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When One Spouse Has it: Dementia and the Permissibility of Marital Sex Under Criminal Statute, 49 J. Marshall L. Rev. 1225 (2016)

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WHEN ONE SPOUSE HAS IT: DEMENTIA AND THE PERMISSIBILITY OF MARITAL SEX UNDER CRIMINAL STATUTE

JAMES COOK

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I. INTRODUCTION

In April 2015, prosecutors asked jurors in rural Garner, Iowa, to determine whether Henry Rayhons¹ should be found guilty of third degree sexual abuse of his deceased wife, Donna Rayhons.² At his trial, Mr. Rayhons emotionally testified, “I treated her like a queen. She was my queen . . . I miss her every day. I will never

1. Pam Belluck, *Sex, Dementia and a Husband on Trial at Age 78*, N.Y. TIMES (Apr. 13, 2015), www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html?_r=0. Henry Rayhons is both a farmer has been a longstanding member of the Iowa State Legislature. *Id.*

2. *Id.*

take her ring off.”³ When pressed by prosecutors, Mr. Rayhons fervently denied having raped his wife.⁴ He denied having vaginal sexual intercourse with his wife on May 23, 2014.⁵ However, Mr. Rayhons did admit to prior sexual activity that day, which he testified Donna initiated by indicating she wanted to “play.”⁶

Henry and Donna Rayhons were both widowed and married in 2007 after growing closer in church choir.⁷ Shortly into their marriage, Mrs. Rayhons grew forgetful and was diagnosed with early-onset Alzheimer’s in 2010.⁸ In March 2014, Mrs. Rayhons went to lunch with her daughter wearing sleepwear beneath her coat and was later found placing her hands in toilet water at the restaurant.⁹ Thereafter, she was committed to an elderly care facility.¹⁰ The physician at the facility, Dr. John Brady, at the request of Mrs. Rayhons’s daughter, opined whether her mother held the mental ability to consent to sexual activity.¹¹ Dr. Brady evaluated Mrs. Rayhons as mentally incapable of consent and advised Mr. Rayhons to abstain from any further sexual activity with her.¹²

On May 23, 2014, Mrs. Rayhons’s roommate complained of sexual noises from Mr. and Mrs. Rayhons.¹³ Video footage, from that evening, showed Mr. Rayhons disposing of his wife’s undergarments in the laundry.¹⁴ Thereafter, a state investigation

3. Tony Leys, *Rayhons Testifies, Denies He Had Sex with Wife*, DES MOINES REG. (April 17, 2015), www.desmoinesregister.com/story/news/crime-and-courts/2015/04/17/henry-rayhons-testimony-sex-abuse-trial/25941879/.

4. *Id.*

5. Belluck, *supra* note 1.

6. Leys, *supra* note 3.

7. Bryan Gruley, *Can A Wife With Dementia Say Yes to Sex?*, BLOOMBERG BUS. (Dec. 9, 2014), www.bloomberg.com/news/2014-12-09/rape-case-asks-if-wife-with-dementia-can-say-yes-to-her-husband.html.

8. *Id.* According to the Mayo Clinic, “Alzheimer’s disease is a progressive disease that destroys memory and other important mental functions. It’s the most common cause of dementia – a group of brain disorders that results in the loss of intellectual and social skills.” *Alzheimer’s Disease*, MAYO CLINIC (June 17, 2014), www.mayoclinic.org/diseases-conditions/alzheimers-disease/basics/definition/con-20023871.

9. Sarah Kaplan, *In an Iowa Courtroom, an Astonishing Case of Sex and Alzheimer’s*, WASH. POST (Apr. 7, 2015), www.washingtonpost.com/news/morning-mix/wp/2015/04/07/in-an-iowa-courtroom-an-astonishing-case-of-sex-and-alzheimers/.

10. *Id.*

11. Belluck, *supra* note 1. Henry and Donna Rayhons were widowed and had children from their previous marriages. *Id.* “Experts say adult children whose parents are in second or third marriages may have more difficulty condoning sexual activity with the newer spouse, something that may have played a role in Iowa, where Mrs. Rayhons’s daughters and husband disagreed about her care.” *Id.*

12. *Id.*

13. *Id.*

14. Sarah Kaplan, *Former Iowa Legislator Henry Rayhons, 78, Found Not Guilty of Sexually Abusing Wife with Alzheimer’s*, WASH. POST (April 23,

ensued¹⁵ and law enforcement questioned Mr. Rayhons about the video footage.¹⁶ Mr. Rayhons admitted to law enforcement that he engaged in “sexual contact” with Mrs. Rayhons on May 23.¹⁷ He was arrested a week after his wife died in August 2014.¹⁸

Mr. Rayhons faced a highly publicized trial in April, 2015.¹⁹ Prosecutors at the trial told jurors that semen uncovered from Mrs. Rayhons’s bed and underwear matched Mr. Rayhons’s DNA.²⁰ Defense attorneys countered that the semen stemmed from sexual activity prior to May 23 and that a rape kit performed on Mrs. Rayhons did not indicate signs of vaginal sex.²¹

Prosecutors were accusing Mr. Rayhons of sexual abuse of an Alzheimer’s patient in a nursing home.²² Mr. Rayhons’s prosecution raises the issue of whether a person with Alzheimer’s or dementia can consent to sexual activity.²³ Although sexual activity generally decreases with age²⁴, the aging population remains sexually active.²⁵ No recognized policy exists among elder care professionals to address sexual activity of nursing home residents.²⁶ Despite this lack of industry guidance, one nursing home, Riverspring Health, equates elderly sexual activity as part of their “autonomy” and “civil and privacy rights.”²⁷ Riverspring’s

2015), www.washingtonpost.com/news/morning-mix/wp/2015/04/23/former-iowa-legislator-henry-rayhons-78-found-not-guilty-of-sexually-abusing-wife-with-alzheimers/.

15. Belluck, *supra* note 1. Mr. Rayhons was prosecuted by the Iowa Attorney General because of his “prominence in the county.” *Id.*

16. *Id.*

17. Kaplan, *supra* note 9.

18. *Id.* Mrs. Rayhons’s daughter also obtained guardianship of her before her death. *Id.*

19. See Tony Leys & Grant Rodgers, *Rayhons: ‘Truth finally came out’ with not guilty verdict*, DES MOINES REGISTER, Apr. 22, 2015, www.desmoinesregister.com/story/news/crime-and-courts/2015/04/22/henry-rayhons-acquitted-sexual-abuse/26105699/ (stating, “The case was watched across the nation because of the difficult questions it raised about a woman’s ability to consent to sex while in the debilitating grips of Alzheimer’s disease.”).

20. Belluck, *supra* note 1.

21. *Id.*

22. See *id.* (stating, “Henry Rayhons, 78, has been charged with third-degree felony sexual abuse, accused of having sex with his wife in a nursing home on May 23, 2014, eight days after staff members there told him they believed she was mentally unable to agree to sex.”).

23. *Id.*

24. B. Kessel, *Sexuality In The Older Person*, 30 AGE AND AGEING 121, 121 (2001) (discussing the continued sexual activity of the elderly).

25. *Id.*

26. Eliza Gray, *Why Nursing Homes Need to Have Sex Policies*, TIME (Apr. 23, 2015), <http://time.com/3833358/nursing-home-sex/>.

27. Robin Dessel and Mildred Ramirez, *Policing Procedures Concerning Sexual Expression at the Hebrew Home at Riverdale*, THE HEBREW HOME AT RIVERDALE (April 2013), www.riverspringhealth.org/files/sexualexpressionpolicy.pdf. Upon looking at the policies of the Hebrew Home at Riverdale, one

CEO, Daniel Reingold, finds that other nursing homes avoid discussion of sexual activity among residents because of industry-wide concerns regarding liability and discomfort surrounding the issue.²⁸

Other health professionals struggle with determining whether Alzheimer's patients can consent to sex.²⁹ This issue was attenuated for jurors in the *Rayhons* case.³⁰ Dr. Brady relied upon a medical evaluation known as the "Brief Interview for Mental Status" test (BIMS) to determine Mrs. Rayhons's capacity to consent.³¹ The test consists of basic requests such as repeating words like "sock" and "bed" and answering questions about the current day or month.³² Ten days before her May 23 encounter with her husband, Mrs. Rayhons scored a zero on her BIMS.³³

To prove its case, the prosecution had to meet the following elements: 1) that Mr. Rayhons was ordered by his doctor to refrain from having any sexual contact with his wife; 2) that despite his doctor's orders, Mr. Rayhons, did in fact have sexual contact with his wife; and 3) that the deceased Mrs. Rayhons could no longer consent to sex.³⁴ The jury returned a verdict of not guilty.³⁵ The criminal trial of Mr. Rayhons delved further than merely questioning whether an individual with Alzheimer's or dementia can consent to sex.³⁶ Rather, it highlighted the intimate issue of consent to sex that few bother to question in marriages where one spouse is afflicted with Alzheimer's or dementia and the other is not.³⁷

According to Staffordshire University social work professor Derek Beeston, consent and sex among Alzheimer's patients

will find that the nursing facility not only encourages staff to provide couples engaging in sexual activity with their own rooms, but also provides that sexual conduct must be private, consensual, cannot involve minors and cannot put others at risk for contracting a sexually transmitted disease. *Id.*

28. Belluck, *supra* note 1.

29. See Gruley, *supra* note 7 (discussing how health professionals assess the ability of consent to sexual activity by patients with dementia).

