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# Capacity to Consent to Sexual Activity among Those with Developmental Disabilities

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# I. Author's Note

When I first began looking for guidance on the issues of capacity to consent among people with developmentally disabled, I had significant difficulty finding any clear authority on the issue. Instead, what I found were dozens of individuals, who either possessed developmental disabilities themselves or had a child who did, asking the same questions I was attempting to answer through online forums or chatrooms. Many expressed concern that they or their partner would be violating the law if they engaged in a sexual relationship. One woman lived with her husband, but planned to travel on vacation to a different state and she was unsure whether that state would respect their marriage or if her husband could be arrested if they had sex while on their trip. The answers to these sorts of basic questions, about what many would consider fundamental rights, are hopelessly complex and shrouded in abstract legal terminology. As a result, there is little chance that the standards, as they are written, can be meaningfully understood by those whom they govern. My hope in creating this guide is to improve the understanding of those with developmental disabilities as to what their sexual rights are, to inform their families as to what the legal standards are that will apply, and finally, to help both parties identify when such standards have been violated in cases of rape or sexual abuse.

# II. Introduction

The law surrounding the capacity of people with developmental disabilities to consent to sexual activity is characterized by an inherent tension between a desire to protect these individuals from harm and a fear of inhibiting their autonomy.<sup>1</sup> This theme runs throughout much of the case law on the topic and informs state legislature's choices in drafting the language of assault statutes.

As a society, we seek to protect vulnerable populations from abuse. In doing so, we draft laws offering additional protections for those most susceptible to harm and least equipped to defend themselves from it. In addition, persons with disabilities living in the care of the state have a constitutional right to protection from harm. (*Reed*, 1997). Studies show that people with developmental disabilities are sexually victimized at significantly higher rates than the rest of the population. (Morano). As a result, additional statutes and guidelines have been put in place to prevent offenders from using "consent" as a defense to sexual assault charges, where the victim lacked the requisite capacity to consent to sexual activity.

However, it is also true that people with developmental disabilities have the same sexual abilities and desires as those without. Justice Douglas wrote in 1942, "Procreation...invokes one of the basic civil rights of man and a basic liberty." (*Skinner v. Oklahoma*). The sexuality of people with developmental disabilities and their right to engage in sexual behavior are frequently

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<sup>1</sup> Though the correct term is "persons with developmental disabilities," other outdated terms such as "mentally retarded," "imbecile," or "mentally incompetent" may appear throughout the paper where quoting from a case, statute, or other outside source. These terms, though no longer correct, are still used in several state statutes, which have not been updated for many years.

ignored or overlooked. Statutes intended to protect these individuals, in some cases, restrict them from engaging in any sexual activities at all. Denying the sexuality of the developmentally disabled community significantly inhibits those individuals' autonomy and prevents them from enjoying fundamental human experiences.

Trying to navigate this line between protecting freedoms and protection from harm has proved challenging. Each state has drafted a standard for determining capacity to consent to sexual activity. In judicial settings, the court is then tasked with applying these standards to the facts of the case at hand—knowing that the determination will carry significant implications for the individual in question. Finding the individual incapable of consenting risks condemn them to an asexual existence, even where they may be capable of meeting the standard under different circumstances. Finding them capable of consenting makes the sexual abuse case harder to prosecute and may allow their abuser go free if the prosecution is not able to show lack of consent through other evidence.

Education plays a crucial role in terms of providing developmentally disabled individuals the information necessary to understand sexual conduct, as well as to identify and report abuse. However, family members and care providers should also ensure that they are informed and engage with the individual on this topic as well. Too often parents and caretakers of people with developmental disabilities fail to consider their sexuality or open a dialogue around the subject for fear of embarrassment or out of a misplaced sense of propriety. These relationships may be critical in terms protecting them from sexual abuse and reporting abuse when it occurs.

### **III. Historical Background**

#### **A. The Eugenics Movement**

The eugenics movement in the early twentieth-century was a “major factor in initiating the differential treatment of [persons with developmental disabilities.]” (Denno, 1997). The impetus behind the movement came from increased concern about genetic inheritance of developmental disabilities, based on the theories espoused by Darwin decades earlier. This notion was coupled with a growing fear that such individuals were dangerous to society. (Denno, 1997). Many of the scientific and popular works of the twentieth-century advanced the idea that those with developmental disabilities were “criminals,” “prostitutes,” or “parasites,” encouraging the public to believe that such a condition was both inherited and correlated with social ills. (Denno, 1997). As a result, the movement to segregate the “dangerous minority” enjoyed widespread support. This time period saw dramatic increases in rates of institutionalization. (Denno, 1997).

The institutionalization process had twin goals of separating those with developmental disabilities from the rest of society as well as separating individuals with developmental disabilities from one another. Institutionalization “included a separation of the sexes in order to prevent sexual activity and its consequent ‘social burden.’” (Denno, 1997). During this time period, developmentally disabled women were seen as both more sexually promiscuous, but also

more fertile. Many believed a causal relationship existed between the two. Part of the eugenics movement aimed to contain developmentally disabled women for the purpose of restricting their sexuality and ability to pursue romantic relationships. These concerns disproportionately affected women though men were also discouraged from engaging in sexual behavior.

## B. Sterilization

In addition to institutionalization, officials began recommending the selective use of sterilization. This practice was particularly favored among individuals who were returning to communities after undergoing institutionalization. (Denno, 1997). Its popularity stemmed, in part, from the increased focus on genetic transmission of developmental disabilities during the early part of the twentieth century.

The infamous 1927 Court decision of *Buck v. Bell* upheld the constitutionality of involuntary sterilization. In the decision, Justice Holmes wrote, “Society can prevent those who are manifestly unfit from continuing their kind...[noting with respect to the plaintiff that] three generations of imbeciles are enough.” (*Buck v. Bell*, 274 U.S. 200 (1927)). Ten years later, twenty-five states had passed legislation allowing for forced sterilization of individuals with developmental disabilities. This shift reflected both concerns about genetic inheritance as well as a desire to repress or deny the sexuality of the developmentally disabled population.

However, following WWII, which highlighted the dangers of eugenics as well as the atrocities inflicted by the Nazis against those with developmental disabilities, the practice of sterilization fell out of favor in the U.S. (Denno, 1997; Morano, 2001). Though the period of eugenics and forced sterilizations ended, it is important to note that undercurrents of these rationales still inform or color the laws regarding capacity to consent. In some cases, the statutes have not been updated since the early 1900s and such thinking is still palpable in many of the older cases.

## C. Deinstitutionalization

Social attitudes toward the practice of institutionalization shifted with the advent of the civil rights movement and a series of exposés depicting the living conditions that existed within these institutions. (Denno, 1997). The deinstitutionalization movement began in the 1970’s and 1980’s. Many individuals with developmental disabilities were moved out of institutions and back into communities. The social ideology during this period also changed. No longer was it considered appropriate to infringe on the fundamental rights of those with developmental disabilities, including their reproductive rights. (Denno, 1997).

As these individuals returned to mainstream society, the issue of capacity to consent became more salient. States have struggled to draft legal standards that both protect their right to sexual expression, while at the same time ensuring that they are offered sufficient protection from sexual abuse.

## IV. Current State of the Field

### A. Sexuality and Ability

Persons with developmental disabilities possess the same “feelings, urges, and sexuality” as those without them. (Denno, 1997). Despite stereotypes of those with developmental disabilities as being either hypersexual or “childlike” in possessing no sexual capacity at all, research has proven that they experience the same sexual desires and impulses. A 1982 article in *Pediatric Annals*, confirmed that those with developmental disabilities are no different in terms of their desires and capacities— “[their] reproductive ability, sexual interests, and sexual activity range from high to low, identical to the range of the general population.” (Johnson and Johnson, 847).

Many studies have noted that, “ignorance of th[ose with developmental disabilities] about their own sexuality persists due to the hesitance of parents and institutional staff to broach these issues; such ignorance of sexual matters has been suggested to make the[m] ironically *more* vulnerable to sexual abuse.” (Morano, 2001). Parents, teachers, and caregivers sometimes deny the sexuality of someone with developmental disabilities—most often by failing to recognize that he/she possess those capabilities and desires because they themselves would be more comfortable ignoring the individual’s sexuality rather than attempting to address it. Many simply choose not to address the issue in hopes that it will go away.

### B. Lack of Sex Education

Despite having the same levels of sexual interest, developmentally disabled persons often lack the same educational opportunities as many of their peers. “The sexual behavior and moral outlook of individuals [with developmental disabilities] are learned and reinforced by their environment, parent, educators, and institution and group home staff have a pivotal role in shaping these minds.” (Morano, 2001). Still, the subject remains taboo within the developmentally disabled community. In addition to whatever limitations might accompany one’s developmental disability in terms of refusing sexual advances, these difficulties are frequently augmented by a lack of sex education. Too often, “parents, special education instructions, and institutions open the door to abuse by shying away from any biological instruction either from a misplaced sense of propriety or an unawareness of the importance of such instruction in preventing sexual abuse.” (Morano, 2001).

Without sex education classes or other means of obtaining information, developmentally disabled persons are left uninformed about sex from both from a social and biological standpoint. They frequently lack knowledge in terms of how to identify sexual activity, as well as the risks that accompany it. In addition, those without proper education do not learn approaches to mitigate these risks. Many people with developmental disabilities are at a profound disadvantage compared to their peers in terms of being able to identify and resist unwanted sexual advances.

Finally, and of most interest to this paper, people with developmental disabilities are too often uneducated and ill-equipped to identify instances of sexual abuse and understand the critical role consent plays in sexual encounters. When there is nonconsensual conduct, they are often less apt to report sexual abuse— both because they are unfamiliar with the terminology and because they have difficulty recognizing sexual abuse when it happens. For these reasons, sex education plays an important role in providing individuals with developmental disabilities the tools necessary to understand the crucial differences between consensual and nonconsensual sexual conduct.

There is an unmistakable tension between the sexual desires and abilities of people with developmental disabilities and the lack of sexual education they receive. Without information and instruction, many may be unable to distinguish between appropriate and non-appropriate sexual conduct. This puts them at a distinct disadvantage in terms of recognizing and reporting sexual abuse.

### C. Increased Likelihood of Victimization

Developmentally disabled individuals are “especially vulnerable to abuse and exploitation. It is estimated that these individuals are victimized at 4 to 10 times the rate of the general population” (Morano, 2001). Studies suggest that between 25% and 85% of developmentally disabled individuals have been the victim of sexual abuse. (Morano, 2001). Researchers have offered several theories as to why individuals with developmental disabilities may be especially prone to abuse. These include: “ingrained reliance on caregiver authority figures,” “social insecurities,” “ignorance of sexuality and sexual abuse,” lack of “judgment in assessing other people’s motives” as well as “naiveté” combined with a “tendency to be nonassertive” and follow direction. (Morano, 2001; Craft and Craft, 1981). Though it is unclear which of these factors may contribute to the heightened rate of victimization, the underlying premise that additional legislative safeguards are needed to protect individuals with developmental disabilities from sexual exploitation is supported by data.

Many of these sexual abuse cases follow similar patterns. The majority of offenders in these cases are direct care or service providers (28%). (Soseby and Doe, 1991). This category includes staff members, personal care attendants, transportation providers, and psychiatrists. Family members is the next most populous group, followed by acquaintances, informal service providers, and finally, dates. (Soseby and Doe, 1991). In criminal proceedings against these offenders, some victims with developmental disabilities are not able to effectuate resistance in the ways required by sexual assault statutes. As a result, some proceedings rely on the ability of the prosecutor to show that the victim lacked capacity to consent where they are not able to otherwise demonstrate resistance or the use of force.

## V. Problems and Paradoxes

Though each state has attempted to set forth its standards for capacity to consent in the statute and accompanying case law, it should be noted that the law is a blunt and imperfect instrument

for assessing this question—one that has ethical, contextual, and social dimensions. The law is best adept to deal with concrete standards and facts. However, the majority of standards relating to capacity to consent to sexual activity are highly abstract and mutable. These cases present unique challenges in that they are highly contextual and ill suited to inflexible standards. Often experts testify on both sides as to the individual’s developmental capacities and offer directly contradictory assessments. Sometimes, the same facts are used by both parties to support differing conclusions. In addition to conflicting evidence, the majority of these cases are characterized by inconsistent application of law. Situational factors unique to each case are weighted heavily, especially where no firm numerical cutoffs exist.

Without clear boundaries and systematic applications of the law, the languages of the statutes themselves tend to provide little guidance. This lack of clarity is problematic for both parties at trial. However, it is also troublesome for those individuals who possess developmental disabilities (or care for someone who does) and wish to know what the law surrounding their own capacity to consent. The lack of authority in this area is of serious concern both for individuals who wish to better understand their own rights and for those who may engage in sexual conduct with them. Parents, relatives, educators, and other caretakers should be informed as to what legal standards are applied in their jurisdiction. Yet, the law in this area is hopelessly abstract and complex. As a result, individuals with developmental disabilities are confused and unsure as to what their own sexual rights are and ultimately fear repercussions against themselves or their partner. These struggles are too often set against the background of a society who seeks to deny the sexuality of the developmentally disabled and repress any impulses these individuals may have. Because of the lack of clear guidance on capacity to consent and the inability of those whom the statutes govern to meaningfully understand them, there is a need for additional explanation of the laws in each state as well as how they have been applied in the past.

## **VI. Capacity to Consent and Definitions**

Consent is a prerequisite for anyone who wishes to participate in sexual activity. Actions that take place in the absence of consent fall in to the realm of sexual abuse, assault, sodomy, or rape. In order for consent to be valid, the individual giving it must possess the requisite capacity to consent.<sup>2</sup> Though a person might ostensibly consent to sexual activity, this consent is only valid

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<sup>2</sup> Though perhaps less controversial, the law surrounding capacity of developmental disabilities to consent to marriage is similarly vague and complex. Marriage is a contract and void if one party is incapable of consenting to the contract and its terms. Generally speaking, “A person lacks the capacity to consent to a marriage where he or she is unable to understand the nature, duties, obligations, and effect of marriage.” (52 Am. Jur. 2d Marriage § 22). Previously, individuals were presumed incompetent to marry once committed to a care facility or psychiatric institution, but this is no longer the case. (*Lakeside State Bank v. Dearmond*, 1983). Today, the validity of marriage is determined by state law, so there is no singular governing standard for when a marriage can be annulled due to the lack of capacity of one party. However, as American Jurisprudence notes:

if they are deemed capable of consenting. Some groups, such as children under the age of 13, are *per se* incapable of consenting. The same is true for those with developmental disabilities who fail to meet the standards for capacity set forth in the state statutes and case law.<sup>3</sup> In these case, an individual is deemed incapable of consenting regardless of the facts of the case, including any actions or statements they may have made.

## A. State Statutes

All fifty states have a rape/sexual assault statute defining the crime for that state. These statutes vary, but the majority define rape, and sexual abuse more broadly, as an act that takes place “without consent” of one of the parties involved. This notion of consent is predicated on the individual in question first possessing the “capacity to consent.” In determining which individuals possess the capacity to consent, states differ widely. However, most seek to put forth a test or other standard that individuals must meet in order to be deemed capable of consenting to sexual activity. There is significant variation in how high states choose to set this bar to be deemed capable and what characteristics one must possess to meet this standard.

States differ in approach. Some set forth a separate statute defining capacity to consenting in the case of sexual activity. Others carve out exemptions for individuals who are categorically unable to consent within their rape or sexual assault statute. In these cases, the terms used in the statute such as “developmentally disabled” will be defined in a separate section of the criminal code. As a result, whether an individual is deemed capable of consenting depends primarily on the standard that state chooses to apply as well as how the relevant terms in the statute are defined.

## B. Judicial Case Law

The legal standards set forth by each state in the statutes and surrounding law are applied and interpreted by courts within the state. It is in these cases where lines are drawn in terms of

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‘The courts have also compared the capacity to marry with the capacity to contract generally, and have concluded either that no greater, if as much, mental capacity is required for marriage as for other contracts, or that even less capacity is required for marriage than for the conduct of ordinary business, so that persons unable to handle their business affairs may nevertheless contract for a valid marriage.

The view has been expressed to the effect that mere weakness or imbecility of mind is not sufficient to void a contract of marriage unless there is such a mental defect as to prevent the party from comprehending the nature of the contract and from giving his or her free and intelligent consent to it, and that a mere weakness of mind will not void a marriage contract unless the weakness is so considerable as to amount to derangement. Ordinarily, mental incapacity must relate specifically to the contract of marriage in order to affect it.’

