it is consensual.

Avoidance of Abuse—Is this a situation where the person is exhibiting a distraught reaction based upon what is occurring in the context of sexual activity? This could entail psychological or physical abuse.

Ability to Stop an Interactive Behavior When Desired—The person must be able to show an ability to say no when they so desire, either verbally or by body language, such as gently but firmly pushing the other person away, indicating that they want or need to get out of the situation by stopping the behavior or leaving. Can a person demonstrate by his or her behavior the ability to communicate no and physically remove himself or herself from a sexual situation that is not desired at that particular time?

Appropriateness of Time and Place—Is the person able to either choose the socially appropriate time and place or be prompted to go to the appropriate place or wait for an appropriate time with minimum resistance?

Id. at 266-67.

447. For example, the authors consider "the person's history with regard to making voluntary decisions," the person's "ability to discriminate with whom she or he wants, or does not want, to have sexual relations," and the person's ability "to either choose the socially appropriate time and place or be prompted to go to the appropriate place or wait for an appropriate time." Id.
cate informed sexual consent through responsible sexual behavior in a specific, interpersonal, sexual encounter.\textsuperscript{448}

Such monitoring can take various forms, depending on the service care provider's philosophy and tactics. For example, some authors have adopted the concept of "situational capability," which they claim balances the "philosophical aim of enhancing individual self-expression" while enabling service providers to protect clients from undue harm.\textsuperscript{449} Case Number One, presented below, illustrates how one monitoring team applied the concept of situational capability to the relationship between "Peter" and his companion "Jane," both of whom are severely mentally retarded.

\textit{Case Number One: Peter and Jane}

For over five years, Peter engaged in a stable relationship with Jane. Their relationship did not include sexual intercourse because Peter was known to be impotent, but it did include other kinds of sexual contact (e.g., kissing and petting). Peter's tested social age was approximately six years; his score on the Socio-Sexual Knowledge and Attitudes Test was the lowest of any individual judged capable of giving informed consent by the monitoring team. The monitoring team drew two conclusions about Peter and Jane's sexual relationship: (1) the probability of pregnancy and communicable disease was low because intercourse was unlikely; and (2) the probability of victimization was low because Peter and Jane had known and liked each other for a long time. The monitoring team judged Peter capable of giving informed consent to sexual contact with the expectation that he and Jane would not be engaging in intercourse and that Peter's sexual contact would take place exclusively with Jane.\textsuperscript{450}

In this situation, Peter was "allowed" a sexual life within the confines of his own physical limits and monogamy. In all respects, the risk of harm to him, to Jane, or anyone else was very low. Clearly, Peter would never pass the three primary judicial tests that have been applied to the community-integrated mentally retarded (morality, nature and consequences, and nature of the conduct). His mental retardation level suggests that he would most likely not even understand the "distinctly sexual nature" of his behavior, much less its physical, social, and moral consequences. Yet the authors' concept of situational capability meshes well with this article's proposed contextual approach because it considers the sexual conduct within the relative framework of a safe institutional environment and relationship.

But Peter and Jane are an "easy" case. Far more difficult are those situations where the individuals are severely or profoundly mentally disabled, they are engaging in sexual intercourse (oftentimes with more than one partner), and it is not always clear that the parties

\textsuperscript{448} \textit{Id.}

\textsuperscript{449} \textit{See} Niederbuhl \& Morris, \textit{supra} note 253, at 305-06.

\textsuperscript{450} \textit{See id.} at 305. The names "Peter" and "Jane" are fictitious.
"like" each other. Heated debate on how these situations should be handled reflects the current two extremes on a sexuality rights continuum, what this article calls the "pro-sexuality" and "conservative-sexuality" viewpoints.\textsuperscript{451}

2. The "Smile Test" and Third-Party Consent to Sexual Conduct

Fred Kaeser,\textsuperscript{452} one of the most radical proponents of pro-sexuality team monitoring, has proposed what some call the "smile test," whereby institutional staff "are thought to be able to interpret a pleasurable response to sexual activity as consent to it."\textsuperscript{453} He contends that if the severely mentally retarded show through their behavior that they want to engage in sexual activity, and their institution's "interdisciplinary team" decides that this activity can improve the quality of their lives (which typically it should), then the team should provide third-party consent in the same way it is used in other situations judged to be in a person's best interest.\textsuperscript{454} Kaeser believes that the institution's team also should create a "management plan" for negotiating client sexual behaviors to ensure the lowest possible risk of sexual abuse, assault, and rape by applying the same rape-avoidance strategies used by the nonretarded (i.e., their knowledge, decision-making abilities, and experience).\textsuperscript{455}

In determining the types of education and training involved in this strategy, several of the following issues need to be considered: whether individuals can be instructed to request their sexual wants; if such individuals are nonverbal, whether they can be trained to use signs to initiate sexual activity; and whether such individuals can be trained to use condoms. Kaeser emphasizes that the degree to which the severely and profoundly mentally retarded can learn such tactics varies by individual. He provides two examples (Cases Number Two and Number Three), detailed below, of how such instruction takes place.\textsuperscript{456} Case Number Two demonstrates Kaeser's "successful" efforts to teach Edgar and John, both profoundly mentally retarded, how to have sex with one another by gesturing signs. Case Number Three illustrates Kaeser's relatively "unsuccessful" efforts to teach Maryann how to have sex with just one person, given her proclivity to engage in sexual relations with nearly everyone who requests it. It is

\textsuperscript{451} See Telephone Interview with Paul F. Stavis, Esq., Counsel to the State of New York Commission on Quality of Care for the Mentally Disabled in Albany, New York (June 17, 1996) (describing the pro-sexuality viewpoint).

\textsuperscript{452} Fred Kaeser is Director of Health Education, Community School District Two, New York, NY.

\textsuperscript{453} Stavis, supra note 175, at 7.

\textsuperscript{454} See Kaeser, supra note 441, at 33-38.

\textsuperscript{455} See id. at 37-38; see also Hepner, supra note 434, at 44 ("As we have begun to see the retarded as persons 'capable of benefitting from education' so we must now understand the retarded also as 'capable of benefitting from intimate human contact.'").

\textsuperscript{456} See Kaeser, supra note 441, at 40.
at this point that the interdisciplinary team had to intervene on Maryann's behalf and select Ricky, an appropriate partner for her.

Case Number Two: Edgar and John
Kaesar has claimed success in teaching two profoundly mentally retarded men, Edgar and John, how to sex with one another by gesturing signs. Kaesar and his staff accomplished this goal by continual practice and positive reinforcement which involved having the men practice their "courtship repertoire" each evening. For example, a staff member would assist Edgar in presenting the sign suggesting intercourse to his partner, John. Together with the verbal cue, "Does John want to have sex?" the staff member would shake John's head to indicate, "Yes." Kaesar would repeat the phrase, "Yes, John wants to have sex." Then the staff would escort both Edgar and John to their bedroom. After entering the bedroom, Kaesar would say to Edgar, "When John shakes his head 'yes' you may have sex." Kaesar would then point to the bed. Immediately after this scenario, the staff would remove the men from the bedroom and the procedure would be repeated, yet this time with John responding "no" with a shake of his head. Kaesar explained to Edgar that when John said "no," Edgar could go to his bedroom and masturbate instead. Kaesar would show Edgar the gesture for masturbation while stroking a penis model and stating, "See Edgar, you can masturbate. No sex with John, you can masturbate." Edgar learned this type of courtship behavior after practicing it five to ten times daily for approximately two months. After seven years, Edgard still gestures to John when he wants to have sex with him.457

Case Number Three: Maryann and Ricky
Kaesar claims he was unsuccessful in his initial attempts to teach Maryann, a severely mentally retarded woman, not to engage in indiscriminate sex with the men in her fifty-bed residence. Typically, Maryann would have intercourse with any man who gave her any kind of "gift"—a comb, a hairpin, a barette, etc. Kaesar attempted to explain to Maryann that sexual activity "should be confined to those men who she liked and who treated her well." Because Maryann did not appear able to grasp this concept, an interdisciplinary team convened to assess the degree to which staff may act on Maryann's behalf. Even though the team "determined that Maryann gave every indication that she enjoyed her sexual involvement with men" and that she "consented" to the sexual behavior, they also decided that "the potential risks associated with being involved with so many different men were great enough to warrant placing certain restrictions upon her." Because the team's discussions revealed that Maryann "demonstrated a genuine fondness" for the companionship of Ricky in particular, they agreed that they would consider an arrangement that limited Maryann's sexual interactions to Ricky only rather than eliminate Maryann's sexual activity altogether. Together with a behavioral therapist, Kaesar wrote a behavior management plan for Maryann with several goals in mind: (1) to ensure that Maryann would have sexual relations only with Ricky; (2) to teach Ricky how to use a condom

457. See id. at 38-39.
(Maryann had been taking oral contraceptives for several years); and (3) to teach Maryann and Ricky to wash their genitals after every encounter.

Each time Maryann attempted to engage herself with any of the men at the residence (e.g., another man entering her room or her his) staff were instructed to intervene and say, "No, Maryann you may not have sex with him," and she would be redirected to another activity. Only when Ricky approached her would she be allowed sexual opportunity. Staff would say to her, "It is alright Maryann, it is Ricky," at which point Ricky would be issued a condom. Staff were asked to monitor each of these encounters in a minimally restricted manner by listening intermittently by the door to ensure as [much as] possible that Maryann would not be harmed. Upon finishing their lovemaking staff would have both Maryann and Ricky proceed to the bathroom to wash their genitals.\textsuperscript{458}

The staff was able to manage this approach "quite well." Maryann engaged in sexual activity only with Ricky although she still attempted to interact sexually with other men.\textsuperscript{459}

\textbf{B. The Pro-Sexuality Versus Conservative-Sexuality Debate}

Kaesar's approach to the encounters between Edgar and John (Case Number Two) and Maryann and Ricky (Case Number Three) can best be discussed in terms of the pro-sexuality and conservative-sexuality debate. According to pro-sexuality advocates, for example, service care providers should help mentally retarded persons have sex in the same way that such providers assist the mentally retarded with other biological functions, such as eating or toileting; to treat sex less importantly, or to relinquish its availability altogether, is a violation of mentally retarded individuals' civil rights.\textsuperscript{460} These proponents claim that the legal standards in effect for rape effectively prohibit any sexual behavior among those mentally retarded persons who are institutionalized; administrators who allow sexual behavior are "breaking the law everyday."\textsuperscript{461} As Kaesar says:

\begin{itemize}
  \item \textsuperscript{458} \textit{Id.} at 39.
  \item \textsuperscript{459} \textit{See id.}
  \item \textsuperscript{460} \textit{See} Hepner, supra note 434, at 42. As Hepner contends, the freedom of sexual expression among mentally retarded individuals should not be diminished in priority relative to their other rights:

  Institutional personnel, already under enormous pressure to initiate instruction in the most elementary skills of daily living such as eating, grooming, toilet training and toothbrushing, and to upgrade physical therapy, speech therapy, and recreation programming, should not be permitted to obscure their responsibility to end sexual segregation and to establish sex education programs by arguing that retarded individuals' freedom of sexual association is, comparatively, less important, and that to accomplish any of the other goals, priorities have to be set. Our Constitution does not prioritize the rights it guarantees. Civil rights are not negotiable. Indeed, it is constitutionally impermissible to condition the exercise of one fundamental right upon relinquishment of another.

  \textit{Id.}
  \item \textsuperscript{461} Telephone Interview with Perry Samowitz, supra note 445.
\end{itemize}
It should be apparent to anyone who has a reasonable understanding of mental retardation that too strict a standard of competency regarding mutual sex behavior has been established. All the sex education and training in the world will still not afford a significant number of these people [the ability] to become informed decision makers.462

There are problems, however, with Kaesar's pro-sexuality approach. While pursuing the commendable goal of preventing harm, he contravenes any semblance of privacy between those individuals the interdisciplinary team monitors; the sexual behaviors of both couples in Cases Number Two and Three appear to be watched continuously. With regard to Case Number Three's Maryann, the interdisciplinary team actually designates her sexual partner, at the same time listening to her most intimate moments with their pick, Ricky. At the very least, the team's approach to harm avoidance is perversely overzealous. Then again, would the law ever call such behavior consent?