30. See Belluck, *supra* note 1 (discussing the difficulty in deciding whether a patient with dementia can consent to sex).

31. Gruley, *supra* note 7.

32. *Id.*

33. *Id.* Some medical experts do not find evaluations such as the BIMS indicative of the ability to consent to sex. *Id.*

34. Leys & Rodgers, *supra* note 19 (stating, "To win a conviction, prosecutors had to prove two things: that Rayhons had sexual contact with his wife on the date charged after being told not to, and that Donna Rayhons lacked the mental capacity to consent"). *Id.* In the body of this article, I elected to break the first point written by the authors into two points and, thus, listed three points that needed to be proven for the prosecution to prevail.

35. *Id.*

36. See Belluck, *supra* note 1 (discussing how individuals with dementia retain sexual needs).

37. See *id.* (discussing how sex the issue of sex and dementia is avoided by and a source of discomfort for nursing facilities).

“really is a huge issue, and somewhere down the line we’re going to have to confront it.”³⁸ Already, 5.3 million Americans have Alzheimer’s.³⁹ This number is expected to increase to 7.1 million by 2025 and to 13.8 million by 2050.⁴⁰ As a new population of dementia patients emerge, so will questions about their sexual activity.⁴¹ What counts as consent? As a spouse undergoes cognitive deterioration,⁴² does that mean no more sex for either spouse? Is a spouse committing rape when she continues to have sex with her marital partner who suffers dementia and can no longer remember her name?

Henry and Donna Rayhons’ marriage demonstrated how a spouse who is not afflicted with dementia or Alzheimer’s holds power over a less cognizant, more vulnerable marital partner.⁴³ This power dynamic exists among the 6% of caregivers who are spouses to their dependent counterpart.⁴⁴ The issue of consent in these marriages is attenuated with campaigns raising public awareness of sexual assault, which allows more individuals to scrutinize consent to sexual activity.⁴⁵ Raising public awareness and preventing sexual assault is now part of the public discourse.⁴⁶ Notably, the White House contributed to these efforts

38. *Id.*

39. ALZHEIMER’S ASSOC., 2015 *Alzheimer’s Disease Facts and Figures*, ALZHEIMER’S & DEMENTIA, at 16, www.alz.org/facts/downloads/facts_figures_2015.pdf (last visited Jan. 31, 2016).

40. *Id.* at 22.

41. See Belluck, *supra* note 1 (stating, “The case pivots on longstanding medical and ethical concerns that will become only more pressing as the population ages and rates of dementia rise.”).

42. See *Alzheimer’s Disease*, *supra* note 8 (stating, “Alzheimer’s disease is a progressive disease that destroys memory and other important mental functions. It’s the most common cause of dementia – a group of brain disorders that results in the loss of intellectual and social skills.”).

43. See Gruley, *supra* note 7 (discussing the various ways in which Henry Rayhons controlled Donna’s autonomy, including “[taking] her driver’s license, unplug[ing] the dryer, and [keeping] her away from the stove”). The article also describes a power-dynamic when it states, “a nurse told the women that on a number of occasions, Donna was wearing nothing but a robe after a visit from Rayhons, and that staffers ‘felt sickened by what he was doing to her.’” *Id.*

44. *Caregiving for Alzheimer’s Disease or Other Dementia*, CENTERS FOR DISEASE CONTROL AND PREVENTION, www.cdc.gov/aging/caregiving/alzheimer.htm (last visited Sept. 13, 2015).

45. See generally *FACT SHEET: Launch of the “It’s On Us” Public Awareness Campaign to Help Prevent Campus Sexual Assault*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Sep. 19, 2014), www.whitehouse.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus- (discussing the launch of a public awareness campaign on sexual assault). Although this source does not single out issues regarding dementia, it highlights the prominence and agenda assigned to ensuring that cases of sexual assault and rapes are prevented in the future. *Id.*

46. See generally *id.* (discussing the launch of a public awareness campaign

through the “It’s On Us” campaign. “It’s On Us” discusses sexual assault as acts often perpetrated against intoxicated individuals, who could be construed as comparable to a spouse with Alzheimer’s.⁴⁷

The purpose of this article is to explore defining the acceptable parameters of marital sexual behavior, in situations where only one spouse has dementia, through criminal statute.⁴⁸ An estimated 90% of elder abusers are family members, including spouses, and an estimated 50% of elderly dementia patients have undergone a form of abuse.⁴⁹ Cases, like *Rayhons*, are foreseeable with an aging population and heightened awareness of sex crimes and elder abuse.⁵⁰ Some may question the efficacy of additional sex crime legislation because rape is widely unreported in that only an estimated 33.6% of rapes and sexual assaults were reported to the police in 2014.⁵¹ Nonetheless, a social benefit exists, in formulating a statute to address sex crimes involving only one spouse afflicted with dementia, under Jerome Hall’s General Principle (“General Principle”) of criminal law.⁵²

on sexual assault).

47. *See id.* (stating, “We are committed to creating an environment - be it a dorm room, a party, a bar or club, or the greater college campus - where sexual assault is unacceptable and survivors are supported.”) (emphasis added). The reference in this source to drinking establishments gives rise to an inference of sexual assaults committed against individuals incapacitated because of intoxication.

48. *See* Carol E. Tracy et al., *Rape and Sexual Assault in the Legal System*, WOMEN’S LAW PROJECT (June 5, 2012), at 6, www.womenslawproject.org/resources/Rape%20and%20Sexual%20Assault%20in%20the%20Legal%20System%20FINAL.pdf (discussing the rape and sexual assault statutes across the United States).

49. *Statistics/Data*, NAT’L CTR. ON ELDER ABUSE: ADMIN. ON AGING, www.ncea.aoa.gov/Library/Data/index.aspx#abuser (last visited Sept. 13, 2015).

50. *See* Gruley, *supra* note 7 (discussing increases in the population with Alzheimer’s and the concerns from Mrs. Rayhons’s daughters regarding her sexual activity).

51. Jennifer L. Truman and Lynn Langton, *Criminal Victimization, 2014*, BUREAU OF JUSTICE STAT. (August 2015), www.bjs.gov/content/pub/pdf/cv14.pdf.

52. *See* James F. Fitzpatrick, *General Principles of Criminal Law*, *By Jerome Hall*, 36 IND. L.J. 121, 127 (1960) (reviewing JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (1960)) (stating, “Hall argues strenuously throughout the book that essential to the imposition of criminal liability is the defendant’s awareness of the ‘circumstances that make [an] act a criminal offense’”). According to the author, Jerome Hall proposes the following:

First, since law is uncertain while fact is certain, there must be some institution to declare authoritatively whether specific conduct came within the proscription of the law. That a court must do this rather than an individual or his attorney is essential to the preservation of a legal order. Second, to declare that one’s ignorance of the illegality of his act excuses would subvert and contradict society’s objective ethics.

Fitzpatrick, *supra* note 52, at 127.

The General Principle states that a defendant must be aware of the “circumstances that make [an] act a criminal offense” when she is committing a crime.⁵³ The prosecution of Henry Rayhons demonstrates the need to statutorily make individuals aware of when they break the law.⁵⁴ For instance, while testifying, Mr. Rayhons claimed to take “sexual activity,” as specified by Mrs. Rayhons’s doctor, to only mean sexual intercourse.⁵⁵ Hence, under the General Principle, it is important for lawmakers to stress that sex crimes legislation can apply to non-intercourse sexual activity. Conformity to the General Principle as to permissible sexual behavior with a spouse suffering dementia is especially relevant as members of the American Law Institute (“ALI”) re-examine the Model Penal Code’s rules on sex crimes.⁵⁶

The issue of marital sex involving only one spouse with Alzheimer’s, as discussed in this Comment, references both medical and legal authority.⁵⁷ The background section discusses the cognitive issues of consent and the health benefits of sexual intimacy for Alzheimer’s patients.⁵⁸ The analysis section addresses the right to sexual relations during marriage and competing policy objectives of preventing sexual assault and respecting sexual intimacy of dementia patients.⁵⁹ Next, the comment analyzes (i) the problems under existing and proposed statutory and persuasive authority,⁶⁰ (ii) signing a waiver consenting to sex in

53. *Id.*

54. See Pam Belluck, *Iowa Man Found Not Guilty of Sexually Abusing Wife with Alzheimer’s*, N.Y. TIMES (April 22, 2015), www.nytimes.com/2015/04/23/health/iowa-man-found-not-guilty-of-sexually-abusing-wife-with-alzheimers.html (discussing the verdict in the *Rayhons* prosecution).