(52 Am. Jur. 2d Marriage § 22).

The differing standards for capacity to marry and capacity to consent to sexual activity allow for the logical possibility that an individual would be able to marry but not engage in sexual relations with his or her spouse. It should be noted that state laws relating to capacity to marry are rarely enforced.

<sup>3</sup> Even where the victim was found incapable of consenting, many states still require that the prosecution as prove that the defendant either “knew or should have known” of the victim’s incapacity. For this reason, not all cases where the individual is deemed incapable of consenting result in guilty verdicts.

determining whether capacity to consent existed in a particular factual circumstance. Looking at judicial decisions helps to flush out the meaning behind the terms of the statute and provides examples of individuals on either side of the line, inviting for more concrete comparisons. Though the laws may be applied unevenly by different courts, these cases provide illustrative examples and tangible criteria that the court looks to in order to make determinations.

It is worth noting, as some opinions do, that a finding that an individual was incapable of consenting in one instance does not necessarily preclude him/her from being able to consent at another instance in the future, as in many cases the factors the court looks to are situational or dynamic and may change over time.

In addition, it is important to consider that many sexual relationships are undertaken by individuals with developmental disabilities without ever giving rise to criminal proceedings. Sexual assault cases are almost always brought on behalf of the individual themselves with the help of a parent, family member, or other guardian. As a result, they almost always reflect instances where these relatives felt that the event was non-consensual. In rare circumstances, the individual in question will maintain that the sexual relationship was consensual, yet his/her parents or guardians will seek the state's help in prosecuting the case despite these assertions. However, in the overwhelming majority of cases, where the individual with developmental disabilities has positive feelings towards the sexual relationship and believes that he or she did consent, no charges are ever filed.<sup>4</sup>

## **VII. VI. Six Standards for Consent**

Though there is significant variation in language and application of consent standards from state to state, by and large, they fall in to one of six categories. Each of these categories is broadly defined below. They range from expansive to narrow and differ in terms of requirements. The most stringent standard requires not only an understanding of the nature and consequences of sexual conduct, but also an appreciation of the moral dimensions of the decision to engage in such conduct. (Denno, 1997). Others require only a fundamental understanding of the sexual nature of the act. The significant variation between states means that someone who may be incapable of consenting in one part of the country could easily meet the standard for consent in

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<sup>4</sup> It is important to stress that the overwhelming majority of these cases were originally presented and described as sexual abuse rather than a consensual encounter. Cases exist where the individual and his/her family differ on whether the incident was consensual, and the state brings a case against the defendant according to the family's wishes, but they are extremely rare. Rarer still are cases where the individual and their family both wish not to press charges, and the state seeks to prosecute anyway without their support. As a general rule, the state does not interfere where the individual with developmental disabilities and their family both agree that the relationship was consensual (even if they do go forward, these cases are very difficult to win without the victim's testimony). Individuals with developmental disabilities who are engaging in consensual relationships need not be overly concerned with the risk that their partner will be prosecuted. In such instances, the state only becomes aware of the relationship if someone brings it to their attention and even then, they will likely choose not to pursue a case where both parties believe the relationship to be consensual. In short, where both parties and their families feel the relationship is consensual, there is little danger of prosecution.

another. In addition, because the evaluation is often highly contextual, an individual who is incapable of consenting in one circumstance may be capable in another.

## A. Morality

Colorado and five other states employ what can be broadly termed a “morality standard” in determining whether an individual possess capacity to consent. The morality standard poses the highest bar for capacity. States applying this standard require the developmentally disabled individual have both an understanding of the nature and consequences of sexual conduct, as well as an appreciation of the moral dimensions of the decision to engage in such conduct.<sup>5</sup> (Denno, 1997). Courts are careful to note that such a standard does not seek to pass judgment on the morality of the individual’s decision to engage in sexual conduct, but merely seeks to ascertain whether they understand the social mores surrounding sex whether or not they chose to abide by them.

## B. Nature and the Consequences

Thirteen states apply either a “nature *and* the consequences test” or a “nature *or* the consequences test.” Both versions of this standard have been applied as functional equivalents. States employing this standard require that individuals be able to comprehend the nature of sexual activity as well as its potential consequences, such as pregnancy and sexually transmitted disease. (Denno, 1997). In applying this test, courts consider only these physical consequences rather than social ones.

## C. Totality of the Circumstances

Illinois applies a “totality of the circumstances” test, which builds upon elements used in other standards. Illinois expands upon the requirements of the nature and consequences test to consider the context and facts of the incidence in question—specifically the victim’s situation at the time of the crime and the perpetrators intent. (Denno, 1997).

## D. Nature of the Conduct

Twenty-one states including California apply a “nature of the conduct” test. In order to consent in these states, individuals must understand the sexual nature of the conduct and be able to voluntarily participate. However, the standard does not require any additional understanding of potential risks or consequences of sexual activity, nor of the moral or social dynamics of the act.

## E. Judgment

Georgia and Minnesota apply a “judgment” test. This standard for capacity requires only that the victim be able to “exercise judgment regarding consent to sexual activity.” (Denno, 1997). This

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<sup>5</sup> Many scholars have criticized the morality standard as holding developmentally disabled persons to a higher standard than the rest of the general population, suggesting that such a standard may preclude many teenagers from engaging in sexual activity if applied to them. (Denno, 1997).

test does not incorporate any concrete criteria for making such a determination, beyond this flexible wording.

## F. Evidence of Disability

Eight states including Massachusetts have no specific test, but instead look to evidence of the individual's disability in determining capacity to consent. In these cases, courts simply assess the extent of the individual's developmental disability in determining whether they possess capacity.

# VIII. Capacity to Consent by State

## Alabama

1. Definition - "incapable of consent" by being "mentally defective." Ala. Code § 13A-6-70(c)2 (2015). "Mentally defective" means a disease or defect which renders him incapable of appraising nature of conduct. Ala. Code § 13A-6-60(5).

Ala. Code § 13A-6-63. Sodomy in the first degree provides: (a) A person commits the crime of sodomy in the first degree if: . . . (2) He engages in deviate sexual intercourse with a person who is incapable of consent by reason of being physically helpless or mentally incapacitated;

Ala. Code § 13A-6-64. Sodomy in the second degree provides: (a) A person commits the crime of sodomy in the second degree if: . . . (2) He engages in deviate sexual intercourse with a person who is incapable of consent by reason of being mentally defective.

2. Tests - Nature and Consequences Test - Metzger v. State, 565 So. 2d 291 (Ala. Crim. App. 1990)( Court relied on expert testimony in determining that victim had a mental defect "which rendered her incapable of appraising the nature of her conduct.").

Factors considered:

- Victim was 29
- Expert's opinion was that victim was "in the mildly retarded range" with a mental capacity of an average 8 year-old.
- Lived with her mother all of her life and could not be left home unattended or care for her child.
- Could only write her name but not spell, could count to 10
- She was not employed
- She received Social Security disability
- Did not know that she could become pregnant and had never before or since had sexual relations with others and bore the defendant's child

Generally Alabama applies the "nature and consequences" test. However, earlier opinions contained language applying the "morality test" even though the same statutory definitions were being construed. See, e.g., Brooks v. State, 555 So.2d 1134 (Ala. Crim

App. 1989)(in addition to IQ of the victim, the court focuses on whether the victim will understand “the ostracism or other noncriminal sanctions which society levies for conduct it labels as immoral.” Because of his subnormal intelligence and susceptibility to adults, he “could not have been expected to make a reasonable judgment as to the nature or harmfulness of the acts.”

Factors considered:

- Victim was 17 years old
- Resided in a group home
- Was drugged by Defendant
- IQ of 69 with a mental age of 12
- Mildly or borderline retarded
- Functional level of 8 or 9
- Received Social Security disability benefits
- Was very cooperative, compliant, and submissive with adults.

## **Alaska**

1. Definition - “Mentally incapable” means “suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person”. Alaska Stat. § 11.41.470(4).

Alaska Stat. § 11.41.420. Sexual assault in the second degree provides:

(a) An offender commits the crime of sexual assault in the second degree if

(1) the offender engages in sexual contact with another person without consent of that person;

(2) the offender engages in sexual contact with a person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state;

(3) the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed; or

(4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

Alaska Stat. § 11.41.410. Sexual assault in the first degree provides:

(a) An offender commits the crime of sexual assault in the first degree if

(1) the offender engages in sexual penetration with another person without consent of that person;

(2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) the offender engages in sexual penetration with another person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state; or

(4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

2. Test - Nature and Consequences - Jackson v. State, 890 P.2d 587, 591 (Alaska Ct. App. 1995) (“To appreciate the nature and consequences of engaging in an act of sexual penetration, the victim must have the capacity to understand the full range of ordinary and foreseeable social, medical, and practical consequences that the act entails.”)

Factors considered:

- IQ of 51-55
- Functioned at the level of a kindergartner but was intellectually less advanced than a 3-5 year-old.
- Victim’s inability to live on her own
- Worked at Wendy’s and could ride bus independently
- Inability to write or read all but very rudimentary information of name and address
- Inability to care for her child
- Rudimentary understanding of “sexual intercourse mechanics”
- Received Social Security disability benefits.

- The victim's physical appearance

See also Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1195-96 (Alaska 2009) In this negligence action against a care facility, the issue of whether the victim/plaintiff consented to the sexual advances of her caregiver/facility employee arose. The court considered the following factors in finding that the plaintiff/victim had capacity to consent to sexual relations:

- Plaintiff had suffered a disabling brain injury
- Some of sexual contact was consensual
- Evidence of plaintiff's prior consensual sexual relationships and use of birth control

Defendant was caregiver and differential power relationship existed

## Arizona

1. Definition - "Without consent" means "The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. For the purposes of this subdivision, 'mental defect' means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another." A.R.S. § 13-1401(5)(b) (2001). Alaska Stat. § 13-1406. Sexual assault; classification; increased punishment - "A. A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person."
2. Test - Nature and Consequences - State v. Johnson, 745 P.2d 81, 84 (Ariz. 1987)("[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.").

Factors considered in the court determining that the victim had capacity to consent (and thus there was insufficient evidence of "mental disorder" to submit the issue to the jury) included:

- Mental disability was from a head injury, affecting her ability to remember facts and events, concentration and abstract thinking.
- Handled her own money and used bank account.
- Had attended college (on a limited schedule) since the injury
- Able to live independently
- Normal knowledge of sex and procreation

In re David, 2009 WL 1606018 at \*3 (Ariz. App. 2009), in determining that the victim lacked capacity to consent, the court considered the Johnson factors as follows:

- IQ of 46.

- Graduated from a special needs program and attended a day treatment program
- Cannot read, write, remember abstract facts or understand more than a few words at a time.
- Operates “at a child level”
- Works cutting and capping wires
- Cannot live independently but can perform some simple cleaning tasks
- knowledge of sex and procreation appears to be limited and confused
- Limited ability to make decision and then only of things familiar to her like what TV program to watch

Freezes when she does not want to do something or feels uncomfortable - exhibiting an inconsistent ability to express herself and affirmatively make decisions.

## **Arkansas**

1. Definition - . A person commits the offense of “rape” if he or she engages in sexual intercourse or deviate sexual activity with a person who is incapable of consent because he or she is physically helpless, mentally defective, or mentally incapacitated. Ark.Code Ann. § 5–14–103(a)(2) (Supp.2009). “Mentally defective” means that a person suffers from a mental disease or defect that renders the person: (i) Incapable of understanding the nature and consequences of a sexual act; or (ii) Unaware a sexual act is occurring. A determination that a person is mentally defective shall not be based solely on the person's intelligence quotient. Ark. Code 5-14-101(4)(A).
2. Test - Nature and the Consequences - In All v. State, 2001 WL 1021728 (Ark Ct. App. Sept. 5, 2001)(unreported decision), the court found that the victim “was incapable of ‘the kind of thinking a person needs in order to know their own boundaries and protect themselves well’” in determining that she was “mentally defective.” The court determined that the victim lacked capacity by considering the following factors:
  - Victim was a resident of a nursing home
  - She suffered from cerebral palsy, which made her ‘incompetent to make important decisions regarding her body.
  - Victim’s IQ was in the bottom one percent of the general population
  - She was mentally retarded.
  - She was “seriously impaired all the time.”
  - Capable of understanding the “basic mechanics of the birds and the bees,” but that she was incapable of “the kind of thinking a person needs in order to know their own boundaries and protect themselves well.”

Fernandez v. State, 362 S.W.3d 905 (Ark. 2010)(defendant conceded that the victim was “incapable of consent due to her mental defect or mental incapacity so no analysis was required).

## **California**

1. Definition - “[A]ny person who commits an act of oral copulation, and the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, . . . The prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.” Cal. Penal Code §§ 288a, subd. (g); 289, subd. (b).  
“(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. . . .the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent. Cal. PenalCode § 261.

Consent, in this context, means “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.” (Pen.Code, § 261.6.)

2. Test - In People v. Thompson, 142 Cal.App.4th 142, 648 Cal. Rptr. 803 (Cal. App. 2006), the court determined the “consent . . . the means ‘positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.’” (Pen.Code, § 261.6.)”. In determining that the victim lacked capacity to consent, the court applied the following factors:

- Victim was 34 years old
- Lived in a group home and worked in sheltered workshops
- could not cook, use a bus, or do simple arithmetic
- could not hold down a real job, handle money, or cast an independent vote
- conversed at the level of a 9 or 10 year old and read at the level of a 7 or 8 year old
- Although she had attended high school, she was not really qualified for a diploma
- Some understanding of what sexual intercourse was but did not understand disease potential.
- Had given legal consent before on various forms

Thompson also cites various other cases and the range of abilities/disabilities found in consent caseslaw in California. In People v. Mobley, 72 Cal.App.4th 761, 85 Cal.Rptr.2d 474 (1999), the victims were found to have lacked the ability to consent as follows:

Victim 1:

- developmentally delayed but technically not retarded

- IQ was about 80.
- ability to reason was less than that of a 14 year old
- could read, dress himself, hold down a part-time job, handle money and make purchases, vote, use a microwave, and use public transportation (though he needed help to plan his itinerary)
- had attended high school and received a certificate of completion.
- had taken sex education classes and knew about heterosexual sex.
- could take in information, but he had trouble applying it to a new situation.
- had a “limited ability” to make informed choices.

Victim 2:

- developmentally delayed but technically not retarded
- 
- IQ was around 70 or 75, which was equivalent to a mental age of 11.
- had been in special education classes.
- He could read, take public transportation, hold down a job, and vote.
- He had had some sex education in school.

According to expert, both victims “if presented with homosexual advances in a threatening environment[,] would have difficulty recognizing [their] options in making a choice in that situation.” He distinguished mere “assent” from “informed consent,” which would “requir[e] a person to agree to do something ‘with enough information about what they are being asked to do’ and that they do it without threat or coercion after it has been explained to them at a level they understand.”

## Colorado

1. Definition - § 18-3-402. Sexual assault - Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if: . . (b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct. Colo. Rev. Stat. § 18-3-402(1)(b).
2. Test - Nature of the Conduct - In People v. Bertrand, 342 P.3d 582 (Colo. App. 2014), the court set forth the applicable standard as whether the victim is incapable of appraising the nature of the victim's conduct. In determining that the victim lacked capacity to consent, the court considered:
  - Victim is 26 years old but “she’s like a 15-year-old in her actions”
  - She cannot care for herself and her mother must provide food, clothing, and shelter, as well as control her finances
  - She receives social security benefits because she was disabled
  - She knew that having sex with defendant was incest and that she didn’t want to have sex with him

- Defendant approached her after she took daily medicine that he knew made her sleepy.

See also *People v. Gross*, 670 P.2d 799 (Colo.1983) (“If 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.” Gross applies a test that considers whether the victim understands the moral consequences of her sexual conduct but later case law omits this consideration. Gross victim lacked consent when:

- victim 15 years old and was mentally retarded
- Defendant was 28
- lived at times in a “dream world” and tended not to know what she was doing.

She had an extremely simplistic understanding of sexual intercourse.