Paul Stavis and others claim that the pro-sexuality proponents hold "bizarre theories" regarding consent in the belief that the ends justify the means in encouraging sexual intercourse.463 Because some couples may never engage in sexual intercourse even though they may be sexual or affectionate in other ways, some mental health professionals question the reasonableness of Kaesar's assumption that intercourse is the "end all" of any kind of sexual behavior.464 Moreover, program staff can come dangerously close to criminal facilitation of a sexual offense for two different reasons: (1) if they encourage sexual activity between mentally retarded individuals who may not be legally capable of consent;465 or (2) if they encourage sexual activity which, appropriately or not, is illegal for even consenting nonretarded adults.466

462. Kaesar, supra note 441, at 36.
463. Telephone Interview with Paul F. Stavis, supra note 451.
464. See Interview with Lara Beaty, developmental psychologist with an extensive background working with both severely and mildly mentally retarded individuals, in New York, NY (Mar. 12, 1996) (noting that, with regard to the profoundly mentally retarded, she "couldn't imagine any one capable of having sex"); Interview with three staff members at the Shield Institute, in Queens, New York (June 29, 1996). The Shield Institute is a day treatment facility that offers one of the most comprehensive habilitation programs in New York City, serving individuals with developmental disabilities ranging from preschool age through adulthood. The three staff members interviewed were: Pam Boyle, M.A., Clinical Coordinator of Sexuality Services; Jeannie Matich-Maroney, Ph.D., Associate Director of Clinical Services; and Mike Crocker, M.A., Clinical Director and also Director of the New York City Abuse and Disabilities Network.
465. See Interview with three staff members at the Shield Institute, supra note 464 (describing the pro-sexuality viewpoint).
466. See Green, supra note 224, at 546 (noting that one-half of the states and the District of Columbia penalize homosexuality and 13 states and the District of Columbia penalize fornication); see also Eskridge, supra note 34, at 60-67 (discussing the law of sexual consent from a gay perspective).
Stavis is most concerned with the ambiguous type of behavior incorporated under the smile test, which he believes would not meet legal standards. Moreover, staff determinations of which behavior constitutes a "smile" are entirely discretionary. Irrespective of the pro-sexuality stance, some program staff do not take seriously acts that would be viewed as criminal if committed by the nonretarded, most particularly, incidents involving lower mentally functioning women and higher mentally functioning men. Stavis provides his own case example (Case Number Four) of what he considers to be the exploitative involvement between "Sally" and "Roger," given the imbalance in their respective levels of functioning.

Case Number Four: Sally and Roger
Sally, a profoundly mentally retarded nonverbal woman residing in a state institution, was found naked in a stairwell with Roger, a moderately mentally retarded, "verbal, relatively 'street-wise' and sexually active man." Roger, who was fully clothed, was found stuffing Sally's underwear behind a pipe near the stairwell door. Many other pairs of underwear belonging to female residents were also found behind the pipe. Three of those residents were considered incapable of consenting to sexual activity. Although Roger informed a physician that he had engaged in sexual intercourse with Sally on the day he was discovered and many other occasions, there was no physical evidence to confirm his statement. The institution's staff concluded that even though Sally was unable to consent to sexual relations, there was no sexual abuse and no incident to report because sexual intercourse most likely had not occurred. Moreover, some staff thought Sally capable of rejecting unwanted sexual advances and expressed concern for her sexual privacy. "There was no follow-up regarding the other underwear found and no special precautions were taken to protect any of the women from further incidents of this nature."

Stavis finds Sally's situation troublesome in part because of the imbalance between her mental retardation level compared to Roger's, as well as staff determinations that Sally was unable to consent to sex. Yet, Stavis offers no clear recommendations for how such activities should be handled in the future, apart from his belief that they should be reported. For example, are staff now expected to monitor continuously Sally's and Roger's whereabouts to ensure that they no longer interact sexually, either between themselves or with others? More-

467. See Stavis, supra note 175, at 7.
468. See Interview with three staff members at the Shield Institute, supra note 464 (emphasizing that there must be "something more" to the smile test so that it can operate in practice).
469. See Telephone Interview with Paul F. Stavis, supra note 451. For more on this problem, see New York State Comm'n on Quality of Care for the Mentally Disabled, Investigation into Allegations of Child Abuse and Neglect at Western New York Children's Psychiatric Center: Final Report (1990); New York State Comm'n on Quality of Care for the Mentally Disabled, Sexuality and Developmental Disabilities: An Investigation of Sexual Incidents at Bernard Fineson Developmental Center (1991).
470. Sundram & Stavis, supra note 149, at 449. The names "Sally" and "Roger" are fictitious.
over, Stavis’s analysis implies that Sally can never have sex with anyone under any circumstances, a stance beholden to current legal standards that fail to address sexual behavior among the institutionalized. For example, is it morally appropriate to hold the institutionalized mentally retarded to the same consensual standards that are applied to the community-integrated mentally retarded? Could Sally be trained in a way to indicate her unwillingness to engage in sexual intercourse? As prior parts of this article have shown community-integrated mentally retarded individuals are held to a higher standard of consent relative to nonretarded persons, particularly if they are female. This standard is higher still for those mentally retarded females who are institutionalized. Lastly, Stavis never acknowledges the limited research showing the benefits of allowing sexual expression in an institution in terms of an improvement in residents’ overall adjustment levels and a decrease in their aggressive or violent conduct and, perhaps most importantly, indications that when the institutionalized are released into the community they are less vulnerable to sexual attack and more equipped to interact socially.

Both the pro-sexuality and conservative-sexuality views also reflect clear moral preferences. Kaeser’s team prefers that Maryann be monogamous (even though she passes the smile test with everyone), is troubled that she exchanges sex for trinkets, and teaches her that sex is reserved only “for men who treat her well.” One pro-sexuality professional critiqued the “love committees” in some institutions where select staff decide that individuals can engage in sexual conduct only if they appear to be “in love” with their partner. Yet, Case Number Three’s interdisciplinary team determined that Maryann can have sex

471. See supra notes 167-253 and accompanying text.
472. See Ellen Anderson Brantlinger, Influencing Staff Attitudes, in MENTAL HANDICAP AND SEXUALITY, supra note 48, at 177, 179 (contending that the suppression of appropriate channels of sexuality among mentally retarded individuals may lead to behavior that is “dangerous or disturbing,” as well as depression, lack of grooming and personal hygiene, and “[f]eelings of resentment, despair, frustration, and loneliness”); John W. Money, Some Thoughts on Sexual Taboos and the Rights of the Retarded, in HUMAN SEXUALITY AND THE MENTALLY RETARDED, supra note 438, at 3, 3-11 (finding that sexually active mentally handicapped individuals are better adjusted and less aggressive than their sexually inactive peers); David A. Shore & Harvy L. Gochros, Introduction, in SEXUAL PROBLEMS OF ADOLESCENTS IN INSTITUTIONS xiii, xiv (David A. Shore & Harvy L. Gochros eds., 1981) (emphasizing that attempts to suppress sexual behavior in institutions are not only ineffective, they may backfire because the suppressed behavior “may manifest itself in less acceptable, more hidden and sometimes more violent ways”); West, supra note 441, at 11-13 (reporting a decrease in aggression among the severely and profoundly institutionalized mentally retarded when residents are allowed to be sexually active).

473. For more on this issue, see Paul R. Abramson et al., Sexual Expression of Mentally Retarded People: Educational and Legal Implications, 93 Am. J. MENTAL RETARDATION 328, 328-34 (1988); Brantlinger, supra note 472, at 177; Craft, supra note 48, at 20-26; Lynda K. Mitchell, Intervention in the Inappropriate Sexual Behaviour of Individuals with Mental Handicaps, in MENTAL HANDICAP AND SEXUALITY, supra note 48, at 207, 207-37; Michelle Dobrasky, Selected Case Histories of Developmentally Disabled Individuals (July, 1996) (on file with the author).
474. See Telephone Interview with Perry Samowitz, supra note 445.
with only one person, and they designated the person she seemed to
"like" the most.

Although the contextual approach incorporates institutional sta-
tus as one of its most important factors, this article suggests that this
approach need not be applied on the level of the pro-sexuality/con-
servative-sexuality debate. By acknowledging institutional status, the
contextual approach accepts per se the premise that even severely and
profoundly mentally retarded individuals can consent to sexual activ-
ity. How the institutional context influences determinations of con-
sent will be considered in light of the particular facts characterizing
the conduct.

The contextual approach recognizes that current legal definitions
of consent will simply not apply in many of the situations involved in
an institutional context, such as those discussed in Cases Number One
through Four. In those situations, moral decisions will have to be
made and current legal notions discarded. Peter and Jane, Edgar and
John, Maryann and Ricky are not consenting in the legal sense. Yet, it
may well be argued that they pass a morally acceptable test. This test
does not require that they understand society's moral views of sexual
conduct before they can consent, but rather that it would be morally
unacceptable to prohibit them from engaging in relations that appear
to provide them happiness.475

This discussion suggests that morals and moral choices pervade
determinations of sexuality, rape, and mental retardation at every
level of the legal system—legislative, judicial, and institutional.
Neither a contextual approach nor a court's jury instructions can elim-
nate moral considerations in a rape case, nor should they. But they
can discourage the inappropriate ways that morals may be used to
prohibit the sexual conduct of mentally retarded females or to unfairly
convict their nonretarded partners. In these instances, the concept of
"dignity of the risk" imparts one guiding philosophy, at least until we
decide that there may be no "dignity" when the "risk" involved can be
rape.

VII. Conclusion

This article addresses the question of when sexual relations with a
mentally retarded individual should be deemed nonconsensual and
therefore criminal. Throughout history, persons with mental retarda-
tion, especially women, have been viewed in contradictory ways—
either as asexual and childlike or as hypersexual and dangerous, capa-
bile of perpetuating offspring "as defective as themselves." Little has
changed in the present day, as the recent Glen Ridge rape case shows.
Consent determinations, difficult in any rape case, become the source

475. See State v. Olivio, 589 A.2d 597, 604 (N.J. 1991) ("Like all other citizens, the mentally
retarded have the right to pursue happiness.");
of stigma and stereotype when the victim happens to be mentally retarded.

This article contends that courts applying contemporary rape statutes typically hold mentally retarded individuals to a higher consent standard than their nonretarded counterparts because they presume that mental retardation in itself may preclude an ability to consent. This article suggests, however, that under appropriate circumstances, most mentally retarded persons can engage in consensual sexual relations. It therefore proposes a contextual approach to consent determinations that incorporates a wide range of factors, most particularly modern knowledge about the adaptive capabilities of mentally retarded individuals as well as the situational context of the sexual conduct. It suggests that such an approach bypasses the inappropriate moral judgments reflected in many state consent tests, as well as the pejorative perceptions of mentally retarded persons that have prevailed in state legislatures, the courts, and society. A contextual approach also balances the competing interests inherent in protecting a vulnerable class of individuals while allowing them their right to engage in consensual sexual relationships.

The following are a selected number of recommendations that this article proposes:

1. *Apply a Contextual Approach to Determinations of Consent.* A contextual approach would focus on the situational context of the sexual conduct as well as recent research on mental retardation. A victim's mental ability would constitute only one of a number of factors courts would consider in determining consent. A contextual approach would also enrich current concepts of consent that are applied to nonretarded individuals in rape cases.

2. *Provide Specific Jury Instructions.* Courts must provide juries specific instructions to limit any potential vagueness inherent in the contextual approach. Jury instructions must detail (a) which factors jurors should evaluate in their determinations of consent; (b) if necessary, how those factors should be defined (e.g., mental disability); and (c) the weight such factors should be accorded relative to one another. The factors that a court would instruct a jury to consider include many of those listed in Appendix, Table E of this article, those used by prior courts with the approval of mental health professionals, and those that most courts have yet to incorporate sufficiently, such as situational stress and the victim's ability to consent under other circumstances.

3. *Encompass Mentally Retarded Individuals Under the General Sex Offense Statutes.* When courts take first-step assessments of whether in fact a victim is mentally retarded in an effort to determine that victim's consent, they artificially emphasize that victim's IQ and the mental retardation label. By excluding from statutory specification the term mental retardation or any other pejorative label cur-
rently encompassing it, state legislatures would appropriately foster the presumption that most mentally retarded individuals are able to consent to sexual relations under most circumstances. Moreover, the victim's level of mental functioning would acquire less significance.

4. Remove Statutory Differences in Degrees and Penalties Based upon Mental Retardation. If the specific terms encompassing mental retardation are removed in those state statutes that currently have them, mentally retarded individuals would then be encompassed under the general sex offense statutes applicable to the nonretarded. This aggregation would render irrelevant the statutory differences in degrees and penalties applicable to sex offenses incorporating mentally retarded victims in most states. It also would eliminate an additional statutory hurdle that potentially could preclude a rape conviction in a case involving a mentally retarded victim in a way that it would not if the victim were nonretarded, assuming the facts are the same.

Although courts have applied vague, unworkable tests in determining a mentally retarded victim's capacity to consent, it would be unrealistic to suggest that a rigid, precisely defined standard could ever be effective in so amorphous an area as sexual relations. This article does not propose a rigid standard. Rather, it strives to reflect current research on mental retardation and rape law in an effort to more appropriately guide courts and juries on those factors they should consider in cases involving both mentally retarded and nonretarded individuals. As a result, it offers a contextual approach that does not impose a more stringent social, moral, or sexual standard on mentally retarded individuals. The mental retardation label should only help, not hurt, such individuals.