55. *Id.*

56. See *Model Penal Code: Sexual Assault and Related Offenses*, AM. LAW INST., www.ali.org/projects/show/sexual-assault-and-related-offenses/ (last visited Oct. 14, 2016) (stating, “This project is re-examining Article 213 of the Model Penal Code, which was ahead of its time when approved by ALI in 1962, but is now outdated and no longer a reliable guide for legislatures and courts.”).

57. See Joshua Chodosh et al., *Nursing Home Assessment of Cognitive Impairment: Development and Testing of a Brief Instrument of Mental Status*, 56 J. AM. GERIATRICS SOC’Y 2069 (2008) (discussing medical cognitive tests used on individuals with dementia); see also Jed Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013) (discussing problems of sexual autonomy and “rape-by-deception”).

58. See Belluck, *supra* note 1 (discussing medical issues regarding sex and individuals with dementia).

59. See Ronald Pies, *Dementia shouldn’t mean the end of sex*, WASH. POST (June 12, 2015), www.washingtonpost.com/opinions/dementia-shouldnt-mean-the-end-of-sex/2015/06/12/3172e912-fe67-11e4-833c-a2de05b6b2a4_story.html (discussing allowing sexual activity of individuals with Alzheimer’s from a medical ethics standpoint); see also Rubinfeld, *supra* note 57 (discussing policy goals of sexual autonomy and self-possession).

60. See MODEL PENAL CODE § 213 (1962) (stating sexual offense law under the MPC); see also MODEL PENAL CODE § 213 (Discussion Draft No. 2, 2015)

advance of the progression of dementia, (iii) a presumption of consent,⁶¹ and (iv) the Cognition-Plus Approach.⁶² This Comment suggests a statutory exception concentrating the power to initiate sexual relations in the spouse afflicted with dementia.⁶³ It further analyzes the justifications and problems of such a proposal. Lastly, the conclusion reiterates the need to address marital sexual relations where one spouse has dementia.⁶⁴

II. BACKGROUND

Every state criminalizes marital rape.⁶⁵ All states acknowledge “penetration without consent or any additional force beyond penetration [a]s rape.”⁶⁶ However, consent is inconsistently defined across the states.⁶⁷ In Illinois, “‘consent’ means a freely given agreement to the act of sexual conduct in question.”⁶⁸ Mississippi does not define consent in its sexual battery criminal statute.⁶⁹ Similarly, Iowa does not separately define consent under its sexual abuse statute, but states there is sexual abuse where “[t]he act is done by force or against the will of another.”⁷⁰

Some jurisdictions require a victim’s awareness of the “nature” of the sexual act to show consent.⁷¹ California recently defined “consent” as “positive cooperation in act or attitude pursuant to an exercise of free will . . . [t]he person must act freely and voluntarily and have knowledge of the nature of the act or

(stating proposed changes to sexual offense legislation under the MPC).

61. See Melissa C. White, Comment, *The Eternal Flame: Capacity to Consent to Sexual Behavior Among Nursing Home Residents with Dementia*, 18 ELDER L.J. 133, 157 (2010) (discussing nursing home methods to determine residents’ capacity to consent to sexual activity).

62. See Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1205 (discussing legally recognizing the facilitation of sexual activity among individuals with long-lasting cognitive problems through oversight by “an adequate decision-making support network.”).

63. See Angela Nelson, *The Rayhons Trial: A Juror’s Perspective*, KIOW RADIO (May 1, 2015), <http://kiow.com/2015/05/01/rayhons-trial-a-jurors-perspective/> (stating, “[Henry Rayhons] testified that Donna was the initiator of intimate acts and claimed his undying love for her”).

64. See Belluck, *supra* note 1 (quoting Derek Beetson, “It really is a huge issue, and somewhere down the line we’re going to have to confront it.”).

65. Tracy et al., *supra* note 48, at 6.

66. *Id.* at 1.

67. *Id.* at 3.

68. 720 ILCS 5/11-1.70 (2011). Illinois law goes on to state, “Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.” *Id.* Notably, the statute explicitly singles out defenses premised on the dress of the victim and states, “The manner of dress of the victim at the time of the offense shall not constitute consent.” *Id.*

69. See Miss. Code Ann. § 97-3-95 (1998) (stating sexual battery law).

70. Iowa Code § 709.1 (1999).

71. Tracy et al., *supra* note 48, at 19.

transaction involved.”⁷² Florida’s sexual battery statute finds an individual “mentally defective” and incapable of consent if he or she has “a mental disease or defect which renders [the] person temporarily or permanently incapable of appraising the nature of his or her conduct.”⁷³

Appraising whether an individual with Alzheimer’s can comprehend the “nature” of or voluntarily have sex is difficult, even with the help of experts.⁷⁴ Conflicting expert testimony in *Rayhons* demonstrated this difficulty.⁷⁵ At trial, prosecutors introduced testimony from a neurology expert, Dr. Alireza Yarahmadi, who stated that dementia patients “have feelings, but they don’t have good judgment.”⁷⁶ Another testifying expert, a physician who treated Donna Rayhons, countered that “intimacy is beneficial for dementia patients.”⁷⁷ In spite of these differences, Dr. Brady and Mrs. Rayhons’s nursing care facility relied upon the less nuanced BIMS in an attempt to assess an ability to consent.⁷⁸

A. *Medically Testing a Dementia Patient’s Ability to Consent to Sexual Activity*

There is no scientifically established test to assess the ability of a patient to consent to sexual activity.⁷⁹ In addition to BIMS, other tests to measure the progression of Alzheimer’s, include the Minimum Data Set (MDS) 3.0 Cognitive Performance Scale (CPS), which incorporates BIMS, the Mini-Mental State Examination (MMSE) and the Modified Mini-Mental State Examination (3MS).⁸⁰

72. CAL. PEN. CODE § 261.6 (2015).

73. Fla. Stat. § 794.011 (2016)

74. See Gruley, *supra* note 7 (discussing difficulties for medical experts in assessing consent).

75. See Belluck, *supra* note 1 (discussing expert testimony offered in the *Rayhons* prosecution).

76. Belluck, *supra* note 1 (quoting Alireza Yarahmadi).

77. Belluck, *supra* note 1 (quoting John Boedeker). Dr. Boedeker testified, along with social worker Michelle Dornier of Mrs. Rayhons’s nursing home, on the results of her BIMS. *Id.* Dornier additionally testified that Donna Rayhons “was always pleased to see Henry.” *Id.* Dr. Boedeker did not conduct the BIMS or make the determination Mrs. Rayhons could no longer consent to sex. *Id.* Instead, the doctor for Mrs. Rayhons at her nursing home, Dr. John Brady, made that determination. *Id.*

78. See Gruley, *supra* note 7 (discussing use of the BIMS test to assess consent).

79. *Id.*

80. Chodosh et al., *supra* note 57, at 2069. The findings in this article were premised on the MDS 2.0. *Id.* That same year, developers of the MDS introduced the MDS 3.0, and conducted a study finding it more efficient and accurate than the MDS 2.0. Debra Saliba and Joan Buchanan, *Development & Validation of a Revised Nursing Home Assessment Tool: MDS 3.0*, CTRS FOR MEDICARE AND MEDICAID SERVS., at ix (Apr. 2008), www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/

All of these tests incorporate objective standards in evaluating cognitive impairment.⁸¹ The BIMS primarily tests for recall memory of simple words, such as “sock, blue, and bed,”⁸² and knowledge of the current year, month, and day of the week.⁸³ The MDS 3.0 is more extensive because it incorporates mood and inappropriate sexual behavior.⁸⁴ The 11-question MMSE has been widely used since 1975, and asks simple requests such as to “[n]ame a pencil and watch” and to “spell ‘world’ backward.”⁸⁵ The MMSE accounts for “five areas of cognitive function: orientation, registration, attention and calculation, recall, and language.”⁸⁶ The MMSE is limited, because it “relies heavily on verbal response and reading and writing . . . [t]herefore, patients that are hearing and visually impaired, intubated, have low English literacy, or those with other communication disorders may perform poorly even when cognitively intact.”⁸⁷

Medical experts question whether the tests indicate a patient’s ability to consent.⁸⁸ When asked about *Rayhons*, Susan Wehry M.D., a Vermont state official charged with investigating elder sex abuse, explained, “The BIMS in this case tells me nothing except that [Donna Rayhons] has dementia. You can have virtually no short-term memory and still consent to a lot of things.”⁸⁹ She emphasized that Mrs. Rayhons’s nursing care facility should instead “have completed a broader assessment that

NursingHomeQualityInits/downloads/mds30finalreport.pdf (reporting findings that the MDS 3.0 served as a more efficient, accurate and superior cognitive assessment than the MDS 2.0). Both studies acknowledge that the structure provided under BIMS made for a more accurate assessment of cognition than an observational methods employed under the MDS 2.0. Saliba & Buchanan, *supra* note 80, at 70; Chodosh et al., *supra* note 57, at 2074. In fact, the BIMS is now incorporated into the MDS 3.0. Saliba & Buchanan, *supra* note 80, at 70. Interestingly, one test used to diagnose Alzheimer’s is that of “clock-drawing,” in which a cognitive assessment is rendered based upon the patient’s drawing of a face of a clock. Eric G. Tangalos, *Alzheimer Disease Diagnosis in the Long-term Care Setting: Case Illustration*, MEDSCAPE (May 24, 2012), www.medscape.org/viewarticle/764053.