## Connecticut

1. Definition - Connecticut General Statutes § 53a–65 (4) and (5) provides, “a person is physically helpless if he or she is (A) unconscious, or (B) for any other reason is physically unable to communicate unwillingness to an act or sexual intercourse or sexual contact”; “Impaired because of mental disability or disease’ means that a person suffers from a mental disability or disease which renders such person incapable of appraising the nature of such person's conduct.”
2. Test - Conn. Statutes § 53A-65(4) - ‘Impaired because of mental disability or disease’ means that a person suffers from a mental disability or disease which renders such person incapable of appraising the nature of such person's conduct.” This statute has not been applied yet in Connecticut jurisprudence. *State v. Wyman*, 173 A. 155, 156 (Conn. 1934) was decided under a prior statute that spoke in terms of a victim that is “epileptic, imbecile, feeble-minded or a pauper” but that statute has been repealed. That case noted however that “in view of the purpose of that statute . . . , 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] feebleminded,’ and so within the prohibited class, for either marriage or carnal intercourse.” This case is cited as an example of courts determining whether a victim was in a class of individuals for whom intercourse and marriage were prohibited for eugenic reasons. *Sexuality, Rape, and Mental Retardation*, 1997 U. Ill. L. Rev. 315, 343 (1997). *State v. Tozier*, 46 A.3d 960 (Conn. App. 2012)(interprets “mentally incapacitated” in the context of a drugged victim).

Although no relevant caselaw was located, the Connecticut statute is worded is similar to Mich. Stat. § 750.520a. and Oregon statutes § 163.305. Thus caselaw in those jurisdictions may be generally instructive.

## **Delaware**

1. Definition - Del. Code Annotated, title 11, section 761(j)(3) provides that ““Without consent”” means: . . .The defendant knew that the victim suffered from a cognitive disability, mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct or incapable of consenting.”  
See also Del. Code Ann. tit. 11, § 761(a), which provides, “Cognitive disability” means a developmental disability that substantially impairs an individual's cognitive abilities including, but not limited to, delirium, dementia and other organic brain disorders for which there is an identifiable pathologic condition, as well as nonorganic brain disorders commonly called functional disorders. ‘Cognitive disability’ also includes conditions of mental retardation, severe cerebral palsy, and any other condition found to be closely related to mental retardation because such condition results in the impairment of general intellectual functioning or adaptive behavior similar to that of persons who have been diagnosed with mental retardation, or such condition requires treatment and services similar to those required for persons who have been diagnosed with mental retardation.”

Test - “Nature of the Conduct” There is very little relevant caselaw in Delaware. In State v. Tunis, 1994 WL 710948 at \*1 (Del. Super. Ct. Nov. 18, 1994), the court determined that medical testimony was required to sustain burden of proof. The prosecution had offered testimony from family and friends of the victim’s mental retardation, mental age and lack of independent living skills). See also, Johnson v. State, 929 A.2d 784 (Del. 2007)(unpublished opinion)( although the victim was “mentally disabled” in this case, in determining whether she consented, the court did not apply any sort of analysis of whether she could not consent because of her disability and rather solely focused on the fact that she resisted and said no).

## **District of Columbia**

1. Statute - DC Code section 22-3003 - “Second Degree Sexual Abuse” provides: A person shall be imprisoned for not more than 20 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:. . . (2) Where the person knows or has reason to know that the other person is:(A) Incapable of appraising the nature of the conduct;(B) Incapable of declining participation in that sexual act; or(C) Incapable of communicating unwillingness to engage in that sexual act.
2. Test - “Nature of the Conduct” - There is very little relevant caselaw in D.C. See generally U.S. v. Benn, 476 F.2d 1127 (D.C. Cir. 1972)(court was addressing whether the victim was competent to testify in court and not whether she was competent to consent to

sex; court found her competent to testify but no discussion of analysis of whether she met the “nature of the conduct test.” ). See also, U.S. v. Medley, 452 F.2d 1325 (D.C. Cir. 1971)(where victim did not testify because “she had the mind of a small child, around about seven years old” and state failed to introduce any other medical or corroborating testimony of rape, rape conviction was reversed but simple assault conviction was affirmed).

Although there is no relevant caselaw, the District of Columbia statute is worded similar or identical to 18 USCA 2242, Colo. Stat. 19-3-402, ME St. 17-A, section 855, KY St 510.010.

## **Florida**

1. Definition - Fl. Stat. section 794.011(4)(e)(5) provides the following to make the crime circumstance to make the crime more serious: “The victim is mentally defective, and the offender has reason to believe this or has actual knowledge of this fact.” Additionally, subsection (1)(b) defines “Mentally defective” as “a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.”
2. Test - “Nature of the Conduct” - In State v. Dudley, App. 5 Dist., 64 So.3d 746 (2011), aff’d, 139 So.3d 273 (2014), the court determined that the victim met the definition of being “mentally defective” and also held that “mental deficiency” does not equate with “legal insanity,” rejecting argument that anyone with a sufficient mental capacity to competently testify in court cannot be found “mentally deficient.” In determining that the victim was “mentally defective,” the court considered the following factors:
  - The victim was 21 years old and had an IQ of sixty-one on her verbal IQ scale, fifty on her performance IQ, and fifty-one on her full scale, putting her at less than one percentile.
  - the victim is mentally retarded, in the moderate range;
  - Her mother put her on birth control because of an incident with a handicapped young man that made the mother fear she was being “taken advantage of” and could become pregnant from.
  - Needs constant supervision and cannot be left alone.
  - Cannot perform even the simplest arithmetic or understand abstract concept.
  - “The victim's word choices and phraseology throughout the testimony reflect the mental ability of a young child”
  - victim repeatedly referred to defendant's sexual organ as his “popsicle” and testified to the times when defendant put his “popsicle” inside her
  - special education teacher testified that victim needed constant supervision as she was not capable of self-direction and had significant cognitive limitations
  - victim had mild cerebral palsy and had been diagnosed with bi-polar disorder, and defendant was fully aware of victim's mental condition

Compare with State v. Torresgrossa, App. 5 Dist., 776 So.2d 1009 (2001), victim held competent to consent when:

- Victim in mid-30's with below average intelligence falling within the mildly mentally retarded range
- Victim was never involuntarily committed, never been adjudged incompetent, never been the subject of guardianship proceedings, and never had a guardian appointed
- Has no history of hallucinations, delusions, or psychosis, does not suffer from any perceptual disorder
- Is not precluded from entering into contracts, marrying, voting, or driving a vehicle
- Has a high school diploma, has periodically held employment and had a driver's license
- Previously had consensual sexual relations with a previous boyfriend and had discussed marriage with him.

Hudson v. State, 939 So.2d 146 (Fl. App. 2006)(expert testimony not required)

## Georgia

1. Definition - "The State had the burden of proving beyond a reasonable doubt that the victim's disability rendered her incapable of knowing and intelligent consent to the alleged sexual act, and whether or not the State had discharged this burden was for the jury to decide." Durr v. State, 229 Ga.App. 103, 104(1), 493 S.E.2d 210 (1997). There is no specific statute addressing mentally disabled victims but case law has developed in the context of the victim being coerced due to his/her disability satisfying the element of force in aggravated sodomy statute. West's Ga.Code Ann. § 16-6-2(a).
2. Test - "Knowing and Intelligent Consent" - In Melton v. State, 639 S.E.2d 411 (Ga. 2006), the court held the test is whether "the victim's disability rendered her incapable of knowing and intelligent consent to the alleged sexual act." The test met after the court considered the following factors:
  - The 29 year-old victim had an IQ of no more than 42.
  - Had the mental functions equivalent to a kindergarten or first-grade child.
  - She was on the low end of the moderately mentally disabled range
  - She had "mental functions [that] were equivalent to a kindergarten or first-grade child"
  - She was not able to understand the consequences of her actions, including sexual acts, or understand when an innocent affectionate act became sexual."
  - Lived in a group home where she was under constant supervision
  - Cannot read or write anything except her name
  - She cannot drive, use a knife or cross the street by herself.

- Was able to work at jobs doing minor tasks like pouring drinks, sweeping floors and wiping off tables.

See also Page v. State, 610 S.E. 2d 171 (Ga. 2005)(31-year-old victim that suffered from mental retardation, deafness, and seizures, and has for her entire life, found incapable of consent considering the following factors:

- Victim cannot stay at home by herself
- cannot work
- requires total supervision
- cannot communicate verbally
- cannot read or write, and only knows about five signs
- is unable to choose her own food or clothes
- whose mother testified that she functions “like a two year old or less”

Weldon v. State, 607 S.e.2d 175 (Ga.App. 2004)(fact that disabled victim feared that if she did not cooperate with advances was sufficient evidence of mental coercion in the form of intimidation to satisfy force element of aggravated sodomy. West's Ga.Code Ann. § 16-6-2(a)).

## **Hawaii**

1. Definition - “Mentally defective” is defined as “a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct.” HRS section 707-700.

Hi. Stat. § 707-731. Sexual assault in the second degree - “(1) A person commits the offense of sexual assault in the second degree if: . . . (b) The person knowingly subjects to sexual penetration another person who is mentally incapacitated or physically helpless.”;

Hi Stat. 707-732 Sexual assault in the third degree “(1) A person commits the offense of sexual assault in the third degree if: . . . (d) The person knowingly subjects to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor.

“Hawaii’s statute omits the requirement of force. . . . Sexual intercourse with a mentally defective person is all that is required for a conviction under HRS § 707–732(1).” State v. Gonsalves, 706 P.2d 1333 (Hawaii App. 1985).

Test - In In Interest of Doe, 918 P.2d 254 (Hawaii App. 1996), the state must show that the victim was “mentally defective,” (a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct) and that Defendant knew that Complaining Witness was mentally defective. The Doe court relied upon State v. Gonsalves, 706 P.3d 1333 (Hawaii App. 1985), which stated the court must evaluate “not only whether the complaining witness had ‘an understanding of the physiological elements of the sex act[,]’ but also whether she understood ‘the moral and societal elements of the act,’” considering whether the victim

understands the “moral quality” of sex, nature of stigma of extra-marital sex and medical consequences of sex. The Doe court resolved the case on other grounds, not specifically addressing factors to consider.

In State v. Gonsalves, 706 P.2d 1333 (Hawaii App. 1985), the court affirmed the finding that the victim was “mentally defective” relying upon the following factors:

- victim's IQ is 40, which is in the moderately retarded range
- She functioned intellectually at the level of “a three-or four-year-old child”
- Could not make intelligent decisions if they involved judgment
- Could only do simple tasks
- Could not think abstractly or predict outcomes / consequences

Could not take long-term consequences of behavior into consideration

## **Idaho**

1. Definition - Idaho Code § 18-6101 - “Rape is defined as penetration ., . (3) Where she is incapable, through any unsoundness of mind, due to any cause including, but not limited to, mental illness, mental disability or developmental disability, whether temporary or permanent, of giving legal consent.”
2. Test - Morality - In State v. Soura, 796 P.2d 109 (Idaho 1990), in determining whether the victim had the capacity to consent, the court stated that the applicable test was whether the victim, “understood and appreciated the physical, emotional and moral consequences of sexual intercourse with the defendant.” In making that determination, the court looked to the following factors:
  - Victim had a passive personality with an IQ of 71, placing her in the lower 2 ½ percent of the population
  - She had never held a job and could only perform menial tasks and then only under close supervision
  - She cannot perform domestic work or take trips without close supervision
  - she had not completed special education courses in high school
  - She could not understand the physical aspects of and potential disease consequences of sex and the morality of an extra-marital affair including that divorce is a possible consequence.
  - The court goes on to discuss how the law sanctions the capacity to consent to marriage at a young age while the same 15 year-old could not consent to morally objectionable conduct like having an extra-marital affair.
  - The appellate court relied upon the trial court’s observation of the appearance of the victim in court noting, “ The trial court found her answers to be slow and short; her facial expressions consisted of a “sagging jaw, mouth open ... she appeared to stare off into space at times.”

## **Illinois**

1. Definition - 720 ILCS 5/11-1.20 provides the following: “§ 11-1.20. Criminal Sexual Assault.(a) A person commits criminal sexual assault if that person commits an act of sexual penetration and:(1) uses force or threat of force;(2) knows that the victim is unable to understand the nature of the act or is unable to give knowing consent.”

720 ILCS 5/11-1.30 provides that “(a) A person commits aggravated criminal sexual assault if that person commits criminal sexual assault and any of the following aggravating circumstances exist during the commission of the offense . . . (6) the victim is a person with a physical disability”

2. Test - “Totality of the Circumstances” - In *People v. Whitten*, 647 N.E.2d 1062 (Ill. App. 1995), the court set forth the applicable test as, “to support a guilty verdict based upon the victim's inability to understand the nature of the act and to give knowing consent, the State must show that the victim had insufficient intelligence to understand the act, its nature, and possible consequences. (*People v. McMullen* (1980), 91 Ill.App.3d 184, 46 Ill.Dec. 492, 414 N.E.2d 214.) Simply understanding what is involved in an act of sexual intercourse will not be sufficient to meet this standard.” In applying this test, the court relied upon the following factors:

- understanding of the physical aspects of the sexual act itself is not enough (here that plus knowledge of where babies come from” was not sufficient because the victim did not understand the emotional consequences of sexual intercourse nor the consequences of having a baby and the effect it has on the mothers life”
- Victim was 32 years old.
- Victim’s IQ was 45-54 and second grade (9 year-old) functional / mental age
- She could not find her way around town or ride a bus by herself or shop alone or understand the value of money or babysit but could vacuum dust and wash dishes. Could not use a stove or run the washing machine.
- Defendant was a 56 year-old male and was an employee of the group home where victim lived

Similarly, in *People v. McMullen*, 414 N.E.2d 214 (Ill. App. 1980), the court found the victim mentally incapable of consent considering the following:

- 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
- never allowed to travel by herself or to go to school events alone, had never ridden a bus by herself, and could not find her own way around town
- She could not shop alone because she did not understand the value of money and was never allowed to babysit because she could not handle a crisis.

- Had some understanding of the physical part of sexual intercourse and knew where babies come from, but she did not, according to the stepmother, understand the emotional consequences of sexual intercourse or the consequences of having a baby and the effect it has on the mother's life
- IQ 45-54 with mental age of 5 with little understanding of the “implications of intercourse” and “inability to do many of the acts performed in Blunt”
- Had the mental ability of a child beginning the second grade
- Her score for social judgment and social reasoning was 2, while the mean score is 10.

In People v. O'Neal, 365 N.E.2d 1333, (Ill. App. 1977), the victim did not have the capacity to consent. Her mental age was five, and she could perform only the simplest of mental tasks. At trial, she showed little understanding of the implications of sexual intercourse.

In contrast, In People v. Blunt, 212 N.E.2d 719 (Ill. App. 1965), the court found that a prosecutrix who knew that intercourse could result in pregnancy and venereal disease, and also knew of the moral reprehensibility of illicit intercourse, was capable of consenting to the act. Her IQ was around 77 or 78, and she could travel by bus, cook, clean, shop, and babysit.

## **Indiana**

1. Definition - Rape is defined as “a person who knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct (as defined in IC 35-31.5-2-221.5) when: . . . (3) the other person is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) cannot be given.” IC 35-42-4-1 . “Mentally disabled or deficient” are not defined in the statute. Douglas v. State, 484 N.E.2d 610 (Ind. App. 1985), held that the plain and ordinary meaning of “mentally disabled or deficient” is subnormal intelligence.
2. Test - “Nature and the Consequences” In Stafford v. State, 455 N.E.2d 402, 405 (Ind. Ct. App. 1983), the court held that the “capacity to consent presupposes an intelligence capable of understanding the act, its nature and possible consequences.” The court considered the following factors in determining that the victim was incapable of giving consent “by reason of her limited intelligence, mental age of six to seven years, and the consequential limitation on her judgment”:
  - Victim was 25 and “moderately mentally retarded”
  - Victim “gave considerable detail about what had happened that day, and her story conformed to the information supplied through the Court”
  - She lives with her mother
  - She had attended special education classes.

- Able to read words up to six letters and had comprehension of what she did read. She had very rudimentary understanding about court rooms and court room procedures.
- no indication of delusional thinking or of her having any hallucinatory experiences
- Her “ understanding of the reproductive process is, at best, rudimentary.”

The Stafford court compared its victim to the victim in *McMullen*, 414 N.E. 214 (Ill. App. 1980), as follows, “ In *McMullen*, where the court concluded the victim was mentally incapable of consenting to intercourse, the victim's I.Q. was 45 to 54, the victim was passive and susceptible to manipulation, and the victim did not understand the social and psychic consequences of sexual activity, though she did have some understanding of the physical nature of sexual activity and knew “where babies come from.”