Ed Murphy, a mentally retarded adult, describes the dilemma: It is very hard to go through life with a label. You have to fight constantly. Retarded is just a word. We have to separate individuals from the word. We use words like "retarded" because of habit—just like going shopping every week and getting up in the morning. The word "retarded" must be there if you are going to give people help, but what the hell is the sense of calling someone retarded and not giving them anything? 476

476. BOGDAN & TAYLOR, supra note 81, at 92.
APPENDIX

TABLE A

SEXUAL EXPRESSION AMONG SUBGROUPS OF MENTALLY RETARDED INDIVIDUALS

<table>
<thead>
<tr>
<th>Subgroup</th>
<th>Characteristics of Sexual Expression</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mildly Mentally Retarded: IQ level of 50-55 to about 70</td>
<td>Similar to average or normal psychosocial-sexual behavior in society</td>
</tr>
<tr>
<td></td>
<td>Explores, adapts, controls sexual impulses and urges in similar ways as majority of society</td>
</tr>
<tr>
<td></td>
<td>Responds to verbal modes of sex education/sex counseling/sex therapy</td>
</tr>
<tr>
<td></td>
<td>Capable of developing appropriate adaptive skills with current sex education/sex counseling/sex therapy methods</td>
</tr>
<tr>
<td>Moderately Mentally Retarded: IQ level of 35-40 to 50-55</td>
<td>Secondary sexual characteristics might be delayed</td>
</tr>
<tr>
<td></td>
<td>Adaptive and psychosocial-sexual behavior not readily accessible to individual</td>
</tr>
<tr>
<td></td>
<td>Functions more on a primary reward and primitive reinforcement system level</td>
</tr>
<tr>
<td></td>
<td>May respond to verbal mode of sex education/sex counseling to develop more appropriate adaptive behavior; however, may require techniques of behavior modification systems to be effective</td>
</tr>
<tr>
<td>Severely Mentally Retarded: IQ level of 20-25 to 35-40</td>
<td>Very poor control of sexual impulses</td>
</tr>
<tr>
<td></td>
<td>Lack of development of adaptive psychosocial-sexual behavior</td>
</tr>
<tr>
<td></td>
<td>Limited ability to predict or to foresee consequences of sensual/sexual behavior</td>
</tr>
<tr>
<td></td>
<td>Problems comprehending societal rules, especially private versus public, and developing adaptive behavior in these areas</td>
</tr>
<tr>
<td></td>
<td>Techniques of behavior modification may be most effective in creating change in this group</td>
</tr>
<tr>
<td>Profoundly Mentally Retarded: IQ level of below 20 or 25</td>
<td>Function primarily by having basic needs met</td>
</tr>
<tr>
<td></td>
<td>Very little adaptive behavior</td>
</tr>
<tr>
<td></td>
<td>Predominantly reactions are impulsive</td>
</tr>
<tr>
<td></td>
<td>Limited ability to predict or foresee consequences of sensual/sexual behavior</td>
</tr>
<tr>
<td></td>
<td>Minimal recognizable adaptive skills</td>
</tr>
<tr>
<td></td>
<td>Pleasure seeking frequently in self-stimulating way</td>
</tr>
<tr>
<td></td>
<td>Often masturbates excessively or in harmful way</td>
</tr>
<tr>
<td></td>
<td>Techniques of behavior modification must be used to affect change</td>
</tr>
</tbody>
</table>

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477. Monat, supra note 137, at 3-4 (verbatim depictions of sexual expression); DSM-IV, supra note 96, at 40 (IQ levels).
TABLE B  
STATE STATUTORY TERMS OR CATEGORIES THAT ENCOMPASS MENTALLY RETARDED VICTIMS

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
</tr>
</thead>
</table>
| Alabama     | "Incapable of consent" by being "mentally defective."  
 ALA. CODE § 13A-6-70(c)(2) (1994). "Mentally defective" means a disease or defect which renders him incapable of appraising nature of conduct.  
 Id. § 13A-6-60(5). |
| Arkansas    | "Incapable of consent" if "mentally defective" and such defect renders him incapable of understanding the nature and consequences of sexual acts.  
| Connecticut | "Mentally defective" means mental disease or defect which renders such person incapable of appraising the nature of their conduct.  
 CONN. GEN. STAT. ANN. § 53a-65(4) (West 1994). |
| Florida     | "'Mentally defective' means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct."  
| Hawaii      | "Mentally defective" means a disease, disorder, defect which renders him incapable of appraising the nature of his conduct.  
| Maryland    | "Mentally defective" means (1) mental retardation or (2) mental disorder, either temporary or permanent, which renders the victim substantially incapable of appraising the nature of his or her conduct, or to communicate unwillingness.  
 MD. ANN. CODE art. 27, § 461(b) (1996). |
| Mississippi | Mentally defective "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."  
 MISS. CODE ANN. § 97-3-97(b) (1994). |
| Montana     | Sexual intercourse without consent—"without consent" means victim is incapable of consent because he is mentally defective.  
 MONT. CODE ANN. § 45-5-501(1)(b)(i) (1995). "Mentally defective" means that a person suffers from a mental disease or defect that renders the person incapable of appreciating the nature of his conduct.  
 Id. § 45-2-101(39). |
| New Hampshire* | "[Victim] is mentally defective and defendant knows or has reason to know."  
| New Jersey  | "Mentally defective" means "a condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including but not limited to, being incapable of providing consent."  
 N.J. STAT. ANN. § 2C:14-1(h) (West 1995). |

478. An asterisk indicates that the statute has no separate section for definitions.
<table>
<thead>
<tr>
<th>State</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oregon</td>
<td>Person is deemed incapable of consent to a sexual act if the person is mentally defective. OR REV. STAT. § 163.315(2) (1990). “Mentally defective’ means that a person suffers from a mental disease or defect which renders the person incapable of appraising the nature of the conduct of the person.” Id. § 163.305(3).</td>
</tr>
<tr>
<td>South Carolina</td>
<td>“Mentally’ defective means that a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.” S.C. CODE ANN. § 16-3-651(e) (Law. Co-op. 1995).</td>
</tr>
<tr>
<td>Tennessee</td>
<td>“Mentally defective” means that the person “suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his conduct.” TENN. CODE ANN. § 39-13-501(3) (1991).</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Lack of consent results from incapacity to consent and such incapacity exists when such person is mentally defective. W. VA. CODE § 61-8B-2(b)(2), (c)(2) (1992). “Mentally defective’ means that a person suffers from a mental disease or defect which renders such person incapable of appraising the nature of his conduct.” Id. § 61-8B-1(3) (Supp. 1996).</td>
</tr>
</tbody>
</table>

**Mentally Disabled**

<table>
<thead>
<tr>
<th>State</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana*</td>
<td>Mentally disabled or deficient such that consent cannot be given. IND. CODE ANN. § 35-42-4-1(3) (West 1986 &amp; Supp. 1996).</td>
</tr>
<tr>
<td>Maine*</td>
<td>“Mental disability” that is “reasonably apparent or known to defendant and which in fact renders the other substantially incapable of appraising the nature of the contact involved or of understanding that the person has the right to deny or withdraw consent.” ME. REV. STAT. ANN. tit. 17-A, §§ 253(2)(C), 255(1)(D) (West 1983 &amp; Supp. 1996).</td>
</tr>
<tr>
<td>Rhode Island*</td>
<td>“Mentally disabled” means “a person who suffers from a mental impairment which renders that person incapable of appraising the nature of the act.” R.I. GEN. LAWS § 11-37-1(4) (1994).</td>
</tr>
</tbody>
</table>

**Mentally Retarded**

<table>
<thead>
<tr>
<th>State</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois*</td>
<td>“Mentally retarded” for aggravated criminal sexual assault and aggravated sexual abuse means victim must be an institutionalized severely or profoundly mentally retarded person. 720 ILL. COMP. STAT. ANN. 5/12-14(c), 12-16(e) (West 1993 &amp; Supp. 1996). Incapable of consent for criminal sexual assault and criminal sexual abuse if “unable to understand the nature of the act or unable to give knowing consent.” Id. 5/12-13(a)(2), 12-15(a)(2).</td>
</tr>
</tbody>
</table>
**Kentucky**

“Incapable of consent” is defined in “Lack of Consent” statute. Lack of consent results from incapacity to consent and a person is deemed incapable of consent when he is mentally retarded or suffers from a mental illness. KY. REV. STAT. ANN. § 510.020(2)(b), (3)(b) (Michie 1990). “Mentally retarded” means “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” Id. § 510.010(4) (Michie Supp. 1996).

**Massachusetts**

Included in definition of indecent sexual assault and battery on a mentally retarded person, knowing such person to be mentally retarded. MASS. ANN. LAWS ch. 265, § 13F (Law. Co-op. 1992 & Supp. 1996).

**Vermont**

“Without consent” means where the actor “knows that the other person is mentally incapable of understanding the nature of the act . . . due to a mental illness or mental retardation as defined in § 3061 of Title 14.” VT. STAT. ANN. tit. 13, § 3254(2)(A)-(D) (Supp. 1996). “Mental retardation” means significantly subaverage intellectual functioning which exists concurrently with deficits in adaptive behavior. Id. tit. 14, § 3061(4) (1989).

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**Mentally Incapable/Mental Incapacity**

**Alaska**

“Mentally incapable” means “a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person’s conduct.” ALASKA STAT. § 11.41.470(4) (Michie 1996).

**Nebraska**

“Mentally incapable” of resisting or appraising the nature of his or her conduct. NEB. REV. STAT. §§ 28-319(1)(b), -320(1)(b) (1995).

**Nevada**

“(V)ictim is mentally . . . incapable of resisting or understanding the nature of his conduct.” NEV. REV. STAT. ANN. § 200.366(1) (Michie 1988 & Supp. 1995).

**South Dakota**


**Virginia**

“Mental incapacity” means that the condition of the victim existing at the time of the offense prevents the victim from understanding the nature or consequences of the sexual act involved in such offense. VA. CODE ANN. § 18.2-67.10(3) (Michie 1996).

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**Mental Disease or Defect**

**Delaware**

“Without consent” means defendant knows that the victim suffered from a mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct. DEL. CODE ANN. tit. 11, § 761(g)(3) (1995).

**Kansas**

Missouri

"[Consent] may be express or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of . . . mental disease or defect . . . is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense . . . ." Mo. Ann. Stat. § 556.061(5) (West Supp. 1997).

North Dakota*

Mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct. N.D. Cent. Code §§ 12.1-20-03(1)(e), 12.1-20-07(1)(b) (1985 & Supp. 1995).

Wisconsin

"The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2): . . . (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct." Wis. Stat. Ann. § 940.225(4)(b) (West 1996).

Developmental Disability

California

Incapable of consent because of a "mental disorder or developmental . . . disability." Cal. Penal Code §§ 261(a)(1), 286(g), 288a(d), 289(b)-(c) (West 1988 & Supp. 1996).

Wyoming*


Unsoundness of Mind

Idaho*


Louisiana*


Oklahoma*


Without Consent

Arizona

Texas

"Without consent" means the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it. TEX. PENAL CODE ANN. § 22.011(b)(4) (West 1994 & Supp. 1997).

Utah

"Without consent"—if the actor knows that as a result of mental disease or defect, the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it. UTAH CODE ANN. § 76-5-406(6) (1995).

<table>
<thead>
<tr>
<th>Multiple Terms or Categories</th>
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<tbody>
<tr>
<td>Iowa*</td>
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<tr>
<td>Michigan</td>
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<tr>
<td>New York</td>
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<tr>
<td>North Carolina</td>
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</tbody>
</table>
"Developmental disability" means a "disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to the individual." WASH. REV. CODE ANN. § 71A.10.020(2) (West 1992). "Mental disorder' means any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." Id. § 71.05.020(2).

Other Terms or Categories Not Used Elsewhere

**Colorado*  
Actor knows the victim is incapable of appraising the nature of his or her conduct. COLO. REV. STAT. ANN. §§ 18-3-403(1)(c), -404(1)(b) (West 1989).

**Georgia**  
Drake v. State, 236 S.E.2d 748, 750-51 (Ga. 1977) (holding that constructive force is found when the victim is mentally unable to consent to the sexual act, for example, a state of being mentally incompetent).

**Minnesota*  
"Mentally impaired" means that "a person, as a result of inadequately developed or impaired intelligence ... lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration." MINN. STAT. ANN. § 609.341(6) (West 1987).

**New Mexico**  
"Force or coercion" means the perpetrator knows or has reason to know that the victim suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act. N.M. STAT. ANN. § 30-9-10A(4) (Michie 1994).