81. Chodosh et al., *supra* note 57, at 2070 (stating “[p]roposed changes to the MDS 2.0 point to the use of objective cognitive testing” and “standard objective cognitive tests like the MMSE are not feasible in the [nursing home] setting . . .”); see also Saliba & Buchanan, *supra* note 80, at 69 (explaining a preference for an objective approach in the adoption of the MDS 3.0).

82. Saliba & Buchanan, *supra* note 80, at 12.

83. *Id.*

84. *Id.* at 17.

85. Lenore Kurlowicz & Meredith Wallace, *The Mini Mental State Examination (MMSE)*, HARTFORD INST. FOR GERIATRIC NURSING, DIV. NURSING, NYU (January 1999), www.mountsinai.on.ca/care/psych/on-call-resources/on-call-resources/mmse.pdf.

86. *Id.*

87. *Id.*

88. Gruley, *supra* note 7.

89. *Id.*

gauged her ability to solve problems and make judgments, including judgments about sex.”⁹⁰

B. The Sexual Needs, Benefits and Problems of Individuals with Alzheimer’s

Dr. Wehry’s suggestion for Mrs. Rayhons’s nursing home still fails to address the sexual benefits and needs of Alzheimer’s patients and their spouses.⁹¹ A 2011 study led by family social scientist Steven M. Harris concluded that intimacy from a caregiver can contribute to the treatment of Alzheimer’s.⁹² In fact, the Alzheimer’s Society of the United Kingdom found that “[f]or many couples coping with dementia, physical intimacy continues to be a rich source of mutual comfort, support and pleasure for many years.”⁹³ The Alzheimer’s Society additionally states, “Where sexual difficulties do arise, it’s important to remember there is no single ‘normal’ way of dealing with this very personal issue.”⁹⁴ Married couples affected by Alzheimer’s have also found sexual intimacy to serve as a means of emotional connection and as a coping mechanism.⁹⁵ One spouse revealed, “[Sex] was very comforting; there were periods when we were very anxious, devastated, scared . . . and being sexual with each other was real important.”⁹⁶ She further stated, “[Sex] became a time of connecting, a time of reassurance, a time of pleasure, it was a time when things felt normal when nothing else felt normal. Our life was unraveling and being sexual with each other was time that felt good.”⁹⁷ Furthermore, the sex drives of some patients will increase as Alzheimer’s or dementia progresses.⁹⁸ A study led by

90. *Id.*

91. See Belluck, *supra* note 1 (discussing sexual needs of individuals with dementia).

92. Steven M. Harris et al., *A Caregiver Perspective of How Alzheimer’s Disease and Related Disorders Affect Couple Intimacy*, 15 AGING & MENTAL HEALTH 950, 950 (2011).

93. *Sex and intimate relationships*, ALZHEIMER’S SOC’Y, www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=129 (last visited Jan. 31, 2016).

94. *Id.*

95. *Sexuality and Dementia*, FAMILY CAREGIVER ALLIANCE, (Feb. 7, 2014), <https://caregiver.org/sexuality-and-dementia>.

96. *Id.* These words were spoken by an unnamed caregiver-spouse at a conference hosted by the Caregiver Resource Centers of California. *Id.*

97. *Id.*

98. K. Alagiakrishnan et al., *Sexually Inappropriate Behaviour in Demented Elderly People*, 81 POSTGRAD MED. J. 463, 464 (2005) (discussing the commonality of sexually inappropriate behavior among a sample including individuals managed by different caretakers and exhibiting differing stages in the disease). The study found that even subjects with less advanced dementia engaged in sexually inappropriate behavior and that it made no difference whether the subjects were in community care or nursing care. *Id.* at 465.

Chiara Simonelli found that “[m]any health professionals do agree that [Alzheimer’s] patients have a right to sexual expression.”⁹⁹

Loss of cognitive function does not necessarily mean a patient can no longer consent to sexual activity because “[w]anting to have sex is a bit like being hungry or being thirsty.”¹⁰⁰ According to one medical expert, “there’s a lot of things [Alzheimer’s and dementia patients] might not be able to do, like [manage] money and time and recognition of children, but they have the capacity for self-determination and intimate relationships.”¹⁰¹ One study found elderly spouses continued to value sex and stated that “[a]t the age of 70, two-thirds of the men and one half of the women considered sex important for the happiness of their relationship.”¹⁰² That same study found only 24% of respondents between the ages 65 and 74 did *not* engage in sexual intercourse within the preceding year.¹⁰³ Another study involving healthy retirees over 80 reported 62% of male and 30% female respondents reported having “recent sexual intercourse.”¹⁰⁴

Sexual activity involving a spouse with dementia is not without concern for his or her dignity and well-being.¹⁰⁵ Dementia patients have been found to engage in graphic sexual behavior, such as exposing themselves or masturbating in public, trying to have intercourse with or force sex onto others, and making inappropriate remarks.¹⁰⁶ Although not considered a major concern by medical experts,¹⁰⁷ hypersexual dementia patients can make tiring sexual demands and “physical aggression may result

99. Chiara Simonelli et al., *The Influence of Caregiver Burden on Sexual Intimacy and Marital Satisfaction in Couples with an Alzheimer Spouse*, 62 INT’L J. CLINICAL PRAC. 47, 51 (2008).

100. Belluck, *supra*, note 1 (quoting Derek Beeston). As mentioned in the Introduction, Derek Beeston is a professor of social work at Staffordshire University. *Id.*

101. *Id.* (quoting Patricia Speck). Patricia Speck is a forensic nurse at the University of Alabama-Birmingham. *Id.*

102. Kontula & Haavio-Mannila, *The Impact of Aging on Human Sexual Activity and Sexual Desire*, 46 J. SEX RES. 46, 52 (2009) (analyzing statistical survey data to determine factors influencing sexual activity).

103. *Id.* at 49.

104. Kessel, *supra* note 24, at 121 (citing Judy Bretchneider and Norma McCoy, *Sexual Interest and Behaviour in Healthy 80-102 Year Olds*, 17 ARCH. SEX BEHAV. 109-29 (1988) (researching the prevalence of sexual intercourse among the elderly)). In another study, 46% of respondents aged 70 to 80 reported having orgasms monthly. Asgeir R. Helgason et al., *Sexual Desire, Erection, Orgasm and Ejaculatory Functions and Their Importance to Elderly Swedish Men: A Population-based Study*, 25 AGE AND AGEING 285, 285 (1996).

105. See Benjamin Black et al., *Inappropriate Sexual Behaviors in Dementia*, 18 J. GERIATRIC PSYCHIATRY & NEUROLOGY 155, 158 (2005) (discussing hypersexuality and forms of inappropriate sexual behavior in dementia patients).

106. *Id.*

107. Karen M. Robinson, *Understanding Hypersexuality: A Behavioral Disorder of Dementia*, 21 HOME HEALTHCARE NURSE 43, 44 (2003).

if these needs are not met.”¹⁰⁸ These problematic behaviors are treatable with psychiatric medications.¹⁰⁹ Another concern is that individuals with Alzheimer’s or dementia could be sexually exploited.¹¹⁰ Sexual exploitation becomes an issue for consent and protecting a dementia patient from unwanted sexual activity in the cases where the patient experiences a decreased sex drive as a result of the disease.¹¹¹ Balancing these concerns against the benefits of sexual intimacy heightens the need to reassess sex crime laws as applied to marital couples affected by dementia.

III. ANALYSIS

Sex crime statutes are being re-examined by The American Legal Institute (ALI) in Article 213 of the Model Penal Code.¹¹² Initially approved by the ALI in 1962, Article 213 “is now outdated and no longer a reliable guide for legislatures and courts.”¹¹³ States are re-examining their own sex crime legislation to include affirmative consent.¹¹⁴ If done improperly, these re-examinations by states and the ALI run the risk of precluding sexual activity within marriages affected by Alzheimer’s. As one juror from *Rayhons* wrote:

108. K. Alagiakrishnan et al., *supra* note 98, at 464.

109. *Id.* at 465.