See also *Bozarth v. State*, 520 N.E.2d 460 (Ind. App. 1988)(twenty-one year old victim was deaf, legally blind, had an IQ in the 50-70 range with a mental age of a 10 year old, with only a “rudimentary” understanding of sex held unable to consent under statute; notes that “the *lack* of consent is not an element of the offense; it is the *inability* to give consent that is required to show mental disability or deficiency.”).

See also, *Johnson v. State*, 31 N.e.3d 40, 2015 WL 1407768 (Ind. App. 2015)(unpublished opinion)(the state does not have to prove “any knowledge on the part of a defendant. Rather, the intent element is expressed with respect to the defendant's purpose in arousing or satisfying sexual desires where such touching is not consented to or cannot be consented to”)(18 year old with IQ between 50-70 who could not cook, drive, be left alone overnight and was easily influenced held unable to consent).

## Iowa

1. Definition - Iowa Code § 709.4(2) provide as follows:

Any sex act between persons who are not at the time cohabiting as husband and wife is sexual abuse in the third degree by a person when the act is performed with the other participant in any of the following circumstances: . . .

(b)(1)The other participant is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.

2. Test - Nature and the Consequences” In *State v. Sullivan*, 298 N.W.2d 267 (Iowa 1980), the court stated the applicable test was:

The key issue is whether the mental strength of the victim is so far below the normal that it precludes effective resistance. *Sullivan*, 298 N.W.2d at 272; *Haner*, 186 Iowa at 1262, 173 N.W. at 226. 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. *Sullivan*, 298 N.W.2d at 272.

Although the Sullivan court held that although the portion of the statute regarding the victim's ability to know "moral 'right' and 'wrong' test" was unconstitutional, . . . we hold the remaining portion of subsection 709.4(2) protects not only completely incompetent persons but those who 'while having some degree of intellectual power and some capacity for instruction and improvement, are still so far below the normal in mental strength that they can offer no effectual resistance to the approach of those who will take advantage of their weakness.' *Haner*, 186 Iowa at 1262, 173 N.W. at 226." In finding the victim lacked the capacity to consent, the court looked to:

- victim was 25
- mental age was 8-10 years
- victim testified "that people get married and have babies, but ... doesn't know how they have babies."

In *State v. Chancy*, 391 N.W.2d 231 (Iowa 1986), the court found the victim incapable of consent where:

victim's IQ (two years prior to testing) was 64  
victim's mental age was 9-12 and classified as "mentally retarded"  
victim functioned at a fifth grade level  
she was enrolled in special education classes  
the offender was a stranger unknown to the victim  
victim was able to perform certain chores  
victim was permitted to walk home by herself

## **Kansas**

1. Definition - K.S.A. 21-5503 defines Rape as: . . . (2) Knowingly engaging in sexual intercourse with a victim when the victim is incapable of giving consent because of mental deficiency or disease, . . . which condition was known by the offender or was reasonably apparent to the offender. . . .
2. Test - Nature and the Consequences - In *State v. Jaurez*, 861 P.2d 1382 (Kan. App. 1993), the court held that, "When a mentally deficient individual's capacity 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. 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.” The court considered the following factors in holding the victim was incapable of consenting:

- victim was 16 years old at the time of the offense
- victim’s IQ was 67
- victim’s mental age was 7-8
- he had been enrolled in special education classes
- psychologist classified the victim as “educable mentally handicapped.”

In State v. Ice, 997 P.2d 737 (Kan. App. 2000), , the court notes that this standard may not require anything more than an understanding of the concrete consequences of the act and of the act itself. The court found the victim capable of consent considering:

- victim was 17 years old at the time of the crime
- victim was classified as “educable mentally handicapped”
- her IQ was about 65
- mental age was 8-9
- victim had received some sex education training in the past.
- She testified that when someone says “no” to sex, “they mean no.”
- she knows that individuals should use protection during sex and that condoms protect you from AIDS.
- She testified she knew that sex was when a man put his penis into a woman's vagina and that married people had sex if they wanted to have a child.
- She was able to identify different ways she had been sexually violated and understood the anatomical body parts that have sexual functions

She also had a basic understanding of the meaning of rape, explaining “When you don't want that person to put their penis in your vagina, you should tell them no and if they keep doing it, that's more or less a rape.”

## **Kentucky**

1. Definition - KRS § 510.060 provides that “(1) A person is guilty of rape in the third degree when:  
(a) He or she engages in sexual intercourse with another person who is incapable of consent because he or she is an individual with an intellectual disability.  
KRS § 510.010(4) defines an “Individual with an intellectual disability” means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as defined in KRS Chapter 202B”
2. Test - “Nature of the Conduct” In Hillebrandt v. Commonwealth, 2013 WL 6212240 (Ky. App. 2013), the court held that “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.” However , the Hillebrandt court

goes on to note that the evidence must show that he/she understood the sexual nature of the acts prior to the time that they occurred and not since. In determining that the victim was not capable of consent the court relied upon the following factors:

- victim's IQ was 48
- victim testified that she understood what sexual relations were, but further testified that she did not know "how babies were made."

In Salsman v. Commonwealth, 565 S.W.2d 638 (Ky. App. 1978), the court found the victim capable where:

- victim 24 years old at the time of the offense
- victim's verbal IQ was 57, but her overall score was in the 60's
- her mental age based on verbal reasoning was 10, in other areas it was 12-13
- the victim was deaf and relied on reading the lips of others
- psychologist testified that he believed she would be capable of understanding the sexual act but was unable to meaningfully resist it

"Salsman stands for the proposition that a charge of rape in the third degree cannot be proven under circumstances where the purported victim, though she has an intellectual disability, nevertheless is capable of consenting to sexual intercourse." Hillebrandt, 2013 WL 6212240 (Ky. App. 2013).

## **Louisiana**

### **1. Definition - LSA-R.S. 14:43 provides:**

A. Third degree rape is a rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of a victim because it is committed under any one or more of the following circumstances: . . .

(2) When the victim, through unsoundness of mind, is temporarily or permanently incapable of understanding the nature of the act and the offender knew or should have known of the victim's incapacity.

### **2. Test - Nature of the Conduct - In State v. Ward, 903 So.2d 480 (La. App. 2005), the court held that the applicable test was whether the "the victim was incapable of understanding the nature of the act" to determine whether she had capacity to consent. The court held that the victim was not capable of consenting, considering:**

- Victim was 20 year-old who lived with her grandmother
- experts testified that evidence of the victim's developmental disability would be readily apparent to anyone who interacted with her over a significant period of time
- expert testified that victim was "severely mentally retarded"

- -victim was in special education classes at the time of the offense
- -victim described the sexual encounter in childlike terms
- -victim's IQ was 46
- -victim's mental age was between 5.5 and 8 years
- -she scored the lowest possible score on the verbal reasoning test the psychologist administered

Similarly, in State v. Jeansonne, 931 So.2d 1258 (La. App. 2006), the court found that the victim was mentally incapable of consenting considering:

- victim was 15 years old at the time
- mental age was roughly equal to that of a first grader
- teacher testified that the victim had "mild to moderate" cognitive delays
- victim possessed some physical disabilities as well
- victim was able to coherently convey information about the act that transpired

Also, in State v. Peters, 441 So.2d 403 (La. App. 1983), the court found the victim incapable of consenting where:

- victim was 29 years old at the time of the crime
- mental age of the victim was 6-7
- victim was non-responsive to some questions

-did not know sexual terminology but instead described the incident in child-like terms

## **Maine**

1. Definition - 17-A M.R.S.A. § 253 provides that "2. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and: . . . C. The other person suffers from mental disability that is reasonably apparent or known to the actor, and which in fact renders the other person substantially incapable of appraising the nature of the contact involved or of understanding that the person has the right to deny or withdraw consent.
  
2. Test - Nature of the Conduct - In State v. Chabot, 478 A.2d 1136 (Maine 1984), a nursing home patient with organic brain disease "described as being a 'total care' patient, 'confused, disoriented,' and 'like a little baby'" found to have mental disability under statute. Mental disability can be either "reasonably apparent" or "known to the actor" and thus the statute allows for either "subjective awareness or an objective manifestation of the required disability." In reaching its conclusion that the victim did not have capacity to consent under the statute, the court relied upon the following factors:
  - Patient suffered from an organic brain disease
  - She was described as being a "total care" patient "like a baby"
  - Defendant worked as an aid in the nursing home where victim was a resident and thus the jury could infer that he knew of her condition

- LPN co-worker testified that the victim's condition would be apparent to an individual who simply “walked in off the street,”
- victim's personal physician testified that her condition would be “obvious” to anyone who observed her.

State v. Ricci, 507 A.2d 587 (Me. 1986)(16 year-old victim with “minor mental disability” described as having “difficulty in school and that her responses to stressful situations were somewhat immature” found to have capacity to consent).

## **Maryland**

1. Definition - Maryland Code § 3-306. Sexual offense in the second degree provides:

(a) A person may not engage in a sexual act with another:

- (1) by force, or the threat of force, without the consent of the other;
- (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the sexual act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;

Maryland Code § 3-301. “Definitions” provides:

(b) “Mentally defective individual” means an individual who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of:

- (1) appraising the nature of the individual's conduct;
- (2) resisting vaginal intercourse, a sexual act, or sexual contact; or
- (3) communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact.

2. Test - “Nature of the Conduct” - In Boyd v. State, 2015 WL 5945316 (Md. App 2015), the court set forth the applicable test as stating, “ individual is mentally defective when he or she suffers from a mental disability that renders him or her substantially incapable of ‘appraising the nature of the individual's conduct’”. In this case, although the victim could and did effectively communicate her unwillingness to engage in sex, the court found that she was unable to “appraise the nature of the conduct” and thus met the definition of “mentally defective individual” which could not consent. The court considered the following factors:

- The victim was 19 years old and lived with her mother
- The victim’s mother testified about her diagnosis of “mental disability” and inability to speak until she was 7 years old.
- Victim’s IEP scores were not high enough to receive a high school diploma, only a certificate. She “in a level of a third grader”

- she doesn't cook, do laundry, but can put on her own clothes and wash herself, although she has to be reminded.
- described as “autistic” and that she “can't comprehend for herself.”
- Special education teacher said she had a “moderate” disability
- Although she could identify sexual parts, she stated she did not know what sex was.

See also Edmondson v. State, 230 Md. 66 (Md. App. 1962), the court found the victim not competent to testify as a witness and additionally not competent to consent relying upon the following factors:

- -victim was 18 years old at the time of the offense
- -victim's mental age was 4
- -victim was unable to communicate clearly
- -victim used primarily sounds and gestures to communicate

-victim was not able to describe the sexual act but instead used basic terms “man” and “hurt” when attempting to convey to police officers what happened

## Massachusetts

1. Definition: M.G.L.A. 265 § 13F provides: “Whoever commits an indecent assault and battery on a person with an intellectual disability knowing such person to have an intellectual disability shall for the first offense be punished by imprisonment in the state prison for not less than five years or not more than ten years”

As discussed below, the criminal code does not offer a definition for “intellectual disability” but the Department of Developmental Services defines the term as follows: Intellectual Disability means, consistent with the standard contained in the 11th edition of the *American Association of Intellectual Disabilities: Definition, Classification, and Systems of Supports* (2010), significantly sub-average intellectual functioning existing concurrently with and related to significant limitations in adaptive functioning.

Intellectual Disability originates before age 18. A person with intellectual disability may be considered to be mentally ill as defined in 104 CMR (Department of Mental Health), provided that no person with intellectual disability shall be considered to be mentally ill solely by reason of his or her Intellectual disability. The determination of the presence or absence of intellectual disability requires that exercise of clinical judgment.

2. Test - “Evidence of Mental Disability” Although the Massachusetts Code provides a separate offense for assault and battery on a person with an “intellectual disability”, it does not define the term. Case law has provided the following definitions of the term (previously the statutory term was “mentally retarded” as set forth in *Commonwealth v. St. Louis*, 42 N.E. 3d 601 (Mass. 2015):

“A mentally retarded person is a person who, as a result of inadequately developed or impaired intelligence, is substantially limited in his or her ability to learn or to adapt to the means necessary to function effectively in the community.”

The judge made clear to the jury that mental retardation “did not play an integral role in the definition [of rape]” and, instead, was simply a factor that could be considered on the question of consent and constructive force.

The state of Massachusetts defines “mental impairment” as a disorder characterized by the display of an intellectual defect, as manifested by diminished cognitive, interpersonal, social, and vocational effectiveness and quantitatively evaluated by psychological examination and assessment.

The St. Louis court relied upon the following factors in determining that the victim suffered from an “intellectual disability” as defined in the Massachusetts Code:

- Victim was a twenty-four year old woman living with her grandparents.
- She was adopted at birth, and at the age of eight months she was diagnosed with “slow learning” and “special needs.”
- She reads at a third or fourth grade level and has a verbal intelligence quotient (IQ) of forty-seven.
- In her “permanent decree of guardianship” a judge in the Probate and Family Court found that she is “mentally retarded” and that failure to appoint a guardian would create risk to her health and welfare. The medical certificate supporting the permanent decree of guardianship details her disability as being mental retardation and states that she lacks the ability to make decisions without adult supervision.
- She acts like a 5 - 7 year-old child
- Cannot go shopping by herself and cannot complete high school classes
- The defendant was 72 and a friend of the victim’s grandparents/guardians.

Other case law interpretations include Commonwealth v. Aitahmedlamara, 63 Mass.App.Ct. 76, 823 N.E.2d 408 (Mass. App. 2005)

Incapable where:

-victim’s IQ was 27-33

-she required assistance for basic life skills including managing money, making appointments, etc.

-she needed assistance keeping track of the days of the week

-victim lived in a group home

-defendant was an employee at the living facility where the victim resided

-victim’s disability was readily apparent when responding to questions at the trial

Commonwealth v. Roderick, 411 Mass. 817, 586 N.E.2d 967 (Mass. App. 1992)

Incapable where:

- victim was in her mid-twenties at the time of the offense
- victim lived in a group-home, care facility
- evidence indicated that the victim was “severely mentally retarded since birth”
- victim was unable to speak. She could make some vocal sounds but was unable to form words. She was however able to communicate to some degree by gestures.
- defendant was an employee at the facility where the victim resided

Commonwealth v. Fuller, 66 Mass. App.Ct. 84, 845 N.E.2d 434 (Mass. App. 2006)

Incapable where:

- victim 31 at the time of offense
- left school at age 16
- has never worked or driven a car
- victim requires aid to help with her hygiene and medications
- victim is not capable of doing activities on her own such as shopping, going for walks, or to the movies
- she has not spent unsupervised time alone with friends

## **Michigan**

Definition - M.C.L.A. 750.520b provides:

A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

- (h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following: . . .
- (ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

M.C.L.A. 750.520a

Definitions:

(b) “Developmental disability” means an impairment of general intellectual functioning or adaptive behavior that meets all of the following criteria:

It originated before the person became 18 years of age.

It has continued since its origination or can be expected to continue indefinitely.

It constitutes a substantial burden to the impaired person's ability to perform in society.

It is attributable to 1 or more of the following:

Intellectual disability, cerebral palsy, epilepsy, or autism.

Any other condition of a person that produces a similar impairment or requires treatment and services similar to those required for a person described in this subdivision.

M.S.A. § 28.788(1)(f) defines “mentally incapable” as “suffer[ing] from a mental disease or defect which renders that person temporarily or permanently \*452 incapable of appraising the nature of his or her conduct.”

2. Test - “Evidence of Disability” / Morality - In People v. Breck, 584 N.W.2d 602, 230 Mich. App. 450 (Mich. App. 1998), the court held, “whether person is ‘mentally incapable,’ for purposes of criminal sexual conduct statutes, encompasses not only an understanding of physical act, but also an appreciation of nonphysical factors accompanying such an act.” Typically, Michigan is regarded as an “Evidence of Disability” test state but the Breck Case appears to change the Michigan Standard” to a “Morality” Standard modeled after the NY decision in People v. Easley: (victim could not appreciate the moral consequences of the acts “because of their inherent inability to consent to sexual relations and found that without an understanding of the moral quality of the act, a person cannot intelligently and truly consent to such an act.”)

The Breck victim was found incapable where:

- victim was 67 years old at time of offense
- mental age was 7 years old
- psychologist testified that the victim was “mentally retarded”
- psychologist testified that he did not believe the victim was capable of making an informed decision about whether to engage in sexual relations because he would not understand the long-term ramifications of safe sex or of engaging in a homosexual relationship.
- victim was described as extremely trusting and unable to differentiate immoral and moral people or make character assessments
- victim did not understand the significance of “consent” in terms of its relationship to sexual activity. He stated that he did not know that sexual activity required consent.