**Ohio*  
Ability to resist or consent is substantially impaired because of a mental condition. OHIO REV. CODE ANN. §§ 2907.02(A)(1)(c), .03(A)(2), .05(A)(5), .06(A)(2), .12(A)(1)(c) (Anderson 1996).
<table>
<thead>
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<td>Alabama</td>
<td>Offenses &amp; Degrees:</td>
</tr>
<tr>
<td></td>
<td>Sodomy 2nd: <em>Id.</em> § 13A-6-64(a)(2).</td>
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<tr>
<td></td>
<td>Sexual abuse 2nd: <em>Id.</em> § 13A-6-67(a)(1).</td>
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<tr>
<td></td>
<td>Consent: Not defined</td>
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<td>Defendant's Knowledge of Victim's Capacity: Not mentioned</td>
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<td>Affirmative Defenses: Not mentioned</td>
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<tr>
<td>Alaska</td>
<td>Offenses &amp; Degrees:</td>
</tr>
<tr>
<td></td>
<td>Sexual assault 3rd: <em>Id.</em> § 11.41.425(a)(1).</td>
</tr>
<tr>
<td></td>
<td>Consent: Not defined</td>
</tr>
<tr>
<td></td>
<td>Defendant's Knowledge of Victim's Capacity: Element of the offense</td>
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<tr>
<td></td>
<td>Affirmative Defenses: Not mentioned</td>
</tr>
<tr>
<td>Arizona</td>
<td>Offenses &amp; Degrees:</td>
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<tr>
<td></td>
<td>Sexual assault: <em>Id.</em> § 13-1406(A).</td>
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<tr>
<td></td>
<td>Consent: Not defined</td>
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<tr>
<td></td>
<td>Defendant's Knowledge of Victim's Capacity:</td>
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<tr>
<td></td>
<td><em>Id.</em> § 13-1401(5)(B): “Without consent’ includes ... (b) The victim is incapable of consent by reason of mental disorder ... and such condition is known or should have reasonably been known to the defendant.”</td>
</tr>
<tr>
<td></td>
<td>Affirmative Defenses: Not mentioned</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Offenses &amp; Degrees:</td>
</tr>
<tr>
<td></td>
<td>Rape: <strong>ARK. CODE ANN.</strong> § 5-14-103(a)(4) (Michie 1993).</td>
</tr>
<tr>
<td></td>
<td>Carnal abuse 2nd: <em>Id.</em> § 5-14-105(a) (Michie 1993 &amp; Supp. 1995).</td>
</tr>
<tr>
<td></td>
<td>Sexual abuse 2nd: <em>Id.</em> § 5-14-109(a)(1).</td>
</tr>
<tr>
<td></td>
<td>Sexual abuse 1st: <em>Id.</em> § 5-14-108(a)(4) (Michie 1993).</td>
</tr>
<tr>
<td></td>
<td>Consent: Not defined</td>
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<tr>
<td></td>
<td>Defendant's Knowledge of Victim's Capacity: Not mentioned</td>
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<tr>
<td></td>
<td>Affirmative Defenses:</td>
</tr>
<tr>
<td></td>
<td><em>Id.</em> § 5-14-102(d): “Actor reasonably believed that the victim was capable of consent.”</td>
</tr>
</tbody>
</table>
California

Offenses & Degrees:
- Sodomy: *Id.* § 286(g)-(h) (West 1988 & Supp. 1996).
- Oral copulation: *Id.* §§ 288a(d)(3), 288a(g)-(h), 261(a)(1).
- Penetration of genital or anal openings by foreign or unknown objects: *Id.* § 289(b)-(c) (West Supp. 1996).
- Sexual battery: *Id.* § 243.4(b)-(c):

Consent:
*Id.* § 261.6: “Acting freely and voluntarily and have knowledge of the nature of the act or transaction involved.”

Defendant’s Knowledge of Victim’s Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Colorado

Offenses & Degrees:
- Sexual assault 2nd: **COLO. REV. STAT.** §§ 18-3-403(1)(c), -403(1)(g) (West 1989).
- Sexual assault 3rd: *Id.* §§ 18-3-404(1)(b), -404(1)(f).
- Consent: Not defined

Defendant’s Knowledge of Victim’s Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Connecticut

Offenses & Degrees:
- Sexual assault 2nd: *Id.* § 53a-71(a)(2).
- Sexual assault 4th: *Id.* § 53a-73a(a)(1)(b) (West 1994).
- Consent: Not defined

Defendant’s Knowledge of Victim’s Capacity: Not mentioned

Affirmative Defenses:

*Id.* § 53a-67(a): An affirmative defense exists if, in a prosecution based on the victim being mentally defective, the defendant, at the time such actor engaged in the conduct constituting such offense, did not know of such condition of the victim.

Delaware

Offenses & Degrees:
- Unlawful sexual contact 3rd: *Id.* tit. 11, § 769.
- Unlawful sexual penetration 1st: *Id.* tit. 11, §§ 772(1), 772(3).
- Unlawful sexual penetration 2nd: *Id.* tit. 11, § 771(1).
- Unlawful sexual penetration 3rd: *Id.* tit. 11, § 770(a)(1).
- Unlawful intercourse 1st: *Id.* tit. 11, § 775(a)(1)-(2).
- Unlawful intercourse 2nd: *Id.* tit. 11, § 774(1)-(2).
- Unlawful intercourse 3rd: *Id.* tit. 11, § 773(1).
- Consent: Not defined

Defendant’s Knowledge of Victim’s Capacity:
*Id.* tit. 11, § 761(g)(3). “‘Without consent’ means: ... [t]he defendant knew the victim suffered from a mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct.”

Affirmative Defenses: Not mentioned
RAPE AND MENTAL RETARDATION

Florida

Offenses & Degrees:

Consent:
Id. § 794.011(1)(a) (West Supp. 1997): “Intelligent, knowing, and voluntary consent and does not include coerced submission. Consent shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.”

Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned

Georgia

Offenses & Degrees:
Rape: Listed only in annotations under constructive force—when the victim is “mentally unable to give consent to the act, as when he is . . . mentally incompetent, the requirement of force is found in constructive force.” Drake v. State, 236 S.E.2d 748, 750-51 (Ga. 1977).

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Not mentioned
Affirmative Defenses: Not mentioned

Hawaii

Offenses & Degrees:
Sexual assault 3rd: Id. § 707-732(1)(c).

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned

Idaho

Offenses & Degrees:
Male rape: Id. § 18-6108(1).

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Not mentioned
Affirmative Defenses: Not mentioned

Illinois

Offenses & Degrees:
Aggravated criminal sexual assault: Id. 5/12-14(c) (West 1993 & Supp. 1996).
Criminal sexual abuse: Id. 5/12-15(a)(2) (West 1995).
Aggravated criminal sexual abuse: Id. 5/12-16(e) (West 1993 & Supp. 1996).

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned
Indiana

Offenses & Degrees:
- Criminal deviate conduct: Id. § 35-42-4-2(3) (West 1986).
- Sexual battery: Id. § 35-42-4-8(2) (West Supp. 1996).

Note: The above are lesser degree felonies, but increase to higher degree if there is a threat or use of deadly force or if
offense is committed with a deadly weapon.

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned

Iowa

Offenses & Degrees:
- Sexual abuse defined: IOWA CODE ANN. § 709.1(2) (West 1993).
- Sexual abuse 1st: Id. § 709.2.
- Sexual abuse 2nd: Id. § 709.3.

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Not mentioned
Affirmative Defenses: Not mentioned

Kansas

Offenses & Degrees:
- Aggravated criminal sodomy: Id. § 21-3506(a)(3)(C).
- Aggravated sexual battery: Id. § 21-3518(a)(3).

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned

Kentucky

Offenses & Degrees:
- Sodomy 3rd: Id. § 510.090(1)(a).
- Sexual abuse 2nd: Id. § 510.120(1)(a).

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Not mentioned
Affirmative Defenses:
Id. § 510.030: “In any [sexual offense] prosecution under this chapter in which the victim’s lack of consent is based solely on his incapacity to consent because he was . . . mentally retarded . . . defendant may prove in exculpation that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent.”
Louisiana

Offenses & Degrees:

Aggravated crime against nature: Id. § 14:89.1(A)(4) (West 1986).

Consent: Not defined

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Maine

Offenses & Degrees:

Unlawful sexual contact: Id. tit. 17-A, § 255(1)(D).

Consent: Not defined

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Maryland

Offenses & Degrees:

Sexual offense 3rd: Id. art. 27, § 464A(a)(2).
Sexual offense 2nd: Id. art. 27, § 464B(a)(2).

Consent: Not defined

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Massachusetts

Offenses & Degrees:


Consent: Not defined

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Michigan

Offenses & Degrees:

1st degree criminal sexual conduct: MICH. COMP. LAWS ANN. §§ 750.520b(1)(d)(i), .520b(1)(g), .520b(1)(h)(i)-(ii) (West 1991).
2nd degree criminal sexual conduct: Id. §§ 750.520c(1)(d)(i), .520c(1)(h)(i)-(ii), .520c(1)(g).
4th degree criminal sexual conduct: Id. §§ 750.520e(1)(c) (West Supp. 1996).

Consent: Not defined

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses: Not mentioned
Minnesota

Offenses & Degrees:
Criminal sexual conduct 2nd:  Id. § 609.343(e)(ii).
Criminal sexual conduct 3rd:  Id. § 609.344(d).
Criminal sexual conduct 4th:  Id. § 609.345(d).

Consent:
Id. § 609.341(4)(a) (West Supp. 1997): Words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and that the [victim] failed to resist a particular sexual act.

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Mississippi

Offenses & Degrees:
Sexual battery:  MISS. CODE ANN. § 97-3-95(1)(b) (1994).

Consent:  Not defined

Defendant's Knowledge of Victim's Capacity: Not mentioned

Affirmative Defenses: Not mentioned

Missouri

Offenses & Degrees:
Deviate sexual assault:  Id. § 566.070.
Sexual misconduct 1st:  Id. § 566.090.

Consent:
Id. § 556.061(5): "[Consent] may be express or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of . . . mental disease or defect . . . is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense . . . ."

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses:
Id. § 566.023: marriage as a defense.
Id. § 566.020(1) (West 1979 & Supp. 1996): mistake as to incapacity or age.

Montana

Offenses & Degrees:
Sexual intercourse without consent:  Id. § 45-5-503.

Consent:  Not defined

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses: Not mentioned
Nebraska  
Offenses & Degrees:  
Sexual assault 1st:  
Sexual assault 2nd/3rd:  
  Id. § 28-320(1)(b).  
Consent: Not defined  
Defendant's Knowledge of Victim's Capacity: Element of the offense  
Affirmative Defenses: Not mentioned

Nevada  
Offenses & Degrees:  
Consent: Not defined  
Defendant's Knowledge of Victim's Capacity: Element of the offense  
Affirmative Defenses: Not mentioned

New Hampshire  
Offenses & Degrees:  
Felonious sexual assault: Id. § 632-A:3(1).  
Sexual assault: Id. § 632-A:4.  
Consent: Not defined  
Defendant's Knowledge of Victim's Capacity: Element of the offense  
Affirmative Defenses: Not mentioned

New Jersey  
Offenses & Degrees:  
Sexual assault: Id. § 2C:14-2(c)(2).  
Aggravated criminal sexual contact: Id. § 2C:14-3(a).  
Criminal sexual contact: Id. § 2C:14-3(b).  
Consent: Not defined  
Defendant's Knowledge of Victim's Capacity: Element of the offense  
Affirmative Defenses: Not mentioned

New Mexico  
Offenses & Degrees:  
Criminal sexual penetration 1st: N.M. STAT. ANN. § 30-9-11C(2) (Michie 1994).  
Criminal sexual penetration 2nd: Id. § 30-9-11D(3)-(4).  
Criminal sexual penetration 3rd: Id. § 30-9-11E.  
Criminal sexual penetration 4th: Id. § 30-9-12C(1)-(2).  
Consent: Not defined  
Defendant's Knowledge of Victim's Capacity: Element of the offense  
Affirmative Defenses: Not mentioned
New York

Offenses & Degrees:
Sodomy 3rd: Id. § 130.40(1).
Sexual abuse 2nd: Id. § 130.60(1).
Sexual abuse 3rd: Id. § 130.55.
Sexual misconduct: Id. § 130.20(1)-2:
Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Not mentioned
Affirmative Defenses:
Id. § 130.10: “If the [victim]’s lack of consent is based solely upon his incapacity to consent because he was mentally defective . . . , it is an affirmative defense that at the time the defendant engaged in the conduct constituting the offense [he] did not know the facts or conditions responsible for such incapacity to consent.”

North Carolina

Offenses & Degrees:
2nd degree sexual offense: Id. § 14-27.5(a)(2).
Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned

North Dakota

Offenses & Degrees:
Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned

Ohio

Offenses & Degrees:
Felonious sexual penetration: Id. § 2907.12(A)(1)(c): Marriage or cohabitation are not defenses.
Sexual battery: Id. § 2907.03(A)(2).
Gross sexual imposition: Id. § 2907.05(A)(5).
Sexual imposition: Id. § 2907.06(A)(2).
Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense
Affirmative Defenses: Not mentioned

Oklahoma

Offenses & Degrees:
Rape by instrumentation: Id. tit. 21, § 1111.1.
Rape 1st: Id. tit. 21, § 1114(A)(2).
Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Not mentioned
Affirmative Defenses: Not mentioned
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<thead>
<tr>
<th>State</th>
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<th>Defendant’s Knowledge of Victim’s Capacity:</th>
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<tr>
<td>South Carolina</td>
<td>Criminal sexual conduct 3rd: S.C. CODE ANN. § 16-3-654 (Law. Co-op. 1985).</td>
<td>Not defined</td>
<td>Element of the offense</td>
<td>Not mentioned</td>
</tr>
</tbody>
</table>
Texas

Offenses & Degrees:

Consent: Not defined

Defendant's Knowledge of Victim's Capacity:
- Id. § 22.011(b)(4) (West 1994): Without Consent: Actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it.

Affirmative Defenses: Not mentioned

Utah

Offenses & Degrees:
- Object rape: Id. § 76-5-402.2.
- Sodomy—forcible sodomy: Id. § 76-5-403(2).
- Forcible sexual abuse: Id. § 76-5-404(1).

Consent: Not defined

Defendant's Knowledge of Victim's Capacity:
- Id. § 76-5-406(6) (1995): Without consent: “actor knows that as a result of mental disease or defect, the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it.”

Affirmative Defenses: Not mentioned

Vermont

Offenses & Degrees:
- Aggravated sexual assault: Id. tit. 13, § 3252(a)(1)-(9).

Consent:
- Id. tit. 13, § 3251(3): “Words or action by a person indicating a voluntary agreement to engage in a sexual act.”