110. Not surprisingly, one author recognized this problem and reported having frequently been asked, “Should 2 demented persons or 1 demented and 1 nondemented person be allowed to participate in sexual relationship?” Black et al., *supra* note 105, at 160. The author briefly advised a “safety-first rule” in which he indicated that there should be a competency to understand sex and “no coercion by one or other party . . .” *Id.*

111. See Peter M. Haddad & Susan M. Benbow, *Sexual Problems Associated with Dementia. Part 1. Problems and their Consequences*, 8 INT’L. J. GERIATRIC PSYCHIATRY 547, 547 (1993) (discussing the variety of sexual problems involving individuals with Alzheimer’s).

112. *Model Penal Code: Sexual Assault and Related Offenses*, *supra* note 56. Already, the ALI Council has approved changes to the definition of “consent” and the statutory language for “sexual penetration without consent.” STEPHEN J. SCHULHOFER & ERIN MURPHY, REPORTER’S MEMORANDUM, MODEL PENAL CODE 213 (Tentative Draft No. 2, 2016). The ALI membership approved the Council’s new definition of ‘consent’ at its 2016 Annual Meeting. *Model Penal Code: Sexual Assault and Related Offenses*, *supra* note 56. This new definition of consent adopts a contextualist approach and states:

Consent may be express, or it may be inferred from a person’s behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person’s behavior must be assessed in the context of all the circumstances to determine whether the person has consented.

MODEL PENAL CODE § 213.0 (Tentative Draft No. 2, 2016).

113. *Model Penal Code: Sexual Assault and Related Offenses*, *supra* note 56.

114. See CAL. PEN. CODE § 261.6 (2015) (discussing the requirement of affirmative consent).

I believe the criminal in this case is anyone who labeled Donna ‘defective’, who tried to remove Donna’s basic human rights without asking her or a court to decide, and the victim is ‘love.’ Remember that those with Alzheimer’s are still human beings that have the same emotional needs we all have. When and how do we legally deem someone incompetent for sexual decision-making, and who should make that conclusion?¹¹⁵

This section of the comment will explore this juror’s inquiries and determine whether spousal sexual needs, regardless of mental state, are protected under the Constitution.¹¹⁶ It will analyze the rationales underlying rape laws, problems under current state statutory and Model Penal Code (“MPC”) frameworks, and approaches to addressing marital sexual relations where one spouse has Alzheimer’s. These proposals include the improvement of existing statutes,¹¹⁷ a signed waiver consenting to sex in advance of the progression of dementia, a presumption of consent,¹¹⁸ and a context-based “Cognition-Plus” model.¹¹⁹

A. *Sexual Self-Determination within Marriage as a Right Protected under the Constitution and Medical Ethics*

Constitutional privacy rights associated with marriage permit sexual relations where dementia affects only one spouse.¹²⁰ The United States Supreme Court in *Griswold v. Connecticut* cited the Fourth and Fifth Amendments to describe the right to privacy “as protection against all governmental invasions ‘of the sanctity of a man’s home and the privacies of life.’”¹²¹ In the landmark decision extending marital rights to same-sex couples, the Court found that, among the “fundamental liberties” provided under the Due Process Clause are those involving “intimate choices that define personal identity and beliefs.”¹²² The *Griswold* Court also recognized that the “preambles” in the Bill of Rights extended

115. Nelson, *supra* note 63.

116. *See id.* (discussing Donna Rayhons’s sexual needs as “basic human rights”).

117. *See* MODEL PENAL CODE § 213 (1962) (discussing sexual offense law under the MPC).

118. *See* White, *supra* note 61 (discussing a presumption of consent as part of a proposal for nursing homes to ensure consensual sexual activity among its residents).

119. Boni-Saenz, *supra* note 62, at 1234.

120. *See* *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (stating “[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”). *Griswold* also states, “Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” *Id.* at 486.

121. *Id.* at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

122. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

the right to privacy to marriage.¹²³ In the 1980s, Justice Blackmun articulated the strong connection between self-identity and sexual intimacy in his dissent in *Bowers v. Hardwick*, and stated:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.¹²⁴

Justices O’Conner, Kennedy and Souter, in another opinion, recognized that protection from government intrusion into the confines of marital and familial decisions is “central to the liberty protected by the Fourteenth Amendment.”¹²⁵ In a criminal case regarding evidence of a sex abuse victim’s sexual history, one court also recognized “sexual self-determination” as part of the rationale to exclude evidence under rape shield laws.¹²⁶ The sexual needs

123. *Griswold*, 381 U.S. at 484 (stating “[t]he marriage relationship lies within the zone of privacy created by several constitutional guarantees.”).

124. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J. dissenting) The *Bowers* Court refused to recognize homosexual sodomy as a fundamental right and wrote, “There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.” *Bowers*, 478 U.S. at 195. The Supreme Court later overruled *Bowers* in *Lawrence v. Texas*. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (stating, “*Bowers* was not correct when it was decided, and is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and is now overruled.”). The *Lawrence Court* emphasized the right to privacy when it wrote:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.

The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lawrence, 539 U.S. at 578.

125. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (stating, “Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”) (citation omitted).

126. *People v. Jovanovic*, 263 A.D.2d 182, 205 (N.Y. App. Div. 1999) (stating, “Given the complainant’s right to sexual self-determination, I would find that the inflammatory nature of the evidence of her prior sexual conduct

and benefits of a spouse could fall within the right to privacy as a private marital decision, as opposed to solely an issue of an ability to consent.¹²⁷

In terms of medical ethics, psychiatrist and bioethics expert, Ronald Pies, believes dementia patients should have the right to engage in sexual activity.¹²⁸ He wrote, “one of the myths I sometimes encountered, even among some staff members, was that people with dementia are ‘globally incompetent’—that they cannot give informed consent of any sort.”¹²⁹ Pies further wrote, “[t]his view . . . can cause patients to be denied privileges and pleasures most of us enjoy simply by virtue of our basic humanity.”¹³⁰ Pies cited the *Clinical Manual of Psychiatry and Law*, and recognized that “[t]he competence of a patient is determined in reference to a particular issue at a particular time . . . [and] even patients adjudicated incompetent by a court may retain some capacity to express a preference about medical care decisions.”¹³¹ In other words, a patient’s ability to consent to sex should not be based upon whether she can identify simple colors or objects. Rather, the relevant inquiry should involve whether an individual is, in fact, agreeing to engage in sexual activity.¹³²

B. Sexual Self-Determination and the Rationales Underlying Rape Laws

The medical community’s recognition of sexual self-determination is at odds with the rationale underlying current rape laws.¹³³ Laws against sex crimes are premised upon notions

would, in the eyes of the jury, outweigh the probative value of this evidence.”). Rape shield laws have “circumscribed defendants’ abilities to cross-examine rape complainants about their sexual histories and to proffer evidence on the same matter.” Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 54 (2002).

127. See generally *Sex and Intimate Relationships*, *supra* note 93. The Alzheimer’s Society emphasizes the privacy involved in handling changes to couples’ sex lives caused by Alzheimer’s and advises, “Where sexual difficulties do arise, it’s important to remember that there is no single ‘normal’ way of dealing with this *very personal* issue.” *Id.* (emphasis added).

128. Pies, *supra* note 59.

129. *Id.*

130. *Id.*

131. *Id.*

132. See *id.* (quoting the CLINICAL MANUEL OF PSYCHIATRY AND LAW, “[t]he competence of a patient is determined in reference to a particular issue at a particular time . . . even patients adjudicated incompetent by a court may retain some capacity to express a preference about medical care decisions.”).

133. Chiara Simonelli et al., *supra* note 99, at 51 (stating “[m]any health professionals do agree that [Alzheimer’s] patients have a right to sexual expression.”).

of sexual autonomy.¹³⁴ Sexual autonomy refers to the right to decide whether to engage in sex,¹³⁵ and is often confused with sexual self-determination, a term referencing manifestations of “sexual fulfillment, emancipation and self-realization.”¹³⁶ Legal theorist, Jed Rubenfeld, finds sexual self-determination “utterly mythical” and writes, “[w]e can neither determine our own desires nor avoid the interpersonal clashes of desire that necessarily pit one person’s sexual autonomy against others.”¹³⁷ This is problematic for a spouse with dementia because a sole rationale of sexual autonomy provides little excuse to overlook a cognitive inability to consent.¹³⁸

A spouse with dementia could also be legally precluded from sexual activity under Professor Rubenfeld’s proposed rationale of “self-possession,” referring to “the possession of one’s own body.”¹³⁹ This rationale is also the basis for laws against slavery and torture, in which “another individual becomes master of the victim’s body.”¹⁴⁰ In the context of sex crimes, the “self-possession”

134. See Rubenfeld, *supra* note 57, at 1392-93 (stating, “The earliest statement that rape violates a woman’s sexual ‘autonomy’ was probably Supreme Court’s 1977 Coker decision . . .). The Coker court stated, “[Rape] is the ‘ultimate violation of self.’” Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion) (citation omitted).

135. Rubenfeld, *supra* note 57, at 1379 (stating, “The idea behind sexual autonomy is simple. People have a right to decide for themselves with whom and under what circumstances to have sex.”).