See also, People v. Baker, 157 Mich. App. 613, 403 N.W.2d 479 (Mich App. 1987)

Incapable where:

- victim was 34 years old at the time of the offense
- defendant testified that he knew the victim was “slow” and had trouble reading
- victim was able to be alone and did not require constant supervision

Mueller v. Bell, 275 Fed. Appx. 452, 2008 WL 482278 (6th Cir. 2008), found victim “mentally incapable” where:

- 33 year-old victim, worked at Arby under a rehabilitative services program and lived with his parents.
- was in special ed classes until he left school at age 26
- functions at the level of a 6 to 8 year-old child
- IQ between 45 - 55
- is able to learn things through repetition but can’t make “judgment calls”
- ”he’s always trying to please people” .

## **Minnesota**

1. Definition - M.S.A. § 609.344 Subdivision 1. Crime defined. A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists: . . . the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

M.S.A. § 609.341 : Definitions

Subd. 6. Mentally impaired. “Mentally impaired” means that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration.

2. Test - In State v. Ash, 2008 WL 2965555 (Minn. App.2008), a 17 year-old girl enrolled in special education classes with an IQ of 52, entered into a relationship with a co-worker. Although the individuals and the parents informed the police that the relationship was consensual, the police/prosecution went forward with the case. The defendant admitted that the two had had sexual intercourse so the court held that the only remaining issue under the statute was “whether [victim] had the judgment to give reasoned consent.” The court found that she lacked that capacity based on the following:

Incapable where:

- victim was 17 years old at the time
- IQ was 52
- Victim was enrolled in special education class in 11<sup>th</sup> grade
- victim’s parents testified that they had talked with her about sex and that they believed she understood what consent means
- her mother testified that the victim knows the difference between rape and consensual sex
- Victim had trouble testifying and said she “did not remember” the answer to many of the questions
- victim had difficulty crossing the street safely, reading directions, performing basic math operations, and communicating effectively

- she also had difficulty shopping in a store and managing money
- Special-education teacher said she was classified as “moderately mentally impaired” based on her IQ score
- Defendant was 43 year old newspaper delivery person

\*Note that this is a very close case, and the court notes that it could reasonably have gone either way. They also note that their opinion does not necessarily preclude a finding, at some time in the future, that the victim does have the capacity to consent to sex.

See also, State v. Willenbring, 454 N.W.2d 268 (Minn. App. 1990)

Incapable where:

- victim had an IQ of 68
- Mental age was 13
- psychologist testified that the victim is considered a “vulnerable adult.”

## Mississippi

1. Definition - Miss. Code Ann. § 97-3-95 “Sexual battery” defined:
  - (1) A person is guilty of sexual battery if he or she engages in sexual penetration with: . . .
  - (b) A mentally defective, mentally incapacitated or physically helpless person

Miss. Code Ann. § 97-3-97 “Sexual battery, definitions provides:

  - (b) A “mentally defective person” is one who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct.
  - (c) A “mentally incapacitated person” is one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting an act due to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent.
2. Test - Evidence of Mental Disability - In Streeter v. City of Greenwood, 2006 WL 6181441 (Miss. Cir. Ct. 2006), the parent of a “mentally retarded” woman brought a Tort Claims Act claim against the City for failure to supervise inmates who assaulted the victim. Citing the statute, the court held that the victim “lacked both the legal and mental capacities to consent. It also is unlawful for anyone to engage in sexual penetration with a mentally defective, mentally incapacitated or physically helpless person.” The court found her incapable of consent where:
  - victim was 36 at the time of the offense
  - offenders were unknown to the victim
  - victim was completely dependent on full-time caregivers

- Mental age of the victim was 5 years
- Victim was unable to make her own plate of food or perform basic functions like combing her hair

See also, Wilson v. State, 221 So.2d 100, 103 (Miss. 1969)(“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 actual resistance was not necessary to constitute the offense. . . . The allegations of force in an indictment for rape under the common law could be sustained by proof of carnal knowledge of an insane or mentally incompetent female.”)

See also, Martin v. State, 415 So.2d 706 (Miss. 1982)

Incapable where:

- IQ was 61
- victim was 16 years old at time of offense
- Mental age 7-8 years old
- victim suffered from seizures and abnormal behavior
- Doctor testified that he believed the victim was incapable of giving consent in a sexual encounter, especially under stress or pressure

## **Missouri**

Definition - Statute:

V.A.M.S. 566.031

1. A person commits the offense of rape in the second degree if he or she has sexual intercourse with another person knowing that he or she does so without that person's consent.

Under § 556.061(13), RSMo.Cum.Supp.1984, incapacitated is defined as “ \* \* \* that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act.”

2. Test - Nature of the Conduct - In State v. Buck, 724 S.W.2d 574 (Mo. App. 1986), the court opined that under the statutory definition of “incapacitated”, the issue is whether the victim “was sufficiently deranged so that she was unable to appraise the nature of her conduct.” In that case, the court found the victim unable to consent under the following factors:

- victim was a fellow inmate and was diagnosed as suffering from schizophrenia, paranoid type
- spoke irrationally about being able to see through crystals and clusters of pearls, of people killing her babies and of fluorescent lights burning her body

- insisted on removing her clothes and poured water on herself because her body was burning
- identified herself as God, heard voices that did not exist, saw things which were not there and experienced hallucinations about birds, purple rain and crystal tears.
- could not consent even to a review of her own medical records

Earlier, in *State v. Robinson*, 136 S.w.2d 1008, 1009 (Mo. 1940), the court stated the following black-letter law:

'Carnal intercourse with a woman incapable from mental infirmity of giving consent is rape, unless the man is ignorant of her infirmity and its extent, believes he has her consent, and has no intention to have intercourse without her consent.

“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. \* \* So long as the woman is capable of consenting, and does consent, the act is not rape, and this is true though the man may know that she is of weak intellect.”

In *Robinson*, because there was no evidence that the defendant knew of the victim’s limited abilities, the conviction was reversed.

See also, *State v. Hawkins*, 778 S.W.2d 780 (evidence that victim could not read or write was relevant in issue of whether she had sufficient “mental capacity” to consent to sexual intercourse).

See also, *State v. Schlichter*, 263 Mo. 561, 173 S.W. 1072 (Mo. 1915) (The court found that “her mind was such as to render her incapable of comprehending the immoral or wrongful aspect of the transaction.”) finding her incapable where:

- Victim was 18 years old at the time
- Victim suffered from severe spasms since childhood
- She was able to identify numbers on a clock but could not tell time
- Knew the value of various coins but was not able to add them together
- Only attended one month of school
- Was able to follow certain known routes to familiar places but unable to find her way if not on one of these routes
- Often did not answer when asked questions or was otherwise nonresponsive

State v. Robinson, 136 S.W.2d 1008 (Mo. 1940):

Incapable where:

-25 years old at the time

-Mental age of eight

## Montana

1. Definition - Montana Code 45-5-501. Definitions provides:

(1)(a) As used in 45-5-503, the term “without consent” means:

(i) the victim is compelled to submit by force against the victim or another; or

(ii) subject to subsections (1)(b) and (1)(c), the victim is incapable of consent because the victim is:

(A) mentally disordered or incapacitated; . . .

(G) admitted to a mental health facility, as defined in 53-21-102, is admitted to a community-based facility or a residential facility, as those terms are defined in 53-20-102, or is receiving community-based services, as defined in 53-20-102, and the perpetrator:

(I) has supervisory or disciplinary authority over the victim or is providing treatment to the victim; and

(II) is an employee, contractor, or volunteer of the facility or community-based service.

Montana Code 45-2-101. General definitions:

40) “Mentally disordered” means that a person suffers from a mental disease or disorder that renders the person incapable of appreciating the nature of the person's own conduct.

Montana Code 45-5-503. Sexual intercourse without consent:

(1) A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.

Test - Nature of the Conduct - There is no relevant case law in Montana but the statute provides that the standard applicable is whether the victim “suffers from a mental disease or disorder that renders the person incapable of appreciating the nature of the person's own conduct.” Mont. Code Ann. 45-2-101 (40).

## Nebraska

1. Definition - Statute - Nebraska Rev. St. section 28-320(1) provides, “(1) Any person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or should have known that the victim was physically or mentally incapable of

resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.”

2. Test - “Nature of the Conduct” - In State v. Doremus, 2 Neb.App. 784, 514 N.W.2d 649 (Neb. App. 1994) the victim was deemed mentally incapable of appraising the nature of his/her conduct and thus was incapable of consent. The court found that it was error to not allow the independent evaluation of the victim when the prosecution was allowed to admit expert testimony asserting that victim was not capable of understanding the sexual nature of the act, an element of the crime. The court considered the following factors in making the determination that she was incapable of consent:  
Victim was 34 years old and a resident of the same assisted living facility as defendant  
Defendant was 44 years old and was “mildly mentally retarded”  
She had “moderate” developmental delays according her doctor  
Expert testimony offered that he did not believe the victim was capable of understanding the sexual nature of the act that took place or sexuality in general

See also, State v. Rossbach, 264 Neb. 563, 650 N.W.2d 242 (2002) (there can be no consent when the victim is incapable of resisting or appraising the nature of her conduct).

Reavis v. Slominski, 551 N.W.2d 528 (Neb. 1996)(lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or of appraising the nature of his or her conduct; in civil suit for damages for sexual assault, testimony that victim had been previously sexually abused by relatives and had weakened ability to resist, plus prior sexual relations with her against her will, were sufficient to show defendant had reason to know of her incapacity to consent).

State v. Collins, 583 N.W.2d 341 (Neb. App. 1998)(victims who were college students at Dartmouth and Oberlin Colleges who were “groomed” and abused by father/psychotherapist/defendant since they were 10 held mentally incapable of resisting or appraising the nature of defendant’s actions).

## **Nevada**

1. Definition / Statute - Nevada Rev. Stat. 200.366(1) provides, “A person is guilty of sexual assault if he or she:
  - (a) Subjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim 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 or her conduct.”
2. Test - Nature of the Conduct - In Guitron v. State, 350 P.3d 93 (Nev. App. 2015), the victim was a minor but also had developmental disability. The court relied upon both

youth and developmental disability in determining that “the victim did not understand the consequences of her actions, she was incapable of giving her consent, and [defendant] knew or should have known the victim was mentally or physically incapable of resisting his conduct when he engaged in sex with her.” The court also refers to the “stigma” associated with having her father’s baby, possibly injecting more of a morality element into this state’s test. The court considered the following factors in finding the victim incapable of giving her consent:

- Twelve year-old victim was “a slow learner” in a special program at school which required her to have an Individualized Education Plan.
  - Although she was worried about becoming pregnant, the victim took One-A-Day vitamins because she believed they would prevent pregnancy.
  - Victim did not know how to care for her child, was not prepared for pregnancy, did not know how to prevent it “and did not understand the stigma associated with having her father’s baby.”
- Defendant was in his mid-40s, lived with the victim’s family and “groomed” her by telling her that loved her, he wanted to marry her, and he wanted to spend the rest of his life with her.

## **New Hampshire**

1. Definition/Statute- New Hampshire Rev. Statutes 632-A:2 Aggravated Felonious Sexual Assault provides:

(h) When, except as between legally married spouses, the victim has a disability that renders him or her incapable of freely arriving at an independent choice as to whether or not to engage in sexual conduct, and the actor knows or has reason to know that the victim has such a disability.
2. Test - “Nature of the Conduct” - In State v. Call, 650 A.2d 331 (N.H. 1994), the court merely set forth the then-existing statutory language as the applicable test (“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.’”). The statute now provides that “the victim has a disability that renders him or her incapable of freely arriving at an independent choice as to whether or not to engage in sexual conduct.” In Call, the court determined that the victim was not incapable of consent based upon the following:
  - Victim was 41 at the time of the incident
  - Living in a group home
  - Others present with the defendant testified that they were able to notice some physical symptoms of the victim’s developmental disability
  - “took some form of medication”
  - victim was able to testify coherently using the correct sexual terminology

- responded verbally to defendant's advances in real time, telling him to "cut it out" and explaining, "I told the guy to stop," indicating that she recognized his actions as sexual advances and was capable of refusing consent.
- no expert testimony was provided as to the victim's developmental challenges and no other evidence was offered.
- victim spoke coherently and expressed preferences, asking the men for a cigarette

See also, State v. Degrenier, 120 N.H. 919, 424 A.2d 412 (N.H. 1980)(statute is of unconstitutionally vague; any reasonable person would know that the term "mentally defective" was meant to describe people who are of "marked subnormal intelligence" and the statute only "prohibit[s] intercourse only with those persons whose mental deficiency is such as to make them incapable of legally consenting to the act."

## New Jersey

1. Definition/Statute - New Jersey Statutes Annotated 2C:14-2. Sexual assault provides: (7) The victim is one whom the actor knew or should have known was physically helpless or incapacitated, intellectually or mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent.
2. Test - Nature of the Conduct - In State v. Olivio, 123 N.J. 550, 589 A.2d 597 (1991), the court clarified the statutory definition of a person that is "mentally defective" for purposes of the offense of sexual assault on a mentally defective person as "if, at time of the sexual activity, the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in such conduct with another; [the] person did not have to be aware of probable serious consequences of sexual acts such as pregnancy, disease, adverse psychological or emotional disorders or possible adverse moral or social effects." The standard for defendants is that he/she "knew or should have known that the individual was incapable of consenting." The court found the victim incapable of consenting based upon the following factors:
  - IQ-65, 40-50 according to another test, 86 by another as an adult
  - considered "mentally defective," according to the Wechsler Scale and the Diagnostic Statistical Manual
  - functioned socially at about the level of a seven- or eight-year-old

- at about the fourteenth percentile among those of her age and cultural background.
- .described the sexual organs in the vocabulary of a very young child
- when she complained of the incident, she described the encounter as a “rape.”
- social maturity of only an eight-year-old child and that she functioned at a socially-inactive level.

In State v. Scherzer, 694 A.2d 196 (N.J. 1997), although the victim consented to the sexual conduct, because she was found to be “mentally defective” under the statute, her consent was ineffective. In this case, the court found the victim lacked the capacity to consent considering the following factors:

- the victim understood that she was engaging in conduct of a sexual nature but she did not understand that she had the right to refuse.
- Defendants had \*406 known her since grade school, and thus it was reasonable to infer they were aware of this defect.
- the victim’s tennis teacher testified that the victim was among those that the defendant/fellow students called “stupid” and “a retard.”
- Victim’s sister and a friend both testified that everyone knew that the victim was “different”
- Victim’s friends, family, and teachers testified to her inability to say no to any request because she wanted to please people and to her use of sexuality to make friends.
- Friend said she had never heard victim say no to any request.
- Victim’s sister related an incident that occurred when M.G. was five years old—a group of children, including defendants, persuaded her to eat dog feces—as an example of how easily led she was.
- Victim’s high school guidance counselor testified that after she learned victim was engaging in sexual conversations with a group of football players in the cafeteria and had allowed someone to touch her breast in health class, she told victim that she had a right not to allow someone to touch her body, but that she did not appear to understand the concept, especially when the person touching her was someone she considered to be a friend.

1. Definition / Statute - New Mexico Stat. Ann. Section 30-9-10(A)(4) defines “force or coercion” as “(4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act”

New Mexico Stat. Ann. § 30-9-11. Criminal sexual penetration provides:

Section D. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:

(1) on a child under thirteen years of age; or

(2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

E. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) by the use of force or coercion on a child thirteen to eighteen years of age;

(2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;

(3) by the use of force or coercion that results in personal injury to the victim;

F. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion not otherwise specified in this section.

See also Nevada Jury Instructions: Victim physically or mentally helpless, jury instructions, see NMRA, Crim. UJI 14-904, 14-908, and 14-912.

1. Test - “Nature or Consequences” - State v. Hueglin, 16 P.3d 1113 (N.M. App. 2000)(affirmed conviction of baker based on the victim’s incapacity to consent).  
Victim was 38-year-old with Down Syndrome  
Lived with a caretaker  
Apparent to defendant that victim was physically handicapped and had a speech defect.  
Victim had an IQ of 36 with a mental age of a 6 year-old child.  
Victim could understand the difference between telling the truth and a lie (found to be competent to testify).