Defendant's Knowledge of Victim's Capacity:
- Id. tit. 13, §§ 3254(1), (2)(A)-(D): Lack of consent may be shown without proof of resistance. If the actor knows that the other person is mentally incapable of understanding the nature of the sexual act; or knows that the other person is mentally incapable of resisting, or declining consent to the sexual act due to a mental illness or mental retardation as defined in section 3061 of Title 14.

Affirmative Defenses: Not mentioned
RAPE AND MENTAL RETARDATION

Virginia

Offenses & Degrees:
Forcible sodomy: Id. § 18.2-67.1(A)(2).
Object sexual penetration: Id. § 18.2-67.2(A)(2).
Aggravated sexual battery: Id. § 18.2-67.3(A)(2).
Sexual battery: Id. § 18.2-67.4(A).

Consent: Not defined

Defendant's Knowledge of Victim's Capacity:
Id. § 18.2-67.10(3): "'Mental incapacity' means that [the] condition of the complaining witness existing at the time of an offense . . . prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known."

Affirmative Defenses: Not mentioned

Washington

Offenses & Degrees:
Rape 2nd: WASH. REV. CODE ANN. § 9A.44.050(1)(b), (c), (e) (West Supp. 1997).
Indecent liberties: Id. § 9A.44.100(1)(b), (c), (e).

Consent:
Id. § 9A.44.010(7): "[A]t the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."

Defendant's Knowledge of Victim's Capacity: Not mentioned

Affirmative Defenses:
Id. § 9A.44.030(1): When "lack of consent is based solely upon the victim's mental incapacity . . . it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated."

West Virginia

Offenses & Degrees:
Sexual abuse 2nd: Id. § 61-8B-8(a).

Consent: Not defined

Defendant's Knowledge of Victim's Capacity: Element of the offense

Affirmative Defenses:
Id. § 61-8B-12(a): If "lack of consent is based solely on incapacity to consent because such victim was . . . mentally defective . . . it is an affirmative defense that defendant, at the time of the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions."
Wisconsin

Offenses & Degrees:
Sexual assault 2nd: Wis. Stat. Ann. § 940.225(2)(c) (West 1996): “[S]exual contact ... 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 defendant knows of such condition.”

Consent: 
Id. § 940.225(4): Consent is defined as “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. . . . The following persons are presumed incapable of consent. . . . [a] person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.”

Defendant’s Knowledge of Victim’s Capacity: Element of the offense

Affirmative Defenses: Not mentioned

Wyoming

Offenses & Degrees:
Sexual assault 2nd: Id. § 6-2-303(b).
Sexual assault 4th: Id. § 6-2-305.

Consent: Not defined
Defendant’s Knowledge of Victim’s Capacity: Element of the offense

Affirmative Defenses: Not mentioned
### Table D

**State Judicial Standards for Determining a Mentally Retarded Victim's Capacity to Consent**

<table>
<thead>
<tr>
<th>State and Test</th>
<th>Statutory/Case Authority</th>
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<tbody>
<tr>
<td><strong>Alabama</strong></td>
<td></td>
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<tr>
<td>Morality</td>
<td>Brooks v. State, 555 So. 2d 1134, 1138 (Ala. Crim. App. 1989) (&quot;It cannot be seriously argued that this young man [victim] had the mental capacity to appreciate how the acts would be regarded in his social environment and to appreciate the taboos of his society, or the stigma and ostracism to which he would be exposed.&quot;).</td>
</tr>
<tr>
<td><strong>Nature &amp; Consequences</strong></td>
<td>Metzger v. State, 565 So. 2d 291, 292 (Ala. Crim. App. 1990) (affirming rape conviction based on victim's lack of consent due to her &quot;difficulty assessing the nature and consequences of her behavior&quot;); see also ALA. CODE ANN. § 13A-2-7(c)(2) (1994) (consent is ineffective if given by person unable &quot;to make a reasonable judgment as to the nature or harmfulness of the conduct&quot;).</td>
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<tr>
<td><strong>Alaska</strong></td>
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<tr>
<td>Nature &amp; Consequences</td>
<td>Jackson v. State, 890 P.2d 587, 591 (Alaska Ct. App. 1995) (&quot;A person is 'mentally incapable' of consenting to an act of sexual penetration when the victim suffers 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.&quot;); see also ALASKA STAT. § 11.41.470(4) (Michie 1996) (defining mentally incapable).</td>
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<tr>
<td><strong>Arizona</strong></td>
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<tr>
<td>Nature &amp; Consequences</td>
<td>State v. Johnson, 745 P.2d 81, 84 (Ariz. 1987) (en banc) (&quot;[W]hen the state asserts that the victim was incapable of consenting due to a mental disorder, it must prove that the mental disorder was an impairment of such a degree that it precluded the victim from understanding the act of intercourse and its possible consequences.&quot;).</td>
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<tr>
<td><strong>Arkansas</strong></td>
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<tr>
<td>Nature &amp; Consequences</td>
<td>ARK. CODE ANN. § 5-14-101(3)(A) (Michie 1993 &amp; Supp. 1995): &quot;'Mentally defective' means that a person suffers from a mental disease or defect which renders him incapable of understanding the nature and consequences of sexual acts.&quot; Id. § 5-14-101(3)(B): &quot;A determination that a person is mentally defective shall not be based solely on his intelligence quotient.&quot;</td>
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<tr>
<td><strong>California</strong></td>
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<tr>
<td>Nature of the Conduct</td>
<td>State v. Howard, 172 Cal. Rptr. 539, 540-41 (Cal. Ct. App. 1981) (&quot;Both Penal Code §§ 288a(f) and 286(f) provide that it is a crime to commit the proscribed acts when 'the victim is at the time unconscious of the nature of the act and this is known to the person committing the act...' This section is aimed precisely at this situation—an adult engaging in this type of sexual activity with a mentally retarded person who simply does not understand the nature of the act in which he participates.&quot;).</td>
</tr>
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Colorado
Morality
People v. Gross, 670 P.2d 799, 800 (Colo. 1983) (“The actor knows that the victim is incapable of appraising the nature of the victim’s conduct . . . .”) (citing COLO. REV. STAT. § 18-3-403(1) (1973)). According to the Gross court, “[I]f a victim is incapable of understanding how her sexual conduct will be regarded within the framework of the societal environment of which she is a part, or is not capable of understanding the physiological implications of sexual conduct, then she is incapable of ‘appraising the nature of [her] conduct’ under the language of the statute.” 670 P.2d at 801.

Connecticut
Evidence of Mental Disability
State v. Wyman, 173 A. 155, 156 (Conn. 1934) (“The history of the statute . . . [providing that “any man who shall carnally know any female under the age of forty-five years who is epileptic, imbecile, feeble-minded or a pauper shall be imprisoned”] shows the classification to be sound, its moving purpose being to check the increase of mental defectives and abnormal persons in the community which results by inheritance from defective parents. . . . In view of the purpose of the statute in question (section 6277), it is of less importance whether the woman has sufficient mental capacity to know the distinction between right and wrong. She may be able to draw these distinctions and yet be ‘epileptic, imbecile [or] feeble-minded,’ and so within the prohibited class, for either marriage or carnal intercourse.”).

Delaware
Nature of the Conduct
State v. Tunis, No. 94-03-0582, 1994 WL 710948 at *1 (Del. Super. Ct. Nov. 18, 1994) (“Without consent means the defendant knew that the victim suffered from a mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct . . . .”); see also DEL. CODE ANN. tit. 11, § 761(3)(g) (1995) (same language).

Florida
Nature of the Conduct
FLA. STAT. ANN. § 794.011(1)(b) (West 1992 & Supp. 1997): “‘Mentally defective’ means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.”

Georgia
Judgment
In re Doe, 918 P.2d 254, 262 (Haw. Ct. App. 1996) ("[A] person is mentally defective if he or she is 'suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct.'" (citing HAW. REV. STAT. § 707-700 (1994))); State v. Gonsalves, 706 P.2d 1333, 1337-38 (Haw. Ct. App. 1985) ("People v. Easley, supra, points out that appraisal of conduct cannot mean just an understanding of the physiological elements of the sex act. Rather, it must include an understanding of the moral and societal elements of the act . . . . Additionally, the woman must have the ability to appraise the possible medical consequences of the act . . . . Without the ability to comprehend these factors, the victim cannot be said to be capable of appraising the nature of the act. She would see only the shiny wrappings on Pandora's box, and none of the contents. She would be truly, in the old-fashioned phrase, taken advantage of.").

State v. Soura, 796 P.2d 109, 114 (Idaho 1990) (stating that a victim's resistance and lack of resistance to defendant's sexual advances "does not conclusively establish that she understood and appreciated the physical, emotional and moral consequences of sexual intercourse with the defendant . . . . The purpose of . . . [IDAHO CODE § 18-6101 (1987)] is to protect women with mental disabilities, such as the woman involved in this case, from the many potential difficulties resulting from non-marital sexual relations.").

People v. Whitten, 647 N.E.2d 1062, 1067 (Ill. App. Ct. 1995) ("The ability to give knowing consent should involve more than measuring complainant's IQ or ability to physically resist defendant. Knowing consent requires us to examine all of the circumstances to see if defendant knowingly exercised such control over complainant that a trier of fact could find that complainant did not submit to the sexual advances of defendant voluntarily, intelligently, and by an active concurrence.").

People v. McMullen, 414 N.E.2d 214, 217 (Ill. App. Ct. 1980) ("In this case, the evidence showed that although the victim seemed to understand the physical nature of sexual activity, she did not understand how such activity can affect a person's life and how illicit sexual activity is regarded by other people. Thus, she was unable to understand the social and personal costs of the act. Her inability to understand this important facet of the consequences and nature of sexual activity, combined with other testimony concerning her mental deficiencies, is sufficient to support a guilty verdict based upon her incapacity to consent to intercourse.").

Iowa  
Nature & Consequences  
State v. Chancy, 391 N.W.2d 231, 235 (Iowa 1986) ("Persons who are so mentally incompetent or incapacitated as to be unable to understand the nature and consequences of the sex act are incapable of giving consent.") (relying on State v. Sullivan, 298 N.W.2d 267, 273 (Iowa 1980) (holding that "the standard imposed by subsection 709.4(2) is clear: To avoid the proscribed conduct one must refrain from performing a sex act with a person who is mentally incapable of understanding the nature and possible consequences of sexual activity.").)

Kansas  
Nature & Consequences  
State v. Juarez, 861 P.2d 1382, 1385 (Kan. Ct. App. 1993) ("[W]hen the capacity of a mentally deficient individual to consent to a sexual act is at issue, the jury is capable of determining whether that individual is able to understand the nature and consequences of engaging in such an act."); see also Keim v. State, 777 P.2d 278, 280 (Kan. Ct. App. 1989).

Kentucky  
Nature of the Conduct  
Salsman v. Commonwealth, 565 S.W.2d 638, 640 (Ky. Ct. App. 1978) (upholding conviction for sexual assault in the first degree based on the finding of "forcible compulsion." Victim's mental retardation and deafness were considered in finding forcible compulsion. "In determining whether a woman is incapable of granting consent because she is mentally defective, the sole question is whether she is capable of appraising the nature of the sexual act being performed.").

Louisiana  
Nature of the Conduct  
State v. Peters, 441 So. 2d 403, 409 (La. Ct. App. 1983) ("[LA. REV. STAT. ANN. § 14:43 (West 1986)] . . . defines simple rape and reads in pertinent part: Simple rape is a rape committed where the anal or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under one or more of the following circumstances: . . . (2) Where the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of the victim's incapacity . . . "); see also State v. Watley, 301 So. 2d 332, 333 (La. 1974).

Maine  
Nature of the Conduct  
State v. Ricci, 507 A.2d 587, 588 (Me. 1986) ("There is no evidence that the victim was substantially incapable of appraising the nature of the Defendant's contact with her.") (citing ME. REV. STAT. ANN. tit. 17-A, § 253(2)(C) (West 1983)).