136. *Id.* at 1418 (stating, “For many, sexual autonomy means sexual ‘self-determination’: the ‘fundamental right’ to define and express one’s ‘sexual identity.’ In this identitarian mode, the grail of sexual autonomy holds the heady liquors of sexual fulfillment, emancipation, and self-realization. It promises liberation from the invidious sexual pressures society imposes on us, whether repressive and discriminatory, or over-sexualizing and objectifying.”) (citations omitted).

137. *Id.* at 1421.

138. See *id.* at 1385 (discussing the trend across universities premised upon sexual autonomy and ensuring consent and stating, “Nonetheless, they [universities] strongly express a sexual-autonomy-based ideal of full disclosure, of ‘positive sexual experiences’ achieved through ‘talking,’ and of advance, affirmative consent to each specific act engaged in.”).

139. *Id.* at 1425.

140. See *id.* at 1427. In defining self-possession, Rubenfeld explains, “By self-possession, I don’t mean perfect self-control or composure. I’m referring to self-possession far more basic – and more physical. Self-possession, as I will use the phrase, refers to possession of one’s own body.” Professor Rubenfeld finds self-possession analogous to slavery and torture and writes:

In both slavery and torture, another individual becomes master of the victim’s body. With slavery, this mastery consists of a power to force the victim wholly and bodily to serve the other: to please the other, to be occupied with any task he commands, to exist for his purposes and his satisfaction. With torture, mastery consists of a power to inflict on the victim such excruciating pain, suffering, or terror that the victim’s own bodily self-governance is nullified and sundered. In both cases, the victim’s body becomes - not metaphorically, but physically and actually

rationale necessitates a requirement of force¹⁴¹ and relegates non-forcible rape to crimes of battery and assault¹⁴² and, in those categories, criminal law could still legally preclude a spouse suffering dementia from marital sex.

The nuanced context of one spouse having dementia necessitates at least some legal recognition of sexual self-determination.¹⁴³ Facilitating sexual self-determination of a spouse affected by dementia emerges as a competing policy goal to protecting their sexual autonomy.¹⁴⁴ Balancing these goals involves both recognizing the sexual needs and benefits of a spouse with dementia in addition to their right to refuse sex.¹⁴⁵ Dementia can make a person vulnerable under a power-dynamic to a more cognizant spouse.¹⁴⁶ An individual with dementia may be sexually

- someone else's possession

The same is true of rape. In fact, on this dimension, rape is very close to both slavery and torture. Like slaves, rape victims are made bodily to serve another's pleasure - to exist, if briefly, only for his satisfaction. Like many torture victims, rape victims' bodies are immobilized, penetrated, exposed to wanton bodily cruelty or death, and their extreme pain and fear is often part of what the perpetrator seeks to achieve. Rape may not in every case be an act of enslavement, and not every act of rape literally involves torture, but the similarities are unmistakable. It is no coincidence that when women are enslaved or tortured, sexual abuse is the norm.

Id. at 1426-27. He concludes that “[t]he right to self-possession implies the freedom not to have another person forcibly take sexual possession of one’s body, which in turn implies the freedom not to be forced into sexual service.” *Id.* at 1443.

141. *Id.* at 1434 (stating “the right of self-possession offer rape law what it has always lacked: a legal and theoretical framework in which the force requirement finds its proper place and explanation.”).

142. *Id.* at 1441 (stating, “The law needs to ask instead whether the act was patently offensive, potentially injurious, or otherwise harmful. Rape law does not ask these questions; the law of battery does and hence may be better suited to address unconscious sex.”).

143. See generally Belluck, *supra* note 1. Patricia Speck, a forensic nurse at the University of Alabama refers to a “capacity for self-determination and intimate relationships.” *Id.* She states, “Most of [nursing homes] are embarrassed by sex. . . . Older persons are not considered to be sexual.” *Id.*

144. See Rubinfeld, *supra* note 57, at 1418 (stating, “For many, sexual autonomy means sexual ‘self-determination’: the ‘fundamental right’ to define and express one’s ‘sexual identity.’ In this identitarian mode, the grail of sexual autonomy holds the heady liquors of sexual fulfillment, emancipation, and self-realization. It promises liberation from the invidious sexual pressures society imposes on us, whether repressive and discriminatory, or over-sexualizing and objectifying.”) (citations omitted).

145. See Belluck, *supra* note 1 (discussing the need to address consent to sexual activity from individuals with dementia).

146. See generally *Statistics/Data*, *supra* note 49; see also Holly Ramsey-Klawnsnik, *Elderly Sexual abuse: Preliminary Findings*, 3 J. ELDER ABUSE & NEGLECT 73, 73 (1991) (stating, “Eighty-one percent [of sexual abuse perpetrators] were caregivers for the women they allegedly assaulted, and 78% were family members, predominately sons and husbands.”).

exploited, especially where the perpetrator relies on faulty memory and incognizance.¹⁴⁷ However, a spouse affected by dementia often retains sexual needs and desires,¹⁴⁸ but could technically be precluded from sexual activity under rape laws not recognizing their sexual self-determination.

Professor Alexander A. Boni-Saenz, in another article on sexual incapacity,¹⁴⁹ opts for a rationale of “sexual capability.”¹⁵⁰ This doctrine provides for “the opportunity to pursue functionings associated with sex and sexuality.”¹⁵¹ Professor Boni-Saenz’s rationale “could include having sexual pleasure, forming a sexual identity, or feeling sexy.”¹⁵² The sexual capability doctrine essentially balances self-determination and sexual autonomy inasmuch that “one must respect the sexual capabilities of others.”¹⁵³ Sexual autonomy is protected under this doctrine because it does not “guarantee[]” sex, and instead provides for the right to pursue sex-related “opportunities.”¹⁵⁴ Despite these protections, sexual capability doctrine could negatively impact sexual well-being or patient dignity because of the “subjectiv[ity]” of sex.¹⁵⁵ Notions of sexually appropriate or desirable behavior varies across people,¹⁵⁶ which could raise questions about what sexual opportunities are pursuable for individuals with dementia.

In spite of these concerns, sexual capability doctrine specially recognizes the sexual desires and needs of a spouse with dementia.¹⁵⁷ Determining sexual capability is not rooted solely in

147. See Terry Fulmer et al., 52 J. AMERICAN GERIATRICS SOC’Y 297, 302 (2004) (stating, “Reports of [elder mistreatment] may be unjustified. Furthermore, reports may cause caregivers to withdraw from their roles and devastate social support. Older adults may be fearful of retribution or abandonment if a caregiver knows they have discussed mistreatment with a clinician.”). This study stated that “[i]t has been determined that dementia, depression, and malnutrition are independent risk factors for mistreatment.” *Id.* (citations omitted).

148. See *Sex and intimate relationships*, *supra* note 93 (discussing sexual needs of individuals with Alzheimer’s).

149. Boni-Saenz, *supra* note 62, at 1201. Boni-Saenz also discusses the *Rayhons* case. *Id.* at 1202.

150. *Id.* at 1205.

151. *Id.* at 1225.

152. *Id.*

153. *Id.*

154. See *id.* (stating, “The focus of sexual capability is on ensuring opportunities rather than on guaranteeing happiness, economic resources, or freedom from state interference.”).

155. See *id.* at 1228 (stating, “The welfare associated with sexual activity derives, first, from the subjective mental states that are involved in sex. These mental states are important because of the largely subjective nature of sex.”).

156. See *id.* at 1229 (stating, “Even when there is consensus about what is considered sexual, two people might disagree about whether some activity deemed sexual is desirable.”).

157. See *id.* at 1205 (stating, “An individual’s sexual capability is a product not only of that person’s cognitive abilities, but also of her social resources and the legal treatment of those abilities and resources.”).

medical tests.¹⁵⁸ Rather, it “is the product of various factors, including one’s cognitive impairments, social resources, and the legal treatment of those impairments and resources.”¹⁵⁹ The doctrine is supposed to rely on both mental health and environmental considerations to facilitate sexual self-determination.¹⁶⁰ Among the rationales underlying rape law, sexual capability doctrine certainly favors legal recognition of sexual self-determination without dispensing of sexual autonomy.¹⁶¹

C. Problems with Existing and Proposed Changes to the Model Penal Code

The MPC is outdated because it fails to address marital rape.¹⁶² There is no possibility of prosecution for marital rape, because the MPC defines rape as occurring when, “[a] male [sic] has sexual intercourse with a female not his wife . . .”¹⁶³ This same problem exists under the Code’s sexual assault provision, which recognizes that “[a] person who has sexual contact with another not his spouse . . .” is rape.¹⁶⁴ The language of these statutes fails to adequately protect individuals with Alzheimer’s or dementia from rape and sexual assault by their spouse.¹⁶⁵

The most recently proposed changes to the sex offenses provisions of the MPC remove such references to marriage.¹⁶⁶ The proposed changes include a section regarding rape of a mentally incapacitated person, which states:

An actor is guilty of rape of a vulnerable person, a felony of the second degree, if he or she knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act . . . is unable to express refusal, by words or actions, to engage in such act of sexual penetration, because of mental disorder or disability, whether temporary or permanent.¹⁶⁷

158. *Id.* at 1226-1227.