In State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct.App.1975), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975), the court cited with approval from McDonald v. United States, 114

U.S.App.D.C. 120, 312 F.2d 847, 851 (1962) "... [A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral control." If the jury requests a definition of "mental condition," the language from *State v. Nagel*, supra, may be used because the dictionary is inadequate to define the term.

## New York

1. Definition/Statute - McKinney's New York Ann. § 130.00 Sex offenses; definitions of terms provides:

5. "Mentally disabled" means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.

McKinney's New York Ann. § 130.05 Sex offenses; lack of consent

3. A person is deemed incapable of consent when he or she is:

- (a) less than seventeen years old; or

- (b) mentally disabled

McKinney's New York Ann. § 130.45 Criminal sexual act in the second degree: A person is guilty of criminal A person is guilty of criminal sexual act in the second degree when:sexual act in the second degree when: . . . 2. he or she engages in oral sexual conduct or anal sexual conduct with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.

McKinney's New York Ann. § 260.25 Endangering the welfare of an incompetent or physically disabled person in the first degree provides:

A person is guilty of endangering the welfare of an incompetent or physically disabled person in the first degree when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself or herself because of physical disability, mental disease or defect.

2. Test - Nature of the Conduct-

In *People v. Adsit*, 125 A.D.3d 1430 (N.Y. App. 2015), the court held that in the prosecution for criminal sexual act in the second degree, based on the victim's inability to appraise the nature of her conduct by reason of being mentally disabled, the ability to appraise includes the victim being substantially able to understand what she was doing. The statute provides the "mental disease or defect render "her incapable of appraising the nature of ... her conduct." In this case, the court found the victim not capable of consent based on the following factors:

-victim had suffered a seizure and was incoherent both upon her admission to the hospital and the next day, when the incident giving rise to the charge occurred

-psychiatrist, who reviewed the victim's medical records and examined her, opined that she was suffering from a mental defect that rendered her incapable of appraising the nature of sexual activity.

See also People v. Rogers, 938 N.Y.S.2d 677 (N.Y.App. Div 2012), found that the victim lacked the capacity to consent under the following facts:

-Victim gave birth and defendant was prosecuted as a result. Found Incapable.

-IQ 68, which classifies her as developmentally disabled.

-Worked on a paper route with her mother and was able to obtain a GED

-victim functioned at a preteen level and her limited understanding rendered her “vulnerable to being in situations that could compromise her safety and her physical well-being related to sex acts.”

-The victim was unaware of her pregnancy even at the point when she went into labor. This was consistent with her statement to the psychologist that she “ha[d] no clue” what the typical signs of pregnancy are, even though his evaluation took place several months after she had given birth.

-”The jury also heard and saw the victim when she testified, providing an opportunity to assess her mental capabilities and level of understanding”

People v. Cratsley, 86 N.Y.2d 81 (N.Y.App. 1995), held that “The law does not presume that a person with mental retardation is unable to consent to sexual intercourse (Penal Law § 130.25[1] ), and proof of incapacity must come from facts other than mental retardation alone.” The court found the victim to be incapable of consent considering:

-33 year old victim

-Victim’s IQ was 50, which placed her on “the high end of the moderately retarded” range

-Although knew the purpose of the birth control pills prescribed for her was to prevent pregnancy, she did not know what pregnancy was, or “where babies come from,” and did not know about venereal disease.

-Needed assistance in managing her money

-Worked at a sheltered workshop

-Used child-like language in describing the sexual encounter.

See also, People v. Easley, 364 N.E.2d 1328 (N.Y.App. 1977)(must understand sexual nature of the conduct and consequences- some understanding of the moral dimensions and social stigmas associated with sexual behavior, (not to be confused with understanding and knowingly violating these mores)).

People v. Dean, 70 A.D. 2010 (N.Y. App. 2010), victim deemed competent when

- evidence showed that defendant's IQ of 64 and alleged victim's IQ of 52 placed them both in bottom one percent of range of human intelligence
  - they had known each other for ten years
  - prior to her relationship with defendant, alleged victim had boyfriend at sheltered workshop where she worked and that relationship was characterized by a workshop employee as a loving one
  - defense expert testified convincingly that defendant viewed the victim as his peer.
  - considered each other boyfriend and girlfriend
  - exchanged gifts
  - pictures of the two together
  - relationship characterized by director of the workshop both attended as “a loving one”
  - Court voiced concerns about criminalizing anyone who has relations with the woman
  - the victim's treating physician stated at trial that the victim related that she was happy to be having a baby.
- The record reflects that the victim was given autonomy by medical care providers regarding reproductive choices.

## **North Carolina**

### 1. Statute - N.C.G.S.A. 14-27.27 provides:

“(a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person: . . . (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.”

N.C.G.S.A. § 14-27.20 provides: (1) “Mentally disabled” means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

(2) “Mentally incapacitated” means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

### 2. Test - Nature of the Conduct

In State v. Washington, 506 S.E.2d 283 (N.C.App. 1998), the court cited section N.C. Gen.Stat. § 14-27.1(1), for the applicable standard of whether the victim was “

substantially incapable of appraising the nature of ... her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.” The court found the victim was not competent to testify at the trial based in part upon her having cerebral palsy which impairs her ability to speak and makes it “very difficult to understand much of what she says.” The court went on to find her incapable of consent under the following factors:

- Victim functions at the level of an 8 year-old, both mentally and emotionally
- She cannot make informed decisions about “anything complicated.”
- She often “freezes up” when intimidated

See also, State v. Hunt, 728 S.E.2d 409 (N.C. App. 2012), in which the victim was deemed not capable of consent considering the following factors:

- victim was the 17 year-old friend of defendant’s daughter
- Victim’s special education teacher, school resource office and social workers testified that victim was “classified as intellectually disabled in the mild category[,]” had an IQ lower than 70, and was enrolled in classes for children with learning disabilities.”
- defendant, when he was younger, was also in “Slow Learning Disability” classes, had failed the second and eighth grades and failed in his first attempt to obtain his GED.

State v. Oliver, 85 N.C.App. 1, 354 S.E.2d 527 (M.C.App. 1987), the court found the victim incapable where:

- Victim 16 years old at the time
- IQ less than 66
- Mental age 8-10 years old
- One offender was victim’s father, the other one of his friends.
- Expert testimony from doctor suggested, the victim had limited knowledge or understanding of sexuality
- The victim was deemed competent to testify at trial, and was purported to understand the importance of telling the truth
- Victim knew her age, where she went to school, and the names of her teachers
- Victim did not know where in town she lived or how long she had lived there
- Victim did not answer some of the questions posed to her by the prosecutor, but was able to answer others.

## **North Dakota**

### 1. Definition/Statute -

North Dakota Century Code §12.1–20–03, subd. 1

1. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if: . . .

e. He knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders him or her incapable of understanding the nature of his or her conduct.”

## 2. Test - Nature of the Conduct

In State v. Mosbrucker, 758 N.W.2d 663 (N.C. 2008), the court interprets for the first time the statutory language and determines that the victim must make a “knowing, intelligent and voluntary agreement to engage in sexual activity” and have “knowledge of the practical consequences of sexual intercourse such as unwanted pregnancy and sexually transmitted diseases”. In short the “person understand the nature of the sexual act as well as its consequences such as pregnancy and sexually transmitted diseases but not the moral nature of their participation in the act of intercourse.” The court also noted, “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. North Dakota Century Code § 25–01.2–03. Nor is a developmentally disabled person deprived of the right to “interact” with members of the opposite sex. NDCC § 25–01.2–03(3).” The court found the victim not capable of consenting on the following evidence:

- Victim might understand the act of sexual intercourse but would have difficulty understanding the implications of it. He said Doe would have extreme difficulty understanding sexually transmitted diseases, becoming pregnant and “the social relationships you have to understand and negotiate in order to engage in [sex].”

Victim was 18 years old.

See also, State v. Kingsley, 383 N.W.2d 828 (N.D. 2008)

Incapable where:

- Victims were 25 and 23 at the time of the offense
- no prior relationship with defendant
- knew some basic sexual, anatomical terms, but had a limited understanding of these
- had received a sexual education class, but were unable to extrapolate from the concepts learned in class.
- when asked about the defendant’s actions, for instance, one victim described him as “doing sexual education with her” rather than having sex
- misunderstood some basic health information- “she believed that pregnancy was caused ‘by having your period.’”
- when asked whether she understood what the attacker was doing and why, she said that she did not
- the victim testified that they did not understand the term “sexual intercourse” and did not know anything about “sexual relationships”
- mental age 7-10

-social worker testified to the victims' "limited abilities in areas of 'self direction, learning, and self care.'"

## Ohio

### 1. Definition/Statute -

Ohio Rev. Code 2907.02 Rape; evidence; marriage or cohabitation not defenses to rape charges:

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: . . .

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

Ohio Rev. Code 2907.03 Sexual battery:

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: . .

(2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

### 2. Test - Nature of the Conduct

State v. Zeh, 31 Ohio St.3d 99, 509 N.E.2d 414 (Ohio 1987), "As cogently stated by the appellate court, substantial 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."

The court found the victim to be not capable of consenting considering the following factors:

-one was "low on the intelligence scale and that he was mentally retarded"

-he was mildly mentally retarded

appeared able to function

did not require long-term protective supervision

was capable of making his own free choice sexually

-Experts testified that victim's IQ was below 65

State v. Browder, 2014 WL 197862

Incapable where:

-Victim was 16 years old

-Offender was a stranger

- EMS and police officers testified that the victim's developmental delays were readily apparent during their limited interactions with her
- Mental age was significantly less than her physical age
- Was supervised at the time by her 14 year old cousin
- Easily misled and deceived by the defendant
- Used child-like terminology in describing the act

## Oklahoma

### 1. Definition/Statute -

21 Okl.St. Ann. § 1111 - § 1111. Rape defined:

A. Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator under any of the following circumstances:

2. Where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;

### 2. Test - Nature and the Consequences

In Hecker v. State, 73 Okla.Crim. 119, 118 P.2d 408 (Okla. App. 1941), the court held that "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. Save in exceptional cases, mental capacity to give legal consent must remain a question of fact for the jury." The court found the victim capable under the following factors:

- mental age was 10
- could read and write
- was able to leave the house by herself sometimes
- was 26 years old at the time of the incident
- had remained in school until age 15 (was in fourth grade at the time), and dropped out for reasons unrelated to academics
- did housework and cooked for a family of nine
- testified coherently and gave correct answers to a variety of questions, such as: "how many days in February?", "What state are we in?", "How much change would you get if you paid a dollar for something that cost 65 cents?" etc.
- testified that she understood what sex was and that she knew that she could become pregnant and also that pregnancy does not occur every time.
- expressed some understanding of social stigma associated with sex

-understood that there is more stigma attached to having sex with an individual who is married

See also, Slaughterback v. State, 594 P.2d 780 (Okla. App. 1979)

Incapable where:

- victim was 16 years old at the time of the offense, offender was 55
- victim had been enrolled exclusively in special education class for the last nine years
- victim was nonresponsive to many of the questions asked during the trial

## Oregon

### 1. Definition/Statute -

Oregon Rev. Statutes 163.375. Rape in the first degree

(1) A person who has sexual intercourse with another person commits the crime of rape in the first degree if:

- (d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

Oregon Rev. Statutes 163.405. Sodomy in the first degree

(1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

- (d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

Oregon Rev. Statutes 163.315. Capability to consent; lack of resistance

(1) A person is considered incapable of consenting to a sexual act if the person is: . . .

- (b) Mentally defective;

Oregon Rev. Statutes 163.305. Definition

(3) “Mentally defective” means that a person suffers from a mental disease or defect that renders the person incapable of appraising the nature of the conduct of the person.

### 2. Test - Nature of the Conduct

In State v. Tilly, 269 Or. App. 665, 346 P.3d 567 (Or. 2015), the court relied upon State v. Reed, 118 P.3d 791 (Or. 2005), in expounding upon the statutory definition of

“mentally defective” as follows:

“[mentally defective] refers to a mental defect that prevents one from appraising the nature of one's own conduct. The ‘appraisal’ must constitute an exercise of judgment and the making of choices based on an understanding of the nature of one's own conduct. \* \* \* [W]e view that standard in the context of interactions

with other persons, such as offers and proposals from other persons to engage in certain kinds of conduct.”

The individual must be “capable of assessing the personal and social consequences of his or her decision to engage in that activity.” The nexus, between the victim's mental condition and her incapacity to “appraise the nature of the sexual conduct” must be shown. The Tilly court found the victim incapable of consent under the following facts:

- victim was a 22 year-old resident of a foster care home for adults with mental disabilities
- defendant was a caregiver at victim’s foster care home
- writes and responds like a child who is first learning to write
- her affect, demeanor, conduct, and statements throughout the interview were characteristic of a young, preschool aged child
- required 24 hour care

In State v. Anderson, 137 Or.App. 36, 902 P.2d 1206 (Or. App. 1995), the court noted that being capable of consent in one case does not imply capability to consent in another.

Instead, the matter requires a context specific inquiry. “a prosecutor has broad discretion in deciding which offenses to charge, and that the victim might be capable of consenting in some situations, but not in the factual situation at issue. The court found the victim incapable of consent where:

- victim was “mentally retarded” 25 year old
- some understanding of sexual intercourse
- had two prior sexual relationships
- mental age was estimated between 7-10 years old
- understood the physical act of sex
- understood that condoms can prevent pregnancy and venereal disease but did not understand other forms of birth control
- used correct language in describing incident
- victim had difficulty with verbal communications
- experts classified victims developmental delays are “moderate”
- victim was able to work ½ hour per week and play sports
- victim had hearing problems and some visual impairment

## **Pennsylvania**

### 1. Definition/Statute -

Penn. Stat. Ann. 18 Pa.C.S.A. § 3121 - Rape

(a) Offense defined.--A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant: . . .

(5) Who suffers from a mental disability which renders the complainant incapable of consent.

Penn. Stat. Ann. 18 Pa.C.S.A. § 3126. Indecent assault

(a) Offense defined.--A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and: . . .

(6) the complainant suffers from a mental disability which renders the complainant incapable of consent;

Penn. Stat. Ann. 18 Pa.C.S.A. § 3125. Aggravated indecent assault

(a) Offenses defined. [A] person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if: . . .

(6) the complainant suffers from a mental disability which renders him or her incapable of consent.

Penn. Stat. Ann. 18 Pa.C.S.A. § 3123. Involuntary deviate sexual intercourse

(a) Offense defined.--A person commits a felony of the first degree when the person engages in deviate sexual intercourse with a complainant:

(5) who suffers from a mental disability which renders him or her incapable of consent;

Pennsylvania Suggested Standard Criminal Jury Instructions - 15.3121B (Crim) Rape of Unconscious, Unaware, or Mentally Disabled Person: (intent element) . . .

ii. knew or recklessly disregarded [*name of victim*]'s[mental disability]. A person recklessly disregards the victim's mental disability by consciously disregarding a substantial and unjustifiable risk that the victim is so mentally disabled as to be incapable of consent--in other words, so mentally disabled as to be unable to understand the nature of sexual intercourse and to exercise reasonable judgment.

## 2. Test - Nature and Consequences

Although there is little case law in Pennsylvania, from the Pennsylvania Suggested Standard Criminal Jury Instructions it is apparent that the applicable standard is to show that the victim was “so mentally disabled as to be unable to understand the nature of sexual intercourse and to exercise reasonable judgment.”

Com. v. Thomson, 449 Pa.Super. 159, 673 A.2d 357 (Pa. Super. 1996) Incapable where -victim was 23 at the time of the offense

- defendant was known to the victim previously
- victim was able to babysit alone
- experts testified her IQ was 58
- victim's developmental delays were considered "mild"
- experts testified that the victim was easily manipulated
- the victim's developmental delays were readily apparent to a lay-person

Com. v. Carter, 274 Pa.Super. 538, 418 A.2d 537 (Penn. Super. 1980):

Incapable where:

- victim lived at an in-patient facility due to her developmental disabilities and offender was an employee at the same facility
- victim's boyfriend told the offender that he could have sex with the victim in exchange for a small amount of money

## **Rhode Island**

### 1. Definition/Statute -

R.I. Gen. Laws § 11-37-1. Definitions (4) "Mentally disabled" means a person who has a mental impairment which renders that person incapable of appraising the nature of the act.

R.I. Gen. Laws § 11-37-2. First degree sexual assault: A person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person, and if any of the following circumstances exist: (1) The accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.