Maryland  
Evidence of Mental Disability  
Edmondson v. State, 185 A.2d 497, 497 (Md. 1962) ("The specific offense [charged] was carnal knowledge of an imbecile woman . . . , the girl having been chronologically eighteen years of age, but of a mental age of about four years.") (citing MD. ANN. CODE art. 27, § 462 (1957)).
<table>
<thead>
<tr>
<th>State</th>
<th>Evidence of Mental Disability</th>
<th>Case</th>
</tr>
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<tbody>
<tr>
<td>Massachusetts</td>
<td></td>
<td>Commonwealth v. Roderick, 586 N.E. 967, 969 (Mass. 1992) (&quot;The [severely retarded] victim's presence and conduct in the courtroom were relevant to the issue whether the defendant would have known that the victim was mentally retarded, an element of one of the crimes of which the defendant was found not guilty.&quot;); Commonwealth v. Thomas, 514 N.E.2d 1309, 1315 (Mass. 1987) (jury instructions included two elements for conviction of the offense of indecent assault and battery on a retarded person: &quot;if they found there was nonpermisive touching, and if they also found the victim was retarded, the defendant was guilty&quot;);</td>
</tr>
<tr>
<td>Michigan</td>
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<td>People v. Baker, 403 N.W.2d 479, 480 (Mich. Ct. App. 1986) (&quot;A person is criminally responsible under [Michigan law] if he engages in sexual penetration with another which causes personal injury to the victim and he 'knows or has reason to know' that the victim is mentally incapable, mentally incapacitated, or physically helpless.&quot;) (citing MICH. COMP. LAWS § 750.520b(1)(g) (1983)).</td>
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<tr>
<td>Minnesota</td>
<td></td>
<td>State v. Underhill, No. C9-92-2058, 1993 WL 165682 at *1 (Minn. Ct. App. May 18, 1993) (&quot;A person is 'mentally impaired' when 'as a result of inadequately developed or impaired intelligence, or a substantial psychiatric disorder of thought or mood, [the person] lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.' MINN. STAT. § 609.341 subd. 6 (1990).); State v. Willenbring, 454 N.W.2d 268, 270 (Minn. Ct. App. 1990) (&quot;Mentally impaired' is defined as meaning that 'a person, as a result of inadequately developed or impaired intelligence . . . lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.'&quot;) (citing MINN. STAT. § 609.341 subd. 6 (1988)); see also In re Welfare of R.L.A., No. CX-88-1884, 1989 WL 41771 at *1 (Minn. Ct. App. May 2, 1989).</td>
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<tr>
<td>Mississippi</td>
<td></td>
<td>Martin v. State, 415 So. 2d 706, 707 (Miss. 1982) (noting testimony of a clinical psychologist indicating that the victim &quot;was incapable of giving informed consent to the act of sexual intercourse. Moreover, . . . a stressful situation which could include a sexual encounter, would further reduce the likelihood that a person within [the victim's] range of intelligence could make a good decision in consenting to sexual relations with appellant.&quot;); Anderson v. State, 381 So. 2d 1019, 1021-22 (Miss. 1980) (&quot;Here, the proof shows without contradiction that the victim was mentally incapable of consenting to sexual intercourse.&quot;); Wilson v. State, 221 So. 2d 100, 103 (Miss. 1969) (&quot;Under the common law proof of sexual intercourse with a woman mentally incapable of consent because of imbecility, idiocy or insanity, establishes the crime of rape. Where the victim in a rape case was mentally incapable of consent, it was not necessary to prove 'actual force' beyond the mere force of penetration so that the actual resistance was not necessary to constitute the offense.&quot;).</td>
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</tbody>
</table>
Missouri
Evidence of Mental Disability

State v. Robinson, 136 S.W.2d 1008, 1009 (Mo. 1940) ("Where the woman in point of fact yields an apparent assent to the act, the burden is on the state to prove that at the time of the act she was incapable, because of mental disease, of assenting to or dissenting from the act, and that the defendant knew of such incapacity. And further: it would not be enough to show merely that she was weak-minded, 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.").

Montana
Nature of the Conduct

MONT. CODE ANN. § 45-5-501(1)(b)(i) (1995): "(1) As used in 45-5-503, the term 'without consent' means: . . . (b) the victim is incapable of consent because he is . . . (i) mentally defective or incapacitated." Id. § 45-2-101(39): "'Mentally defective' means that a person suffers from a mental disease or defect that renders the person incapable of appreciating the nature of the person's own conduct."

Nebraska
Nature of the Conduct

State v. Doremus, 514 N.W.2d 649, 652 (Neb. Ct. App. 1994) ("The purpose of the proposed examination in the present case was to rebut the State's expert testimony that the victim was incapable of understanding the concept of sexuality, i.e., whether he was mentally capable of appraising the nature of defendant's conduct. See [NEB. REV. STAT.] § 28-320(1)(b) [(1989)]").

Nevada
Nature of the Conduct

NEV. REV. STAT. ANN. § 200.366(1) (Michie 1988 & Supp. 1995): "A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault."

New Hampshire
Nature of the Conduct

State v. Call, 650 A.2d 331, 332 (N.H. 1994) ("[N.H. REV. STAT. ANN. § 632- A:2(1)(h) (Supp. 1979)] . . . prohibits sexual penetration with mentally defective persons, that is, 'only with those persons whose mental deficiency is such as to make them incapable of legally consenting to the act.'"); State v. Degrenier, 424 A.2d 412, 413 (N.H. 1980) ("The term 'mentally defective,' as used in this section, is not defined anywhere in the statutes of this State. . . . We construe the statute in question to prohibit intercourse only with those persons whose mental deficiency is such as to make them incapable of legally consenting to the act.' (comparing Mich. COMP. LAWS ANN. § 750.520a (Supp. 1980), "which defines a 'mentally defective' person as a 'person [who] suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.' Inasmuch as the General Court modeled . . . [the New Hampshire statute] after the Michigan statute, . . . it is logical to conclude that the legislature intended the same meaning of the words 'mentally defective,' and we so hold.").
<table>
<thead>
<tr>
<th>State</th>
<th>Nature of the Conduct</th>
<th>Law</th>
</tr>
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<tbody>
<tr>
<td>New Jersey</td>
<td>State v. Olivio, 589 A.2d 597, 605 (N.J. 1990) (explaining that a person is mentally</td>
<td>N.M. STAT. ANN. § 30-9-10A(4) (Michie 1994): “(A) Force or coercion</td>
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<td>defective “if, at the time of the sexual activity, the mental defect rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another”).</td>
<td>means . . . (4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim . . . suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act . . . .”</td>
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<tr>
<td>New Mexico</td>
<td>N.M. STAT. ANN. § 30-9-10A(4) (Michie 1994): “(A) Force or coercion means . . . (4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim . . . suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act . . . .”</td>
<td>People v. Cratsley, 653 N.E.2d 1162, 1165 (N.Y. 1995) (“In Easley, we discussed what it meant to be incapable of appraising the nature of one’s own sexual conduct. Understanding the ‘nature’ of one’s sexual conduct implicates a range of human responses, only a part of which is intellectual. We noted that care must be taken not to restrict the freedom of persons with mental retardation who are capable of knowing consent to a sexual relationship by confusing deliberate failure to adhere to a particular set of values with lack of understanding that values exist. Only the latter—a lack of understanding—is an appropriate consideration in assessing legal capacity.”); People v. Easley, 364 N.E.2d 1328, 1332-33 (N.Y. 1977) (“An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored. . . . Therefore, there also needs to be inquiry as to whether there is a capacity to appraise the nature of the stigma, the ostracism or other noncriminal sanctions which society levies for conduct it labels only as immoral even while it yet ‘struggles to make itself articulate in law.’”); see also People v. Jenkins, 633 N.Y.S.2d 996 (N.Y. App. Div. 1995); People v. Novak, 622 N.Y.S.2d 783 (N.Y. App. Div. 1995); People v. Patterson, 560 N.Y.S.2d 357 (N.Y. App. Div. 1990); People v. Dixon, 412 N.Y.S.2d 42 (N.Y. App. Div. 1978).</td>
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<td>New York</td>
<td>People v. Cratsley, 653 N.E.2d 1162, 1165 (N.Y. 1995) (“In Easley, we discussed what it meant to be incapable of appraising the nature of one’s own sexual conduct. Understanding the ‘nature’ of one’s sexual conduct implicates a range of human responses, only a part of which is intellectual. We noted that care must be taken not to restrict the freedom of persons with mental retardation who are capable of knowing consent to a sexual relationship by confusing deliberate failure to adhere to a particular set of values with lack of understanding that values exist. Only the latter—a lack of understanding—is an appropriate consideration in assessing legal capacity.”); People v. Easley, 364 N.E.2d 1328, 1332-33 (N.Y. 1977) (“An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored. . . . Therefore, there also needs to be inquiry as to whether there is a capacity to appraise the nature of the stigma, the ostracism or other noncriminal sanctions which society levies for conduct it labels only as immoral even while it yet ‘struggles to make itself articulate in law.’”); see also People v. Jenkins, 633 N.Y.S.2d 996 (N.Y. App. Div. 1995); People v. Novak, 622 N.Y.S.2d 783 (N.Y. App. Div. 1995); People v. Patterson, 560 N.Y.S.2d 357 (N.Y. App. Div. 1990); People v. Dixon, 412 N.Y.S.2d 42 (N.Y. App. Div. 1978).</td>
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<tr>
<td>North Carolina</td>
<td>State v. Oliver, 354 S.E.2d 527, 537 (N.C. Ct. App. 1987) (&quot;We find the State's evidence was not sufficient to show the victim was substantially incapable of 'appraising the nature of . . . her conduct' or 'communicating unwillingness to submit to the act of vaginal intercourse or sexual act.' However, we find the State did present sufficient evidence to support a finding that the victim was substantially incapable of 'resisting the act of vaginal intercourse or sexual act'.&quot;)</td>
<td>State v. Oliver, 354 S.E.2d 527, 537 (N.C. Ct. App. 1987) (&quot;We find the State's evidence was not sufficient to show the victim was substantially incapable of 'appraising the nature of . . . her conduct' or 'communicating unwillingness to submit to the act of vaginal intercourse or sexual act.' However, we find the State did present sufficient evidence to support a finding that the victim was substantially incapable of 'resisting the act of vaginal intercourse or sexual act'.&quot;)</td>
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<td>North Dakota</td>
<td>State v. Kingsley, 383 N.W.2d 828, 830 (N.D. 1986) (stating that the victim must, &quot;by reason of mental disease or defect, be incapable of understanding the nature of the conduct involved&quot;).</td>
<td>State v. Kingsley, 383 N.W.2d 828, 830 (N.D. 1986) (stating that the victim must, &quot;by reason of mental disease or defect, be incapable of understanding the nature of the conduct involved&quot;).</td>
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</table>
Ohio Nature of the Conduct
State v. Zeh, 509 N.E.2d 414, 418 (Ohio 1987) ("[S]ubstantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct."); see also State v. Bennett, Nos. 4033, 4034, 1986 WL 13702 at *4 (Ohio Ct. App. Dec. 3, 1986).

Oklahoma Nature & Consequences
Slaughterback v. State, 594 P.2d 780, 781 (Okla. Crim. App. 1979) ("Legal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences. This degree of intelligence may exist with an impaired and feeble intellect, or it may not.").

Oregon Nature of the Conduct
State v. Anderson, 902 P.2d 1206, 1207 n.1 (Or. Ct. App. 1995) ("'Mentally defective' means that person suffers from a mental disease or defect that renders person incapable of appraising the nature of the conduct of the person.") (citing OR. REV. STAT. § 163.305(3) (1990)).

Pennsylvania Nature & Consequences
Commonwealth v. Thomson, 673 A.2d 357, 359-60 (Pa. Super. Ct. 1996) (considering victim's mental deficiency, "the expert concluded that the victim did not have good judgment, was highly influenced by people and was unable to understand the consequences of her actions").

Rhode Island Nature of the Conduct

South Carolina Nature of the Conduct
S.C. CODE ANN. § 16-3-651(e) (Law. Co-op. 1995): "Mentally defective' means that a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.

South Dakota Evidence of Mental Disability
State v. Schuster, 502 N.W.2d 565, 569 (S.D. 1993) ("Rape of a person incapable of giving consent, [S.D. CODIFIED LAWS ANN. § 22-22-1(2) (Michie 1990)],... is analogous to the statutory rape of a person less than sixteen years old,... [id. §§ 22-22-1(4), -1(5)]."); see also State v. Willis, 370 N.W.2d 193, 199 (S.D. 1985) (stating that appellant "admitted having sexual intercourse with the victim on the night in question and the evidence reflects S.R.'s mental incapacity to give consent. These latter facts support a jury verdict in themselves."); State v. Fox, 31 N.W.2d 451, 454 (S.D. 1948) ("Upon proof of carnal intercourse where the female is incapable, through lunacy or unsoundness of mind, of giving legal consent, the law conclusively presumes that the carnal intercourse was by force and violence.").

Tennessee Nature & Consequences
State v. Green, CCA No. 01-C-01-9002-CC-00045, 1990 WL 143777 at *3 (Tenn. Crim. App. Oct. 3, 1990) ("Numerous cases support the broad proposition that the capacity to consent, that is, to give consent which the law will recognize as sufficient to relieve the perpetrator of the illicit act from criminal liability for rape or a similar offense, presupposes the mental capability to form an intelligent opinion on the subject, with an understanding of the act, its nature, and its possible consequences.").

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Texas  
Nature of the Conduct  

Utah  
Nature of the Conduct  
State v. Archuleta, 747 P.2d 1019, 1022 (Utah 1987)  
(explaining that although defendant was convicted under the general rape statute, the court refers to the standard set forth in UTAH CODE ANN. § 76-5-406(6) (Supp. 1987) charging that a person commits rape under this provision when ‘‘[t]he actor knows that as a result of mental disease or defect, the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it’’).

Vermont  
Nature & Consequences  
State v. Jewett, 193 A. 7, 8 (Vt. 1937) (holding that conviction of rape is impossible ‘‘under the circumstances of this case unless the woman was incapable of understanding the act, its motive and possible consequences’’).

Virginia  
Nature & Consequences  
Adkins v. Commonwealth, 457 S.E.2d 382, 388 (Va. Ct. App. 1995) (‘‘Manifestly, the legislature did not intend to include as part of the protected class of people under [VA. CODE ANN. § 18.2-61(A)(ii) (Michie 1994)] . . . those whose mental impairment or handicap may prevent them from comprehending the more complex aspects of the nature or consequences of sexual intercourse, but who, nevertheless, have the mental capacity to have a basic understanding of the elementary and rudimentary nature and consequences of sexual intercourse.’’).