159. *Id.* at 1227.

160. *Id.* at 1226.

161. *Id.* at 1227 (stating, “Sexual capability overlaps significantly with the value of sexual autonomy in its emphasis on self-determination.”).

162. *See* MODEL PENAL CODE § 213.1 (1962) (discussing the law for rape under the MPC).

163. MODEL PENAL CODE § 213.1. (1962)

164. MODEL PENAL CODE § 213.4. (1962)

165. *See* MODEL PENAL CODE § 213 (1962) (discussing the law for sexual offenses under the MPC).

166. *See* MODEL PENAL CODE RULE § 213 (Discussion Draft No. 2, 2015) (discussing proposed changes to the law for rape under the MPC).

167. MODEL PENAL CODE RULE § 213.3 (Discussion Draft No. 2, 2015)

This proposed change is too focused on expression of refusal by the vulnerable in its reference to an inability “to express refusal.”¹⁶⁸ A vulnerable person’s capability of expressing refusal to his/her spouse does not necessarily translate into a mutual desire for sex.¹⁶⁹ This problem presents itself where a caregiver-spouse holds power over the victim’s autonomy.¹⁷⁰ Assessing the capacity to refuse could lead to over-reliance on previously discussed medical tests that may not necessarily measure an ability to consent to sex.¹⁷¹

Another proposed change to the MPC seeks to standardize the mental capacity for consent to sexual activity by stating:

An actor is guilty of Sexual Penetration of a Vulnerable Person, a felony of the third degree, if he or she knowingly or recklessly engages in an act of sexual penetration with a person who, at the time of such act. . . is mentally or developmentally disabled to the extent that such person’s social or intellectual capacities are no greater than that of a person who is less than 12 years old.¹⁷²

This proposed rule is not inclusive of the continued sexual needs of a spouse afflicted with Alzheimer’s.¹⁷³ Despite diminished cognitive functioning, the progression of Alzheimer’s or dementia can trigger an increased sex drive.¹⁷⁴ Outright denial of sexual satisfaction precludes spouses with dementia from the sexual benefits of marriage afforded to other married couples and once afforded to themselves.¹⁷⁵ This failure to preserve marital sexual

168. See MODEL PENAL CODE RULE § 213.3 (Discussion Draft No. 2, 2015), *supra* note 143 (discussing the proposed changes for mentally incapacitated persons under the MPC).

169. See Tracy et al., *supra* note 48, at 20 (stating, “[Affirmative consent] jurisdictions define ‘consent’ by statute or case law, generally as words or overt actions indicating a freely given agreement to have sexual intercourse or contact.”).

170. See Gruley, *supra* note 7 (discussing the various ways in which Henry Rayhons controlled Donna’s autonomy, including “[taking] her driver’s license, unplug[ing] the dryer, and [keeping] her away from the stove”). The article also describes a power-dynamic when it states, “a nurse told the women that on a number of occasions, Donna was wearing nothing but a robe after a visit from Rayhons, and that staffers ‘felt sickened by what he was doing to her.’” *Id.*

171. See *id.* (discussing the use of medical tests to determine ability to consent to sexual activity).

172. MODEL PENAL CODE § 213.3(2)(b) (Discussion Draft No. 2, 2015).

173. See *Sex and intimate relationships*, *supra* note 93 (discussing sexual needs of individuals with Alzheimer’s).

174. K. Alagriakrishnan et al., *supra* note 98, at 464.

175. See *Griswold*, 381 U.S. at 485 (stating “[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”). *Griswold* also states, “Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” *Id.* at 486.

benefits for a spouse with dementia exists not only under the MPC, but also under existing state law.¹⁷⁶

D. Problems with State Sexual Assault and Rape Statutes

State statutes run the risk of exposing spouses of dementia patients to criminal prosecution. The definition of rape has evolved to encompass “penetration without consent and without force (other than the act of penetration itself).”¹⁷⁷ The states take various approaches to defining consent. Some have acknowledged consent to involve individual choice and free will, while others have recognized consent to exist based on an individual’s conduct. Freely given consent includes statutory definitions such as, “conveying permission, positive cooperation in an act or an attitude pursuant to an exercise of free will and with knowledge of the nature of the act.”¹⁷⁸ Affirmative consent refers to the statutory requirement of “words or overt actions indicating agreement for sexual intercourse or acts to be considered consensual.”¹⁷⁹ Requiring affirmative consent can create unique difficulties for dementia patients dependent on others, such as in a care-giver spouse relationship.¹⁸⁰ In particular, a dementia patient could manifest consent for unwanted sexual activity to someone who initiates sex due to power they wield or because of unawareness of the sexual situation.¹⁸¹

State courts generally rely upon notions of “mental incapacity” to ascertain consent of the mentally disabled in criminal cases.¹⁸² A majority of state courts find that mental

176. See Tracy et al., *supra* note 48, at 16 (analyzing state sex crime laws and stating, “Penetration by itself is not criminal, unless it occurs by force, without consent or where the victim lacked the capacity to consent.”).

177. *Id.* at 4.

178. *Id.* at 19 (citing D.C. CODE § 22-3006 (2011); CAL PEN CODE § 261.6 (2012); COL. REV. STAT. ANN. § 18-3-401 (2011)). It is important to note that California has recently revised its criminal code to require affirmative consent. CAL. PEN. CODE § 261.6 (2015).

179. Tracy, *supra* note, 48 at 20.

180. See Fulmer et al., *supra* note 147, at 302 (stating, “Reports of [elder mistreatment] may be unjustified. Furthermore, reports may cause caregivers to withdraw from their roles and devastate social support. Older adults may be fearful of retribution or abandonment if a caregiver knows they have discussed mistreatment with a clinician.”).

181. See *id.* (stating, “Reports of [elder mistreatment] may be unjustified. Furthermore, reports may cause caregivers to withdraw from their roles and devastate social support. Older adults may be fearful of retribution or abandonment if a caregiver knows they have discussed mistreatment with a clinician.”).

182. Elizabeth J. Reed, Comment, *Criminal Law And The Capacity Of Mentally Retarded Persons To Consent To Sexual Activity*, 83 VA. L. REV. 799, 813-14 (1997).

incapacity refers to an individual's understanding of the "nature" and often unwanted results of sex, including venereal disease or producing offspring.¹⁸³ In some states, such as New York, courts will inquire as to whether the victim had an understanding of the morals prescribed to sexual activity.¹⁸⁴ In New Jersey, courts determine whether the individual understood "the sexual and voluntary nature of the act, but not the risks and consequences of sexual conduct."¹⁸⁵ Many state statutes will generally refer to "a victim's inability to understand the consequences of his/her [sic] actions"¹⁸⁶ However, "a victim with a developmental disability or condition will not automatically be determined to be mentally incapacitated or rendered incapable of giving consent in all jurisdictions."¹⁸⁷ Proving mental incapacity will often require expert and lay testimony.¹⁸⁸

Proving mental incapacity can lead to conflicting testimonies.¹⁸⁹ These issues are especially exhibited in over-reliance on a single evaluation, such as the MMSE, which according to one study, "did not discriminate capacity status well."¹⁹⁰ Furthermore, the use of objective medical tests to assess consent conflicts with medical beliefs that sex is beneficial for individuals with dementia.¹⁹¹ In jurisdictions adopting rules similar to the Federal Rules of Evidence,¹⁹² a defendant-spouse cannot introduce evidence of past sexual relations, which precludes such evidence where a victim is mentally incapacitated.¹⁹³

E. Problems with a Presumption of Consent and a Waiver Consenting to Sex

One author suggested that nursing homes adopt a presumption of consent from dementia patients.¹⁹⁴ She wrote that nursing homes should instead "remain diligent in looking for

183. *Id.*

184. *Id.* at 814.

185. *Id.*

186. Tracy, *supra* note 48, at 23.

187. *Id.*

188. Reed, *supra* note 182, at 814.

189. See generally *id.* at 814 (discussing expert testimony to ascertain consent).

190. Scott Y. H. Kim and Eric D. Caine, *Utility and Limits of the Mini Mental State Examination in Evaluating Consent Capacity in Alzheimer's Disease*, 53 PSYCHIATRIC SERVICES 1322, 1322 (2002).

191. Chiara Simonelli et al., *supra* note 99, at 51.

192. The Federal Rules of Evidence are similar to the Uniform Rules of Evidence, which have been adopted by most states. Legal Information Institute, *Uniform Rules of Evidence*, CORNELL U. L. SCH. (Jan. 30, 2016), www.law.cornell.edu/uniform/evidence.