R.I. Gen. Laws § 11-37-4. Second degree sexual assault: A person is guilty of a second-degree sexual assault if he or she engages in sexual contact with another person and if any of the following circumstances exist: (1) The accused knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.

### 2. Test - Nature of the Conduct

Under the Rhode Island definition of "mentally disabled," the applicable test is that a "mentally disabled" person has "a mental impairment which renders that person incapable of appraising the nature of the act."

State v. Gardiner, 895 A.2d 703 (R.I. 2006).

Victim found incompetent relying upon the following factors

Adult victim was a resident of a group home where Defendant was employed as a community-living aide.

Victim had an IQ of approximately 55 and the cognitive functioning of about a 7 year-old child.

She had been sexually abused by her father.

Victim had previously falsely accused Defendant of hitting her and another male patient of sexually touching her.

Expert opined that victim did not understand the “nature of sexual activity with respect to intimacy and the long-term kind of associations between two people”

Expert also opined that victim did not have the ability to make informed decisions about appropriate sexual contact between herself and others.

See also State v. Rivera, 987 A.2d 887 (R.I. 2010), sentencing addressed in 64 A.3d 742 (R.I. 2013).

Defendant bus driver for disabled convicted of multiple counts of sexual assault against 3 different disabled riders that he transported.

Victim 1 was 37 years old, had a severe developmental disability, had worked at Center for disabled for 4 years.

Victim 2 was 22 years old, had a developmental disability stemming from a seizure disorder.

Victim 3 was 39 years old, had a developmental disability and 3 types of seizure disorders and had worked at Center for disabled for 12 years.

Much of opinion was devoted to whether victims were competent to testify, rather than whether they met the test of having a “mental impairment which renders that person incapable of appraising the nature of the act.”

## **South Carolina**

### 1. Definition/Statute -

S.C. Code Ann. § 16-3-651. Criminal sexual conduct; definitions.:

(e) “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. § 16-3-654. Criminal sexual conduct in the third degree.

(1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:...

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

## 2. Test - Nature of the Conduct

Under the South Carolina definition of “mentally defective” (as used in the criminal sexual assault crimes), a victim is “mentally defective” if the victim is “incapable of appraising the nature of his or her conduct.”

State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000)

Incapable where

-Victim was 45 year-old woman that defendant met on street and enticed to go with him to a park

-in addition to being “mentally retarded” she suffered from schizophrenia and a seizure disorder

## South Dakota

### 1. Definition/Statute -

South Dakota Codified Laws § 22-22-1 Rape--Degrees--Felony--Statute of limitations

Rape is an act of sexual penetration accomplished with any person under any of the following circumstances:

(3) If the victim is incapable, because of physical or mental incapacity, of giving consent to such act;

South Dakota Codified Laws § 22-22-7.2. Sexual contact with person incapable of consenting--Felony

Any person, fifteen years of age or older, who knowingly engages in sexual contact with another person if the other person is sixteen years of age or older and the other person is incapable, because of physical or mental incapacity, of consenting to sexual contact, is guilty of a Class 4 felony.

Strict Liability: statute governing rape of person incapable of giving consent did not require proof of perpetrator's knowledge of victim's inability to consent

### 2. Test - Evidence of Mental Disability

In State v. Schuster, 502 N.W.2d 565 (S.D. 1993), the South Dakota Supreme Court held that the crime of rape when the victim is “incapable, because of physical or mental incapacity, of giving consent to such act” does not require that the state prove the

defendant's knowledge of the victim's incapacity as follows, "[T]he perpetrator's knowledge of the victim's incapacity is not listed as an element in the rape statute itself. SDCL 22-22-1(2)." The court compared this statute to the statutory rape of a person less than sixteen years old in which "the perpetrator's knowledge of the girl's age is immaterial and his reasonable belief that she was over the age of consent is not a defense." The Schuster court found the victim incapable where:

- Victim was 16 years old at the time
- 23 year old offender was known to the victim
- Mental age of the victim was 8-9
- Victim stated that she had been raped and was able to describe the event coherently to witnesses and officers

State v. Willis, 370 N.W.2d 193 (S.D. 1985), defendant found guilty of "§ 22-22-7.2. Sexual contact with person incapable of consenting" when he had sex with 2 "mentally retarded" girls who were residents of the Vocational School for the Handicapped where he worked. The victims were 29 and 19 years old.

## Tennessee

### 1. Definition/Statute -

Tenn. Code Ann. § 39-13-503. Rape:

(a) Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances: . . .

- (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless

Tenn. Code Ann. § 39-13-502. Aggravated rape

(a) Aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: . . .

- (3) The defendant is aided or abetted by one (1) or more other persons; and
  - (A) Force or coercion is used to accomplish the act; or
  - (B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

Tenn. Code Ann. § 39-13-505. Sexual battery

(a) Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: . . .

- (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless

Tenn. Code Ann. § 39-13-501. Definitions

T.C.A. Section 39-2-602:

“(6) “Mentally defective” means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.”

## 2. Test - Nature of the Conduct

Under the statutory definition of “mentally defective” the victim must be shown to be “incapable of appraising the nature of his or her conduct.” *State v. Schaller*, below, extensively discusses how this showing can be made via expert or factual witness testimony.

In *State v. Jones*, 2014 WL 3002808 (Tenn. App. 2014)

Incapable of consent where:

- received Medicaid’s Home and Community-Based Services which required individuals to 1) have significantly sub-average general intelligence, measured by IQ points; 2) have deficits in adaptive functioning, which means the individuals have difficulties caring for themselves or communicating with others; and 3) the deficits must have appeared before the age of eighteen.

- victim was a 33 year-old man

- IQ was 41 - 55, classified as a “very low mild to high moderate” disability

- motor skills were determined to be at the age equivalent of six years, eight months.

- an overall adaptive level of six years, eight months

- age equivalent for personal living skills was ten years

- participated in Special Education classes

- could not manage his own money, cook meals without supervision, read, or drive a car

- had 24 hour care

- defendant was his state-provided caregiver

*State v. Schaller*, 975 S.W.2d 313, 313 (Tenn.Crim.App.1997).

Victim found capable where only evidence presented by the State to prove that the victim was mentally defective was a detective's testimony that the victim “appeared to be ‘mentally challenged’” and a therapeutic foster care program counselor for the victim who testified that the victim was in therapeutic foster care because the victim was mentally challenged and sexually abused. The court noted that proof that someone is mentally defective “should ordinarily come from a psychologist, psychiatrist, or other expert medical personnel.” In *Jones*, supra, court held expert testimony not required.

*State v. Green*, 1990 WL 143777 (Tenn. App. 1990), states that:

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.

- Capable where the woman was resident at an assisted-living facility
- Doctors testified that in some cases, she was capable of appraising the consequences of her actions, and other times she was not. Her ability to appreciate the nature of her conduct “var[ied]” from day to day.
- The woman was previously married to another resident at the care facility
- She was allowed regularly scheduled sexual visits with another resident at her current care facility
- She was deemed capable to give medical consent in her sterilization procedure which took place a few years prior to the incident-She was 32 at the time of the incident
- The defendant was a male visitor, whose relative resided in the care facility

## Texas

### 1. Definition/Statute -

Tex.Penal Code Ann. § 22.011(b)(4) (Vernon 1989) defines “sexual assault” and specifies that “a sexual assault under Subsection (a)(1) is without the consent of the other person if:

- (4) 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.§ 22.021. Aggravated Sexual Assault

(a) A person commits an offense: . . .

If (2)(C) the victim is an elderly individual or a disabled individual. . . .

(b)(3) “Disabled individual” means a person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.

### 2. Test - Nature of the Conduct

In Wootton v. State, 799 S.W.2d 499 (Tex. App. 1990), the court held that in determining whether there was sufficient evidence to show a lack of consent due to a mental disease or defect, “The emphasis is on the complainant's ability to appraise the nature of the sexual act or the ability to resist it.”

Incapable where:

- victims were 39 and 41 years old at the time
- IQs 45-50

- mental age 6-7
- spent significant portion of their lives in assisted living facilities
- experts testified that complainants were incapable of resisting sexual act by defendant.
- capable of doing some household chores (folding towels, setting up kitchen trays, some janitorial work)
- had received a sexual education course
- knew some basic anatomical terminology but described the event in child-like terms.
- experts testified about the victim's' inability to resist
- gave some consideration to the trusted status of the offender and power dynamics with victims
- offender was known to the victims

Rider v. State, 735 S.W.2d 291 (Tex. App. 1987)

Incapable:

- IQ of 51
- Mental age 6
- spent majority of life in assisted-living facilities and could not care for himself independently
- had received sexual education classes, but not ones that covered the act in question

In re J.A.G., 2007 WL 2963683 (Tex. App. 2007)

Incapable:

- victim was 17 at the time
- had verbal impairments but was not altogether non-verbal
- knew the offender since childhood and was approximately the same age as him in school
- tested at third-grade levels
- used child-like terms to describe the sexual encounter
- difficulty controlling her own movements and sometimes loss of control of her bladder
- can shower and dress herself if given an extended period of time
- not able to keep track of her menstrual periods

Martinez v. State, 634 S.W.2d 929 (Tex. App. 1982)

Incapable:

- IQ 55-65
- Mental age 6-8
- did not know any sexual terminology and struggled to describe the act that took place
- never learned to read or write
- could not count past ten
- did not know how to exchange money or use a phone,
- did not know her date of birth

- had never been out alone
- had never dated nor been with a man.

## Utah

### 1. Definition/Statute -

Utah Code Ann. § 76-5-406. Sexual offenses against the victim without consent of victim--Circumstances

An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, sodomy, attempted sodomy, forcible sodomy, attempted forcible sodomy, sodomy on a child, attempted sodomy on a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

- (6) the actor knows that as a result of mental disease or defect, or for any other reason the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it;

(Previous statute) - U.C.A. 1953 § 76-5-402

“[A] person commits rape when actor knows that as result of mental disease or defect, victim is at time of act incapable either of appraising nature of act or of resisting it.”

### 2. Test - Nature of the Conduct

State v. Kelley, 1 P.3d 546 (Utah 2000)(expert based opinion on IQ, mental age and functional abilities of victim in opining that she did not have the “mental capabilities and ability to appraise the nature of a sexual relationship.”)

State v. Archuleta, 747 P.2d 1019 (Utah 1987)

Found that a woman with an IQ of 64-65, who lived on her own, with “an extremely passive personality” was capable of consenting, though she did not do so in this case.

State v. Harrison, 286 P.3d 1272 (Utah App. 2012)(the state admitted testimony of the victim’s cognitive abilities not to show that she “lacked the ability to consent, but only to show ‘that her actions and resistance were reasonable considering her personality and limitations.’”).

## Vermont

### 1. Definition/Statute -

Vermont Statutes Ann. 13 V.S.A. § 3254. Trial procedure; consent

In a prosecution for a crime defined in this chapter or section 2601 of this title:

(2) a person shall be deemed to have acted without the consent of the other person where the actor:

(A) knows that the other person is mentally incapable of understanding the nature of the sexual act or lewd and lascivious conduct; or . . .

(D) knows that the other person is mentally incapable of resisting, or declining consent to, the sexual act or lewd and lascivious conduct, due to a mental condition or a psychiatric or developmental disability as defined in 14 V.S.A. § 3061.

(1) “Person in need of guardianship” means a person who:

(A) is at least 18 years of age; and

(B) is unable to manage, without the supervision of a guardian, some or all aspects of his or her personal or financial affairs as a result of:

(i) significantly subaverage intellectual functioning which exists concurrently with deficits in adaptive behavior; or

(ii) a physical or mental condition that results in significantly impaired cognitive functioning which grossly impairs judgment, behavior, or the capacity to recognize reality.

(2) “Unable to manage his or her personal care” means the inability, as evidenced by recent behavior, to meet one's needs for medical care, nutrition, clothing, shelter, hygiene, or safety so that physical injury, illness, or disease has occurred or is likely to occur in the near future.

(3) “Unable to manage his or her financial affairs” means gross mismanagement, as evidenced by recent behavior, of one's income and resources which has led or is likely in the near future to lead to financial vulnerability.

## 2. Test - Nature of the Conduct

In State v. Cate, 683 A.2d 1010 (Vt. 1996), the court construed section 3254 as “mentally capable of understanding the nature . . . of the sexual acts.”

State v. Jewett, 109 Vt. 73, 192 a. 7 (Vt. 1937)

Capable

Mental age 7.3

She was 32 years old at the time of the incident

Could perform housework

Did not require constant supervision

Prior sexual relationships

Had been sterilized and understood this to mean she was now incapable of having children

Sixth grade education

Some understanding of social disapproval that may result from sexual relationships

The Jewett court applied a common law test of whether the individual in question was incapable of understanding the act, its motive and possible consequences. Note that this case was prior to the enactment of relevant statute above. It appears that the relevant test is now whether the individual “understands the nature of the acts” (no more need to show understanding of possible consequences).

## Virginia

Definition/Statute -

VA Code Ann. § 18.2-61 Rape provides:

If any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished... (ii) through the use of the complaining witness's mental incapacity or physical helplessness. . .

VA Code Ann. § 18.2-67.10. General definitions

“Mental incapacity” means that condition of the complaining witness existing at the time of an offense under this article which 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.

### 2. Test - Nature or the Consequences

In Sanford v. Commonwealth, 54 Va.App. 357, 678 S.E.2d 842 (Va. App. 2009), the court expounded upon the statutory definition of “mental incapacity” as follows, “A person suffers from a ‘mental incapacity’ within the meaning of the statute, if he or she has a mental ‘condition’ that ‘prevents’ the person from being able to ‘understand’ *either* the ‘nature’ *or* ‘consequences’ of engaging in sexual intercourse.” Thus, incapacity in Virginia can be proven by showing an inability to understand *either* the “nature” *or* “consequences.” The court found the victim incapable of consent under the following factors:

-Victim’s IQ was 46

-Mental age was 4 years

-She was unable to assess cause-effect relationships in social interactions  
victim “cannot live independently.”

- She cannot read or write, though she can copy letters and recognize some numerals
- She can, with help, dress herself and perform basic hygiene (brushing her teeth, etc.) when reminded to do so, but she is unable to wash or brush her hair
- She was “sometimes” able to tell time.
- The offender was known to the victim for a few years prior to the incident
- No formal sex education- limited discussion with her mother about the issue prior.
- She needs prompting to wash her hands or brush her teeth.
- She requires constant supervision.

In Adkins v. Commonwealth, 20 Va.App. 332, 457 S.E. 382 (Va. App. 1995), the court found the victim capable of consent where- IQ between 58-70, mental age 10.4 years, individual was 16 years old but told the man she was 18, she met him in a public place, initiated contact, and called him later with the idea of having sex. He agreed, though the girl’s mother had told him to “leave her alone” and that she had a developmental disability. She used terminology to indicate some knowledge of sexual relationships and When asked about the consequences of having sexual intercourse, she testified, “you could catch AIDS” and “you get pregnant.” The girl left a note for her mother and surreptitiously and purposefully arranged to meet him while her mother was out of the house. She had received sexual education classes.

In addressing what proof is required, the court notes:

to “know, apprehend, or appreciate” nature and consequences of sexual intercourse, for purposes of statute prohibiting sexual intercourse through use of victim's mental incapacity, can range from simple understanding to how act of coitus is physically accomplished together with understanding that sensation of pleasure may accompany act, to thorough and comprehensive understanding of complex psychological and physiological nature of sexual act involved and that, aside from immediate gratification, act may have dire familial, social, medical, physical, economic or spiritual consequences.  
 . . .

When mentally impaired or mentally retarded person has sufficient cognitive and intellectual capacity to comprehend or appreciate that he or she is engaging in intimate or personal sexual behavior which later may have some effect or residual impact upon person, upon person's partner, or upon others, person does not have a “mental incapacity” within meaning of statute prohibiting sexual intercourse through use of person's mental incapacity. . . .

The legislature did not intend to include as part of the protected class of people under Code § 18.2–61(A)(ii) 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.