Washington  
Morality  
(‘‘Evidence showing that a victim has a superficial understanding of the act of sexual intercourse does not by itself render [WASH. REV. CODE § 9A.44.010(4) (1988)] . . . inapplicable. A finding that a person is mentally incapacitated for the purposes of . . . [this statute] is appropriate where the jury finds the victim had a condition which prevented him or her from meaningfully understanding the nature or consequences of sexual intercourse. . . . For example, the nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it may under some circumstances result in a disruption in one’s established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death.’’ (emphasis added)); see also State v. vanVlack, 765 P.2d 349, 352 (Wash. Ct. App. 1988) (victim ‘‘did not, as a result of mental defect, understand the nature and consequences of sexual contact’’).
<table>
<thead>
<tr>
<th>State</th>
<th>Case Details</th>
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<tbody>
<tr>
<td>West Virginia</td>
<td>State v. Burks, 267 S.E.2d 752, 753 (W. Va. 1980) (stating that a conviction requires that a person engages “in sexual intercourse with another person who is incapable of consent because he is mentally defective or mentally incapacitated”).</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>State v. Richardson, No. 94-1906-CR, 1995 WL 556274 at *1 (Wis. Ct. App. Sept. 21, 1995) (noting that evidence was sufficient to find that defendant had intercourse with a victim who was “suffering from a mental deficiency which rendered her incapable of consenting to sexual intercourse”).</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Righter v. State, 752 P.2d 416, 420 (Wyo. 1988) (“[O]ne must refrain from performing a sex act with a person who the actor knows, or should know, is mentally incapable of understanding the nature and possible consequences of sexual activity.”).</td>
</tr>
</tbody>
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Note: There is no case law interpreting or applying a particular test for the following six states: Arkansas, Florida, Montana, Nevada, New Mexico, and South Carolina. Therefore, for these states, the relevant excerpts from state statutes are included instead in this table.
## Table E

**Factors Affecting Determinations of a Mentally Retarded Victim's Capacity to Consent**

<table>
<thead>
<tr>
<th>Factor</th>
<th>Cases</th>
</tr>
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<tbody>
<tr>
<td>Diagnosis of Disability</td>
<td>State v. Olivio, 589 A.2d 597, 604 (N.J. 1991) ([M]entally-retarded persons range 'from the virtually independent to the totally dependent.' Mental retardation is not easy to define and categorize.); People v. Easley, 364 N.E.2d 1328, 1331 (N.Y. 1977) (&quot;As do all others, the mentally aberrant differ from one another in greater or lesser degree. Even mental retardation does not mean that an individual is incapable of consenting as a matter of law. The requisite degree of intelligence necessary to give consent may be found to exist in a person of very limited intellect.&quot;); State v. Kingsley, 383 N.W.2d 828, 831 (N.D. 1986) (Levine, J., concurring) (&quot;It is well to bear in mind that there is no presumption of incompetence simply because a developmentally disabled person is receiving special services or living at a residence for the developmentally disabled. . . . Nor is a developmentally disabled person deprived of the right to 'interact' with members of the opposite sex.&quot; (citing N.D. CENT. CODE § 25-01.2-03(3) (1985)).</td>
</tr>
<tr>
<td>Appearance of Disability</td>
<td>State v. Soura, 796 P.2d 109, 115 (Idaho 1990) (noting trial court found the victim's answers &quot;to be slow and short; her facial expressions consisted of a 'sagging jaw, mouth open . . . she appeared to stare off into space at times'&quot;). <em>But see id.</em> at 116 (Bistline, J., concurring) (&quot;If I did not know better, I would have thought that the day was long gone when a person's intelligence was judged by a person's appearance.&quot;); <em>In re</em> Welfare of R.L.A., No. CX-88-1884, 1989 WL 41771 at *1 (Minn. Ct. App. May 2, 1989) (&quot;The trial court, however, based its determination of mental impairment not only on the fact that P.E. has Down's Syndrome, but also on the court's evaluation of P.E.'s testimony. The court stated that it was clear that P.E. is mentally impaired and that this fact should be obvious to anyone, including someone of R.L.A.'s age and experience.&quot;); State v. Call, 650 A.2d 331, 332 (N.H. 1994) (describing testimony &quot;that the victim was 'handicapped'; that she 'looked mentally retarded'; that she was once a resident of New Hampshire Hospital; that there was 'something mentally wrong' with her&quot;); People v. Easley, 364 N.E.2d 1328, 1331 (N.Y. 1977) ([A]fter observing her . . . , you would have to agree she is mentally retarded.&quot;).</td>
</tr>
</tbody>
</table>
IQ

Payne v. State, 428 S.E.2d 103, 107-08 (Ga. Ct. App. 1993) (victim had "a full scale IQ of 59, which fell within the middle range of mild mental retardation, equipped her with the mental development of an 11- or 12-year-old child, and rendered her incapable of relating in an adult-like manner or consenting to sexual activity"); Ely v. State, 384 S.E.2d 268, 269 (Ga. Ct. App. 1989) (fourteen-year-old victim "functions at the level of a person between the ages of 5 and 10. She has a verbal IQ of 65; a performance IQ of 58 and a full scale IQ of 61. The appellant has a verbal IQ of 73; a performance IQ of 72; and a full scale IQ of 72. He is classified as being in the lower portion of the borderline range. His mental age is 11.2."); People v. Patterson, 560 N.Y.S.2d 357, 358 (N.Y. App. Div. 1990) (victim "was incapable of understanding the nature of sexual conduct since he had been diagnosed as having a moderate retardation, organic brain syndrome, and psychosis, and possessed an I.Q. capacity between 35 to 49, which is equivalent to the mental capacity of about a five year old"). Compare State v. Soura, 796 P.2d 109, 113, 115 (Idaho 1990) (married woman with an IQ in the 70s was determined incapable of consenting), with Adkins v. Commonwealth, 457 S.E.2d 382, 388-89 (Va. Ct. App. 1995) (woman with an IQ of 58-70 was deemed capable of understanding the nature and consequences of sexual activity).

Mental Age

People v. Howard, 172 Cal. Rptr. 539, 540 (Cal. Ct. App. 1981) ("The victim, 19 year old Kenyon W., acted as though he were 5 to 7 years of age; his reading level was on the first or second grade level; and he spoke as if he were a 6 or 8 year old child. He resided in a home for developmentally disabled persons with the mentality of 5 to 7 year olds."); Salsman v. Commonwealth, 565 S.W.2d 638, 639 (Ky. Ct. App. 1978) ("According to a clinical psychologist who examined her, the prosecutrix had a verbal I.Q. of 57. With regard to verbal skills and reasoning skills, the prosecutrix was functioning at the level of a ten year old. The prosecutrix performed better in exercising performance skills which did not require the use of language. Respecting performance skills she was functioning on the level of a twelve to thirteen year old child. Her overall I.Q. average was in the 60's. This placed her in the retarded range."); State v. Oliver, 354 S.E.2d 527, 529 (N.C. Ct. App. 1987) ("Both experts had personally interviewed the alleged victim who was 16-years old at the time. Dr. Scott testified that in his opinion, the victim functioned mentally at an eight to ten-year-old level. Dr. Gordon's opinion was that she functioned at an eight-year-old level."); State v. Ortega-Martinez, 881 P.2d 231, 238 (Wash. 1994) ("S.G.'s case worker . . . estimated S.G.'s mental age to be between the ages of five and nine . . . A police officer with experience in child abuse cases testified S.G.'s mental age seemed close to that of a 4- or 5-year old.").
Cognitive Skills

Metzger v. State, 565 So. 2d 291, 292 (Ala. Crim. App. 1990) (victim “had attended a school for the mentally retarded for seven years, where she learned to print her name and count to ten”); Garcia v. State, 659 S.W.2d 843, 845 (Tex. Ct. App. 1982) (victim “did not know the year of her birth or the ages of her three siblings. She could not tell time, read or write . . . her reading and spelling skills were on a second-grade level, and her arithmetic abilities were gauged at first-grade level.”); Martinez v. State, 634 S.W.2d 929, 933-34 (Tex. Ct. App. 1982) (responding to questions, victim “indicated that she was both five years old and twenty-five years old. She could not say her age but could only write it on the board. She was unable to write anyone’s name . . . knew what street she lived on but not what city, did not know what day of the week it was, nor what month, and could recognize only the numbers one through six. . . . The tests conducted on prosecutrix revealed that she could not count past eight, could not state her age, although she could write it. . . . She could write her name, but misspelled it.”); State v. Ortega-Martinez, 881 P.2d 231, 238-39 (Wash. 1994) (victim “was unable to assess the fundamental, nonsexual concept of time. She could not remember when she had been raped . . . She was also unable to estimate in minutes or hours how long she waited at the bus stop: ‘waited for a long time’ was as specific as she was able to get.”).

Language/ Communication Skills

In re Welfare of R.L.A., No. CX-88-1884, 1989 WL 41771 at *1 (Minn. Ct. App. May 2, 1989) (“The record reveals that P.E. had difficulty understanding simple questions, communicated poorly and was easily confused.”); State v. Ortega-Martinez, 881 P.2d 231, 238-39 (Wash. 1994) (30-year-old victim “exhibited the skills of a child and whose answers were often nonresponsive. . . . Her vocabulary and syntax also reflected her mental deficiencies. S.G. did not understand the meaning of the word ‘position,’ . . . and spoke in child-like language when referring to sexual organs, using the term ‘gina’ for vagina and ‘boops’ for breasts. . . .”).

Functional Skills

Adkins v. Commonwealth, 457 S.E.2d 382, 385 (Va. Ct. App. 1995) (“At trial, Teresa’s mother testified that Teresa is mentally retarded, but that she knows how to take care of herself, how to call 911, and how to go shopping.”); State v. Ortega-Martinez, 881 P.2d 231, 233-34 (Wash. 1994) (“The victim of the rape was S.G., a 30-year-old woman with an IQ in the 40s. S.G. and her husband live in an ‘intensive tenant support program’ which houses mentally retarded individuals and has staff available 24 hours a day. . . . S.G. has a significant eating disorder which prevents her from knowing when to stop eating . . .; cannot live independently . . .; and suffers from an inability to resist the instructions of others . . . . A case worker works with S.G. and her husband 60 hours a week to ensure they receive support and education . . . S.G. also has an advocate who works closely with her and a case manager who monitors her development and general well-being.”).
Independent Living Skills
People v. Whitten, 647 N.E.2d 1062, 1065 (Ill. App. Ct. 1995) ("While complainant cooked some meals for herself and could go shopping and received money for her work at the rehabilitation center, the evidence presented at trial created the inference that she had never lived alone."); People v. McMullen, 414 N.E.2d 214, 215 (Ill. App. Ct. 1980) (victim "performed such duties at home as vacuuming, dusting, and washing dishes. She could not, however, cook or run a washing machine or use a stove.").

Job Skills
Metzger v. State, 565 So. 2d 291, 292 (Ala. Crim. App. 1990) (victim "cannot spell, is not employed, and receives a Social Security disability check each month"); State v. Soura, 796 P.2d 109, 113 (Idaho 1990) ("Testimony was presented that (1) the woman has never held a job and would probably be capable of performing only menial tasks and then only under close supervision . . . .").

Money Management Skills
State v. Johnson, 745 P.2d 81, 84 (Ariz. 1987) (en banc) (victim "was capable of handling money and using a bank account"); People v. McMullen, 414 N.E.2d 214, 215 (Ill. App. Ct. 1980) (victim "could not shop alone because she did not understand the value of money"); Martinez v. State, 634 S.W.2d 929, 933 (Tex. Ct. App. 1982) (victim "did not know how to exchange money").

Social/Interpersonal Skills
People v. McMullen, 414 N.E.2d 214, 215 (Ill. App. Ct. 1980) (victim’s stepmother testified that “the victim's younger sisters (ages 11 and 6) were able to manipulate the victim and get her to do their jobs for them, following even the six-year-old’s orders without objection”); State v. Juarez, 861 P.2d 1382, 1385 (Kan. Ct. App. 1993) ("In reaching its determination, the jury should evaluate the individual's behavior in normal social intercourse as well as consider any expert testimony concerning the individual's mental deficiency."); People v. Cratsley, 653 N.E.2d 1162, 1164 (N.Y. 1995) (victim “had a steady boyfriend with whom she went out to eat and visit acquaintances in the supervised community where he lived”); People v. Easley, 364 N.E.2d 1328, 1331 (N.Y. 1977) ("Crucial to a determination [of ability to consent] may be how such a person actually functions in society."); People v. Dixon, 412 N.Y.S.2d 42, 43 (N.Y. App. Div. 1978) (victim described as “pleasant and also anxious to please persons of authority”).