White v. Commonwealth, 23 Va.App. 593, 478 S.E.2d 713 (Va. App. 1996)

Capable

- Victim was 14.5 years old at the time of the incident.
- Did not know the individual or have any prior relationship with him
- Knew some sexual terminology
- She became pregnant but did not realize that fact until eight months later
- Continued sexual relationship with the individual for some period following their first encounter
- Members of her school testified that she was “at the upper end of the educable mentally retarded range.” (However, though the court found that evidence presented about her current capabilities was not sufficient to find her incapable of consenting, their opinion suggests that this may be due in part to the fact that the evidence presented reflected her current capabilities at trial (more than two years after the event) rather than her capabilities at the time it occurred. “We hold that this record fails to show beyond a reasonable doubt that, at the time of the alleged rape, complainant suffered from a mental incapacity that prevented her “from understanding the nature or consequences of the sexual act involved in such offense and about which [appellant] knew or should have known.” Code § 18.2–67.10(3).)

## Washington

### 1. Definition/Statute -

Washington Rev. Code 9A.44.010. Definitions

(4) “Mental incapacity” is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(10) “Person with a developmental disability,” for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(12) “Person with a mental disorder” for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a “mental disorder” as defined in RCW 71.05.020.

Washington Rev. Code 71A.10.020. Definitions

(5) “Developmental disability” means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual.

Washington Rev. Code 71.05.020. Definitions (*Effective April 1, 2016*)

(29) “Mental disorder” means any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions;

## 2. Test - Nature or Consequence

In State v. Ortega-Martinez, 124 Wash.2d 702, 881 P. 2d 231 (1994), the court held that “A finding of incapacity is proper ‘where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse.’ A ‘superficial understanding of the act of sexual intercourse does not by itself’ defeat this, as the law requires more, a meaningful understanding.”

The Ortega-Martinez court lists the following as factors appropriate to consider:

- understanding of physical mechanics of sexual intercourse and an understanding of development of emotional intimacy between sexual partners and of possibility of pregnancy as well as specter of disease and even death
- victim's IQ, mental age, ability to understand fundamental, nonsexual concepts, and mental faculties generally,
- victim's ability to translate information acquired in one situation to new situation.
- Victim’s demeanor, behavior, and clarity on the stand

In evaluating an understanding of “consequences” of sexual conduct that the court consider, victim’s knowledge of:

- ”the development of emotional intimacy between sexual partners”;
- “circumstances result in a disruption in one's established relationships”;
- “the possibility of pregnancy with its accompanying decisions and consequences”
- “the specter of disease and even death” that may result

In Washington, the language ultimately chosen by the Legislature permits a jury to find an individual mentally incapacitated if it finds he or she was incapable of appraising the

nature of “sexual intercourse” specifically (and does not require a showing that the individual was incapable of appraising the nature of their actions generally), and thus provides a lower bar for the prosecution to meet.

The Ortega-Martinez victim was found incapable of consenting based on the following factors:

- victim’s IQ in the 40’s, Mental age 5-9
- some understanding of disease being associated with sperm but only a superficial one that failed to grasp causal connections in terms of the consequences and risks of sexual conduct
- used child-like terms to describe sexual organs
- described by those who worked with her as incapable of resisting manipulation due to her willingness to please and follow instruction
- victim was 30 years old and lived with her husband in a care facility
- defendant was a stranger, unknown to the victim. He threatened her with violence.
- she could not read
- unable to describe to him when her last menstrual period had been
- answers sometimes non-responsive -childlike vocabulary and syntax

State v. Summers, in which we explained that where a victim's “lack of capacity is based on a permanent, organic condition, it logically follows that prior acts of intercourse cannot demonstrate that the victim understands the nature and consequences because the prior acts may have occurred due to the same lack of capacity.” 70 Wash.App. 424

Patel v. Kent School Dist., 176 Wash.App. 1008 (Wash. App. 2013)

Found capable of consent where:

- victim was classified by the school district as “mildly mentally retarded”
- she expressed concern about incest and recognized the risk it posed for birth defects
- sought to obtain birth control pills
- ”demonstrated an understanding that condoms are used to prevent sexually-transmitted disease”
- victim believed that the sexual conduct was consensual and testified that the defendant never made her do anything she didn’t want to
- the relationship was between peers at school of a similar age
- the individual was “previously diagnosed with cognitive and intellectual delays, was classified by the Kent School District as mildly mentally retarded”
- mother held a guardianship order declaring the individual in question to be legally incapacitated (though this was excluded from evidence for its prejudicial effect).

\*Court explained that a person may be legally incapacitated due to a “demonstrated inability to adequately provide for nutrition, health, housing, or physical safety” or a risk of

financial insecurity; however, these factors do not necessarily bore on whether that individual can consent to sexual activity.

## **West Virginia**

### 1. Definition/Statute -

W. Va. Code, § 61-8B-2(c)(2)-Lack of consent

(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim. . . .

(c) “A person is deemed incapable of consent when such person is...mentally defective”

W. Va. Code § 61-8B-1. Definition of terms . . .

(3) “Mentally defective” means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct.

### 2. Test - Nature of the Conduct

State v. Barnes, 2013 WL 2300946 (W.Va. 2013),

Capacity to consent not found considering the following:

-Defendant was employed as a supervisor by a nonprofit agency that serves the needs of disabled individuals with cognitive impairment and/or developmental disabilities, providing supervised employment for its disabled workers.

-Defendant was victim’s supervisor

-Victim had an IQ of 54, and her overall academic skills were at a 6th grade level

-she functions like a 10 to 12 year-old child

-she lacked the ability to verbally or physically resist the assault

## **Wisconsin**

### 1. Definition/Statute -

Wisconsin Stat. Ann. 940.225. Sexual assault

(2) Second degree sexual assault. Whoever does any of the following is guilty of a Class C felony:

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

## 1. Test - Evidence of Mental Disability

In *State v. Perkins*, 689 N.W.2d 684 (Wisc. App. 2004), the court addressed the type and sufficiency of proof of “mental illness or deficiency” as follows:

The Committee has decided not to define “mental illness or deficiency” in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining *\*\*690* when treatment is required or when involuntary commitment of the mentally ill person is appropriate. *For the purposes of the Sexual Assault Law, the Committee concluded that the term “mental illness or deficiency” has a meaning within the common understanding of the jury.* Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: “... which renders that person temporarily or permanently incapable of appraising the person's conduct.” WIS JI-CRIMINAL 1211 n. 1 (emphasis added).

“The jury is not asked to diagnose the victim's mental illness or deficiency-the State only has to prove that the victim suffered from a mental illness or deficiency that rendered the victim incapable of appraising his or her conduct.”

In finding that the victim lacked the capacity to consent, the court relied upon the following factors:

- Victim was 78 year-old woman who lived in the same residential care facility as defendant
- “severe Alzheimer's,” is unable to converse coherently, and does not remember things that have happened in the past or even earlier in the day.
- She generally responds to questions or attempts to communicate by laughing, or saying “yes ma'am” or “no ma'am.”
- require twenty-four hour supervision because of her mental deficits.
- Defendant, who was 60 years-old, had suffered 3 strokes
- Defendant had no cognitive or mental limitations

*State v. Onyeukwu*, 361 Wis.2d 285 (Wisc. App. 2015)

Incompetent

- six- to eight-year-old child. Incompetent
- never held a job and still lived with her mother.
- did not use anatomical terminology but understood generally what a “private area” was, but did not understand much beyond these basic terms
- cannot read, functions at a sixth grade level
- mother was her legal guardian because had trouble making decisions

- could not make selections at store by herself.
- used child-like terms to describe sexual organs

Richardson v. State, 197 Wis.2d 116 (Wisc. App. 1995)  
Incompetent but issue of competency not challenged.

## Wyoming

### 1. Definition/Statute -

Wyoming Statutes Ann.

Nature and the Consequences § 6-2-302. Sexual assault in the first degree

(a) Any actor who inflicts sexual intrusion on a victim commits a sexual assault in the first degree if: . . .

(iv) The actor knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim's conduct.

### 2. Test - Nature and the Consequences

In Righter v. State, 752 P.2d 416, 420 (Wyo.1988), the court noted that section 6-2-302 should be considered in light of the obvious legislative intent of protecting a class of persons who cannot fully comprehend what they are doing. The court held that it was not unconstitutionally vague finding that:

one 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.

In Saiz v. State, 30 P.3d 21 (Wy. 2001), the court offered the following in interpreting section 6-2-302:

“Incapable” commonly means “lacking capacity, ability, or qualification for the purpose or end in view \* \* \*.” Merriam Webster's Collegiate Dictionary 586–87 (10th ed.1999). In this context, “appraising” commonly means “to evaluate the worth, significance, or status of.” *Id.* at 57.

## IX. Checklist: Relevant Factors

The competing goals of protection and autonomy pose challenges that the current laws are ill-suited to address. The solution, by and large, has been to draft flexible legal standards, which allow the court discretion in examining the context and facts of each case. There are virtually no

limitations in terms of delineating which factors the court may consider in determining whether an individual possesses the capacity to consent to sexual activity. However, there are general commonalities among the elements they tend to look to. Below is a checklist by state, which identifies some of the factors that judges considered in making their decision along with a brief discussion of each. It is important to note that these factors are not exhaustive, and judges may indeed have considered other factors on the list without explicitly mentioning them in their opinion. At a minimum, this chart indicates some of the elements that may be used in assessing whether an individual possesses the capability to consent to sexual activity.

## A. Appearance of Disability

Courts sometimes make note in their opinion as to whether the individual in question displays physical manifestations of their developmental disability or other disabilities. Most often this fact goes more to the determination of whether the defendant knew or should have known that the victim was incapable of consenting rather than whether they in fact had that capacity. It may also be considered whether the victim was hearing or visually impaired.

## B. I.Q.

The IQ score of the individual is frequently mentioned in court opinions. Though cases may rely on different IQ tests, the court frequently considers IQ as evidence of cognitive ability, which goes to the core question presented in many of the statutes.

## C. Mental Age

The mental age of the individual is also sometimes considered as evidence. It is used to represent the equivalent functional ability in years of an individual. Though it is related to IQ in seeking to measure cognitive capacity, it is treated separately by the courts.

## D. Communication Skills and Demeanor on the Witness Stand

Many courts take into account how the victim responds to questioning and their demeanor on the witness stand, as well as their ability to clearly and cogently relay relevant answers and testimony. Part of this evaluation may also come from whether the victim is able to understand the questions asked of him/her. If the individual has trouble speaking and communicating clearly, these facts may weigh against a finding of capacity.

## E. Functional/Independent Living Skills

Courts may consider the individual's abilities in other areas. This evaluation may include cognitive abilities such as counting numbers, keeping track of dates, and reading or writing. However, courts also consider the individual's ability to care for themselves (shower, brush their

hair, do laundry, or cook) as well as their ability to live independently (drive, navigate public transportation, etc.).

## F. Job Skills

An individual's employment history and job skills may also come into play in certain cases. Courts will sometimes consider whether the individual has been able to hold a job and any skills that work may have required. Generally, the more employment and work skills the individual possesses, the more likely they are to be deemed capable to consent.

## G. Money Management

One tangible criteria many courts look to when making these evaluations is the ability of the individual to handle money and be responsible for personal finances. Math, accounting skills, and spending habits may be captured by this factor.

## H. Knowledge of Sexual Terms

In some cases, courts consider the diction used in the victim's description of the event.<sup>6</sup> Using anatomically correct terminology and demonstrating a knowledge of sexual terms tends to indicate capacity, while difficulty describing the sexual act and a reliance on childlike language for sexual terms tend to indicate a lack of capacity.<sup>7</sup>

## I. Diseases/Pregnancy

The victim's knowledge and understanding of sexually transmitted disease and pregnancy may also come in as evidence. Determining whether the victim adequately understands the relationship between these two outcomes and sexual conduct is especially important in states that apply a "nature and the consequences test," but these facts may be considered by the court regardless.

## J. Ability to Consent in Other Areas

Courts may consider whether the individual has been found capable of consenting in other areas. These may include ability to give consent to medical procedures, for searches, and to marry.

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<sup>6</sup> It is worth noting that in some instances, these consent standards can create a perverse incentive where the more sexual education a victim receives, the more likely they are to be found capable of consenting in a sexual abuse scenario. Though it is possible that one could "educate themselves above the capacity standard," this situation should not be used a rationale for keeping individuals uninformed about sexual education.

<sup>7</sup> Note that in many early cases, the victim's prior sexual experience is also considered by the court. However, most modern cases have barred the admission of evidence regarding the sexual history of the victim under the state's rape shield laws, which disallow this type of evidence for fear of prejudicing the victim. In rare cases, courts have allowed evidence of prior sexual history (including the existence of children) on the grounds that such evidence is relevant to the issue of capacity to consent rather than demonstrating a general tendency towards promiscuity or to prove consent in this case.

## K. Power Dynamics

Some courts also consider the relationship of the two individuals in question, their age, capabilities, and the relative balance of power. Many other situational factors may play into this evaluation as well, such as the setting, education of each party, and any authority one may have over the other. In addition, this variable may be related to the relative cognitive abilities of the two individuals.

# X. Checklist By State

	Appearance of Disability	IQ	Mental Age	Communication Skills	Functional / Independent Living Skill	Job Skills	Money Management	Sexual Terminolog	Diseases / Pregnancy	Consent in Other Areas	Power Dynamics
Alabama		X	X		X	X		X	X		
Alaska	X	X	X	X	X	X		X	X	X	X
Arizona		X	X	X	X	X	X	X		X	X
Arkansas		X			X			X			X
California		X	X	X	X	X	X	X	X	X	
Colorado		X	X		X		X	X			X
Connecticut	No relevant cases										
Delaware	No relevant cases										
District of Col.											
Florida		X	X	X	X	X	X	X	X	X	X
Georgia		X	X	X	X	X	X				
Hawaii		X	X		X			X	X		
Idaho	X	X		X	X	X		X	X	X	
Illinois		X	X	X	X	X	X		X		
Indiana		X	X		X	X	X	X			
Iowa		X	X		X				X		X
Kansas		X	X					X	X		
Kentucky	X	X	X	X					X		
Louisiana	X	X	X	X				X			
Maine	X			X	X						
Maryland			X	X				X			X
Massachusetts	X	X		X	X	X	X	X			X
Michigan			X		X	X			X		X
Minnesota		X	X	X	X	X	X				X
Mississippi	X	X	X		X	X					X
Missouri	X		X	X	X		X				
Montana	No relevant cases										
Nebraska				X	X	X		X			X
Nevada			X		X			X	X		X
NewHampshire	X			X				X			
New Jersey		X									
New Mexico	X	X	X		X						
New York		X	X	X	X	X		X	X		X
North Carolina		X	X	X	X						X
North Dakota	X		X	X	X			X	X		X
Ohio	X		X		X			X			
Oklahoma			X	X	X	X	X		X		
Oregon	X		X	X				X	X		X
Pennsylvania	X	X			X	X					X
Rhode Island	X	X	X		X			X			X
South Carolina	No relevant cases										
South Dakota			X	X				X			
Tennessee					X					X	X
Texas	X	X	X	X	X	X	X	X	X		X
Utah		X	X		X						

Vermont			X		X				X	X	
Virginia	X		X	X	X		X		X	X	X
Washington			X	X	X				X		X
West Virginia	No relevant cases										
Wisconsin			X		X				X		
Wyoming	X		X	X	X				X		X

## XI. Conclusion

Each of the standards for capacity to consent seeks to straddle a line between protecting individuals from harm while still providing for them to exercise their autonomy and individual rights. Any such test can act as a double-edged sword. As one court noted:

‘Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people. Less obviously, however, in doing so, the state has restricted the ability of developmentally disabled people to have consensual sex.’

*People v. Thompson* (142 Cal. App. 2006).

The difficult challenge of drafting and applying standards is made harder by the fact that capacity to consent is a complex question, one that is highly situationally dependent.

Much of the existing literature in this field criticizes the type of abstract inquiries that characterize much of the case law on the subject, instead advocating for a contextual approach. Such a standard might focus on situational context and particular circumstances of each case, while taking account of current research in the field of cognitive development. (Denno, 1997). However, this type of flexible standard could lead to uneven applications of the law and provide even less guidance for those seeking to understand whether they themselves or a loved one is capable of legally consenting.

The laws, as they are currently written, can scarcely be understood by those whom they govern and seek to protect. Education and open dialogue surrounding the issue of consent, and sexual topics more generally, is essential in terms of empowering individuals with developmental disabilities and better equipping them to guard against abuse. Despite the discomfort one might feel in broaching these topics, conversation and education are essential in terms of preventing abuse and ensuring that abuse that does occur is reported. Knowledge of the law, combined with a willingness to educate individuals with developmental disabilities about sexual matters, helps to ensure that they are able to exercise their rights and ensure that those rights are not infringed upon.