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General Sexual Knowledge

People v. Howard, 172 Cal. Rptr. 539, 540-41 (Cal. Ct. App. 1981) (“Because of [victim’s] mental retardation, the acts of sodomy and oral copulation meant nothing to him. He was not aware of the nature of these acts. He liked the defendant, wanted to please him and actually liked it when the defendant stuck his ‘boner in my ass.’ This is unconsciousness of the nature of the act.”); State v. Olivio, 589 A.2d 597, 606 (N.J. 1991) (“The evidence presented would permit a jury to find that [the victim] had a rudimentary and childish understanding of some of the physical aspects of sexual conduct, but a jury could conclude also that her understanding of sexual conduct was incomplete and inadequate even with respect to the physical aspects of sex. Furthermore, even if [the victim] was found to have a minimally-adequate comprehension of sex, it is not clear that a reasonable jury would determine that she understood that her body was private and that she had a right to be free from the invasions of others, and capacity to refuse to engage in sexual activity.”); People v. Dixon, 412 N.Y.S.2d 42, 43 (N.Y. App. Div. 1978) (A psychologist testified that the victim “had the mental age of approximately an 11-year-old child, and that she had childish conceptions of a boy friend-girl friend relationship, of marriage, and of sex, and she defined making love as kissing and hugging and being happy, but not as having sex.”); Adkins v. Commonwealth, 457 S.E.2d 382, 389 (Va. Ct. App. 1995) (Victim stated on cross-examination that “she ‘made love’ to the appellant, that she knew that she could get pregnant from ‘making love’ and could catch AIDS, that she had had sex education classes in school, and she used the words ‘penis’ and ‘vagina’ when describing the act of sexual intercourse. . . . In fact, her testimony shows that she was the person who conceived the notion of having sexual intercourse with Adkins and initiated the sexual liaison between them.”).

Diseases (Including STDs and AIDS)

In re Doe, 918 P.2d 254, 256 (Haw. Ct. App. 1996) (The court must “evaluate whether the complaining witness has the ability to appraise the possible medical consequences of the sex act, such as incurable or even fatal sexually transmitted diseases, since such consequences are not remote, spring directly from the act.”); State v. Soura, 796 P.2d 109, 114 (Idaho 1990) (“Although she had previously delivered a child, testimony was presented that the woman did not understand the potential physical consequences of sexual intercourse, e.g., pregnancy, syphilis, gonorrhea and herpes.”).

Pregnancy

State v. Kingsley, 383 N.W.2d 828, 830 (N.D. 1986) (“Although Pamela was able to relate the incident using such terms as ‘penis’ and ‘vagina,’ which she learned from sex-education counseling, she did not know the meaning of the term ‘ejaculate’ and she believed that pregnancy was caused ‘by having your period.’”); State v. Anderson, 902 P.2d 1206, 1207 (Or. Ct. App. 1995) (“The victim understands sex as intercourse, with the man on top and the woman on the bottom. She also understands that condoms can prevent pregnancy and venereal disease, but she does not understand other forms of birth control.”).
Prior Sexual Behavior

State v. Underhill, No. C9-92-2058, 1993 WL 165682 at *1 (Minn. Ct. App. May 18, 1993) ("Significantly, the court has minimized any psychological or emotional discomfort to J.A.G. by prohibiting any inquiry as to specific past sexual attitude or the events surrounding these allegations. . . . Here the APE [adverse psychological examination] is strictly limited to J.A.G.'s understanding of sexual acts, and any questioning on actual sexual activities is specifically prohibited."); State v. Anderson, 902 P.2d 1206, 1208 (Or. Ct. App. 1995) ("We agree with the state that the victim's alleged reputation for promiscuous sexual activity is immaterial to that inquiry."); State v. Green, CCA No. 01-C-01-9002-CC-00045, 1990 WL 143777 at *4 (Tenn. Crim. App. Oct. 3, 1990) (victim testified that "she had been previously married, that her male friend Dan Goff 'took care of me' on a regular basis, and seemed to have understanding of the sexual activity that was taking place without protest between her and Grover Green").

Marital Status

State v. Soura, 796 P.2d 109, 110 (Idaho 1990) ("The woman's [victim's] husband, like his wife, was a person with mental disabilities. The woman's husband worked as a night janitor in a local motel."); State v. Green, CCA No. 01-C-01-9002-CC-00045, 1990 WL 143777 at *2 (Tenn. Crim. App. Oct. 3, 1990) ("While a resident at another nursing home she married a male resident there, and they lived in the nursing home as husband and wife until his death.").

Social Consequences

People v. Cratsley, 653 N.E.2d 1162, 1166 (N.Y. 1995) ("Complainant displayed no understanding that defendant was married, or that engaging in sexual conduct with him might be considered inappropriate."); Righter v. State, 752 P.2d 416, 421 (Wyo. 1988) ("While both [victims] were determined to understand the difference between having sexual intercourse with a woman as opposed to a man, and to some degree the social stigma often associated with homosexual relations, neither victim was considered to be capable of making adult rationalizations or decisions about the activity itself, or to understand the ramifications of adult relationships which include sexual activity.").
McQuirk v. State, 4 So. 775, 776 ( Ala. 1888) ("It has been said that a woman with a less degree of intelligence than is requisite to make a contract may consent to carnal connection, so that the act will not be rape in the man ... "); State v. Soura, 796 P.2d 109, 114 (Idaho 1990) (giving no weight to the fact that victim had previously consented to marriage and to terminating parental rights in her child, the court states that "determination of capability for legal consent depends in large part on the activity involved and the purposes of the laws governing that activity"); People v. Whitten, 647 N.E.2d 1062, 1067 (Ill. App. Ct. 1995) (illustrating the benefit of the "totality of circumstances" test: "Complainant could knowingly consent to sexual relations with one person and yet be unable to knowingly consent with another."); State v. Peters, 441 So. 2d 403, 409 (La. Ct. App. 1983) ("It seems beyond question that competency to testify is not the same as the capacity to understand the nature of the sexual act. There is a vast difference between understanding the distinction between the truth and a lie and understanding the nature and consequences of a sexual assault."); State v. Ortega-Martinez, 881 P.2d 231, 239 (Wash. 1994) ("It is important to distinguish between a person's general ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation. ... The evidence supporting a finding that S.G. had a condition which prevented her from understanding the nature or consequences of sexual intercourse at the time of the incident includes the following. S.G.'s case manager testified, 'If you teach her something in one situation, she wouldn't necessarily understand that same thing applied in another situation unless she experienced that.'").

Metzger v. State, 565 So. 2d 291, 292 (Ala. Crim. App. 1990) (defendant was the victim's brother-in-law); State v. Soura, 796 P.2d 109, 110 (Idaho 1990) ("Soura worked as a nurse's aide for a quadriplegic man who lived near the [victim] and her husband. ... During the early part of 1987, Soura and the [victim] spent a great deal of time together socializing while her husband slept or worked. Soura and the woman soon began to have sexual intercourse together. In early April, Soura moved into the couple's trailer, where the acts of sexual intercourse continued ... "); People v. McMullen, 414 N.E.2d 214, 215 (Ill. App. Ct. 1980) (defendants and victim were students at Urbana High School); People v. Cratsley, 653 N.E.2d 1162, 1163 (N.Y. 1995) (defendant was a cousin of victim's stepfather); People v. Easley, 364 N.E.2d 1328, 1330 (N.Y. 1977) (defendant Easley was "a family friend; for five years immediately preceding the occurrence he was a close neighbor and ... had actually been a member of the grandmother's household for three weeks").
Defendant Is a Service Provider

People v. Whitten, 647 N.E.2d 1062, 1066-67 (Ill. App. Ct. 1995) ("[Defendant] knew complainant was developmentally disabled and he knew this before entering her room; he knew that he was violating the rules of employment and possibly the criminal law by not obtaining complainant's permission before entering her room; he knew that he had no direct duties to discharge with CLA residents; he knew that he was in a position of trust and authority in his relationship with complainant . . . he knew that he should not be having sexual relations with anyone, while on duty, considering his responsibility for the safety of the CILA residents under his supervision; [and] he committed the act when he knew no one of authority would be around, indicating that this was a planned encounter and not a spur-of-the-moment act . . . .

These circumstances indicate that defendant knew, intended, and had the capability to take sexual advantage of one who was unable to give knowing consent because of the disparity not only in IQs but also in defendant's ability to use his position of power and authority over complainant."; State v. Underhill, No. C9-92-2058, 1993 WL 165682 at *1 (Minn. Ct. App. May 18, 1993) ("Respondent Michael Dwayne Underhill was retained as a 24-hour care provider for J.A.G. [victim] in January 1990."); People v. Patterson, 560 N.Y.S.2d 357, 358 (N.Y. App. Div. 1990) ("While the defendant was a personal care aide at an adult home, he twice sodomized and once attempted to sodomize a resident of the home."); People v. Dixon, 412 N.Y.S.2d 42, 42 (N.Y. App. Div. 1978) ("Defendant was the bus driver for Alternatives Industry . . . which employed persons who were mentally or physically handicapped. One of the employees was Rosalie Miller who was 28 years of age and was a regular passenger on defendant's bus."); State v. Willis, 370 N.W.2d 193, 198 (S.D. 1985) ("S.R. and C.F. were both mentally retarded adult females; both were under the influence of appellant, as well as his supervision . . . using his authority figure, he isolated the females to prepare and accomplish his plan, namely, to sexually take advantage of them; both females were placed in fear because of appellant's size and his expression of the loss of their privileges; both females were warned or threatened not to tell anyone. Using his official position of dominance and superior intelligence, coupled with his superior size and strength, appellant ravished the physically mature, yet vulnerable, females.").
| Defendant’s Mental Abilities | Ely v. State, 384 S.E.2d 268, 269 (Ga. Ct. App. 1989) (Appellant “has a verbal IQ of 73; a performance IQ of 72; and a full scale IQ of 72. He is classified as being in the lower portion of the borderline range. His mental age is 11.2.”); People v. McMullen, 414 N.E.2d 214, 219 (Ill. App. Ct. 1980) (Craven, J., dissenting) (“It cannot be, in this most unfortunate fact situation, that the victim was not capable of consent by reason of her incapacity while the defendant, with the same incapacity, is guilty of rape because he failed to appreciate the inability to give consent.” (emphasis added)); Adkins v. Commonwealth, 457 S.E.2d 382, 384 (Va. Ct. App. 1995) (Defendant’s sister received his social security check “because he is not capable of handing his own money.”). |
| Testimony of Experts/Laypersons | State v. Tunis, No. 94-03-0582, 1994 WL 710948 at *1-*2 (Del. Super. Ct. Nov. 18, 1994) (Despite lay testimony establishing that mentally retarded victim has a chronological age of 52, is incapable of independent living but can work under supervision, and victim’s own testimony, defendant was acquitted on appeal because, in part, of the lack of “medical testimony or expert testimony as to the victim’s mental illness or mental defect. There was no direct testimony from any witnesses concerning the victim’s capacity to appraise the nature of the sexual conduct which the defendant was charged to have committed.”); People v. Cratsley, 653 N.E.2d 1162, 1166 (N.Y. 1995) (“People who observe the complainant daily—family members, teachers, employers—are often most familiar with his or her capacity to cope with challenge and can illuminate for the jury the complainant’s ability to understand and cope with a sexual encounter.”); State v. Kingsley, 383 N.W.2d 828, 831 (N.D. 1986) (Levine, J. concurring) (“I believe the State should, in cases like the instant one, present testimony of a medical expert on the subject of mental defect or mental disease and its effect on a particular individual’s comprehension.”); State v. Green, CCA No. 01-C-01-9002-CC-00045, 1990 WL 143777 at *2-*3 (Tenn. Crim. App. Oct. 3, 1990) (Evidence was insufficient to prove that mental defect rendered victim incapable of appraising nature of conduct: “No psychologist or psychiatrist testified.” Evidence presented by victim’s family physician “inconclusive at best.”). |
State v. Soura, 796 P.2d 109, 114 (Idaho 1990) ("Concerning the woman's capability to consent to marriage and sexual relations with her spouse, understandably the law has granted leeway so that even persons of limited intelligence, such as this woman and her husband, may exercise their constitutionally recognized right to marry and procreate. Marriage has long been favorably recognized in our society as one of the fundamental institutions upon which our society is founded. Accordingly, the laws reflect a certain favorability toward creating and maintaining stable and harmonious marriages. The same cannot be said about non-marital sexual relations which are not considered by society in a favorable light, in part because of the difficult consequences that may follow, e.g., unplanned pregnancy, single parent families, divorce, venereal disease and AIDS. The laws reflect this societal attitude against non-marital sexual intercourse and aim to protect those most vulnerable, due to unsoundness of mind or immaturity, from incurring some of the resulting difficult consequences."); State v. Olivio, 589 A.2d 597, 604 (N.J. 1991) ("This Court has expressed its concern about unenlightened attitudes toward mental impairment and about the importance of according the mentally handicapped their fundamental rights. . . . Moreover, as earlier noted, the Legislature itself was solicitous of the status of mildly-impaired adults in attempting to narrow the scope of the statute's protection. . . . These significant policy considerations commend a narrow interpretation of the concept of mentally defective under [N.J. Stat. Ann. § 2C:14-1(h) (West 1983)] . . . ."); Righter v. State, 752 P.2d 416, 419 (Wyo. 1988) ("The statute in question expresses a public policy goal of protecting a class of particularly vulnerable citizens from sexual exploitation. Simply because the Wyoming legislature has chosen to more severely punish one engaging in the conduct proscribed by § 6-2-302(a)(iv), than other states, does not in itself render the statute unconstitutionally vague.").