193. White, *supra* note 61, at 156 (citing FED R. EVID. 412).

194. White, *supra* note 61, at 157.

behavior that would indicate a lack of consent, such as verbal or nonverbal signs of distress or one partner no longer recognizing the other sexual partner.”¹⁹⁵ If applied to criminal prosecutions involving spouses, a presumption of consent could potentially expose dementia patients to sexual abuse.¹⁹⁶ This is problematic where an individual will not manifest signs of non-consent and in situations with a perceived power-dynamic.¹⁹⁷ A presumption also fails to prevent sexual abuse in that individuals will always be “presumed” to be consenting from others seeking sexual activity with them.¹⁹⁸

Another approach is that of a signed waiver.¹⁹⁹ In other words, a person with dementia can construct a legal document consenting to sexual activity with her spouse prior to the point at which advancement of the disease renders her mentally incapacitated.²⁰⁰ As a matter of public policy,²⁰¹ courts will likely be hesitant to enforce such an agreement because of its sexual nature.²⁰²

F. Problems with a “Cognition-Plus” Approach

“Cognition-Plus” allows any individual found cognitively incapable of consent to be sexually active with the help of a “decision-making support network.”²⁰³ The Cognition-Plus model by Professor Alexander A. Boni Saenz is rooted in the rationale of

195. *Id.*

196. See *Statistics/Data*, *supra* note 49 (discussing elder abuse of dementia patients).

197. See Fulmer et al., *supra* note 147, at 302 (stating, “Reports of [elder mistreatment] may be unjustified. Furthermore, reports may cause caregivers to withdraw from their roles and devastate social support. Older adults may be fearful of retribution or abandonment if a caregiver knows they have discussed mistreatment with a clinician.”).

198. See White, *supra* note 61, at 157 (stating “[n]ursing home staff must remain diligent in looking for behavior that would indicate a lack of consent . . .”).

199. Sara Kaplan, Comment to Pam Belluck, *Sex, Dementia and a Husband on Trial at Age 78*, N.Y. TIMES (Apr. 13, 2015), www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html?_r=0 (stating, “Good God. I just gave my husband verbal consent to have sex with me (if I don't have a headache) even if I get Alzheimer's. Do I have to put it in writing and give him a power of attorney, too?”).

200. See *id.* (stating, “Good God. I just gave my husband verbal consent to have sex with me (if I don't have a headache) even if I get Alzheimer's. Do I have to put it in writing and give him a power of attorney, too?”).

201. Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163, 165 (1985) (stating, “[C]ourts may refuse to enforce an otherwise valid contract on the grounds that it is illegal or, more properly stated, because it is against public policy.”).

202. *Id.* at 191.

203. Boni-Saenz, *supra* note 62, at 1234.

sexual capability.²⁰⁴ The Cognition-Plus test would require courts undergo the following steps:

The first step is to gauge whether the individual has the threshold capacity to express volition with respect to a sexual decision. . . . If the first step is satisfied, the second step is to assess whether the individual has the necessary mental capacities to understand and reason about the nature and consequences of a given sexual decision.

If one meets this requirement, then one has sexual consent capacity without the need for assistance. If one does not, however, the third step is to evaluate whether there is an adequate decision-making support network in place.²⁰⁵

Cognition-Plus is a variation of the “contextual approach” in that it evaluates “the facts and circumstances surrounding the sexual act.”²⁰⁶ In doing so, a fact-finder is restrained from normatively evaluating “the nature of the sexual relationship and even possibly the nature of the sexual acts involved.”²⁰⁷

At a minimum, the first step requiring volition must be satisfied for there to be no liability for sexual abuse.²⁰⁸ Volition refers to a basic ability to agree to sex, apart from any understanding of the “nature and consequences of a given sexual decision.”²⁰⁹ According to Boni Saenz, “one cannot proceed to be a sexual agent”²¹⁰ without the ability to express volition.²¹¹ “Nature and consequences” under step two refers to an understanding of the “physical and nonphysical effects”²¹² of a “particular sexual situation.”²¹³ An “adequate decision-making support network”²¹⁴ broadly refers to any individual(s) protecting the interests of a person with dementia through a “position of power and trust.”²¹⁵ A sexual relationship with an alleged victim is considered a “conflict

204. *Id.*

205. *Id.* at 1205.

206. *Id.* at 1244.

207. *Id.*

208. *See id.* at 1205 (stating, “The first step is to gauge whether the individual has the threshold capacity to express volition with respect to a sexual decision. Without this manifestation of desire, one cannot proceed to be a sexual agent.”).

209. *Id.* at 1234 (stating, “The first step is to gauge whether the individual has the threshold capacity to express volition with respect to a sexual decision. Without this manifestation of desire, one cannot proceed to be a sexual agent. If the first step is satisfied, the second step is to assess whether the individual has the necessary mental capacities to understand and reason about the nature and consequences of a given sexual decision.”).

210. *Id.*

211. *Id.*

212. *Id.* at 1235.

213. *Id.*

214. *Id.* at 1204.

215. *Id.* at 1238.

of interest”²¹⁶ and triggers a rebuttable presumption of an inadequate decision-making support network.²¹⁷ This presumption can be overcome through “evidence of loyalty and care.”²¹⁸

Ascertaining the adequacy of a decision-making support network does not sufficiently recognize the sexual benefits commonly associated with marriage.²¹⁹ A spouse excluded from a support network could find herself having to defer to individuals in another support network to have marital sex.²²⁰ In fact, the author notes that sex acts would be precluded where a support network does not allow sexual activity,²²¹ or where no support network exists.²²² A spouse included in a support network enjoys even less protections than some of their unmarried counterparts because a spouse must also overcome a rebuttable presumption.²²³ Criteria of “power and trust”²²⁴ and “loyalty and care”²²⁵ are broad and can become subjective in the consideration of evidence that is “testimonial or documentary in nature.”²²⁶

Cognition-Plus leaves spouses with little guidance under the General Principle.²²⁷ Its context-dependent inquiry does not

216. *Id.* at 1239.

217. *Id.*

218. *Id.* at 1239-40.

219. See Joseph Henrich et al., *The Puzzle of Monogamous Marriage*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y 657, 659 (2012) (stating, “Being married comes with economic, social and sexual expectations, prescriptions and prohibitions for both parties, who are accordingly evaluated—formally or informally—by their community.”); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (stating, “Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”) (citations omitted)).

220. See Boni-Saenz, *supra* note 62, at 1238 (stating that decision-making network is limited to individuals whom a person with dementia “relies on . . . to assist in decision-making tasks.”).

221. *Id.* at 1245 (stating, “[E]ven if everyone had adequate supportive networks in place, the cognition-plus test alone cannot and will not force decision-making networks to be supportive of sexual expression.”).

222. *Id.* at 1246 (stating, “[M]any people with persistent cognitive impairments might not be embedded in an adequate supportive network in the first place, whether due to social isolation, lack of funding for long-term care facilities and staff, or overburdened caregivers.”).

223. *Id.* at 1239-40.

224. *Id.* at 1238.

225. *Id.* at 1239-40.

226. *Id.* at 1240.

227. See Fitzpatrick, *supra* note 52, at 127 (stating, “Hall argues strenuously throughout the book that essential to the imposition of criminal liability is the defendant's awareness of the ‘circumstances that make [an] act

provide a more precise rule for when sexual behavior with a spouse suffering dementia becomes rape.²²⁸ Cognition-Plus leaves unresolved the over-reliance by courts on medical assessments and conflicting testimonies.²²⁹ These state law approaches remain intact through requiring a showing of mental capacity for volition and understanding “the nature and consequences of a given sexual decision.”²³⁰ Given these limitations, many spouses could remain unsure of when they could, if at all, be considered a support network.²³¹ A context-dependent inquiry may recognize sexual self-determination,²³² but more guidance for spouses under the General Principle is also needed.

IV. PROPOSAL

This comment proposes statutorily incorporating a “marital exception” for cases presenting facts analogous to *Rayhons*.²³³ This exception would provide additional safeguards to physical autonomy, protect dementia patients from sexual assault, and ensure the continued sexual benefits of a prior marital relationship. The existing statutory frameworks rely too much on objective medical testimony to assess consent.²³⁴ This can lead to conflicting testimony, which can fail to account for the sexual self-determination of the spouse with dementia.²³⁵ Statutory frameworks, such as the MPC, fail to recognize the sexual self-determination of dementia patients.²³⁶ The law does not have to take away sexual self-determination to protect the elderly and can simultaneously empower and protect them from sexual abuse.

This proposal is designed for cases similar to that of the prosecution against Henry Rayhons, where the defendant is accused of sexually harming a spouse with dementia.²³⁷ An effective statutory exception to sex offenses would apply to a prior and existing marital relationship. A marital exception should recognize sexual activity initiated by a spouse with dementia. Whether there is initiation involves inquiry into verbally or

a criminal offense”).

228. *See id.*

229. *See id.*

230. *Id.* at 1205.

231. *See id.*

232. *Id.*

233. *See generally* Belluck, *supra* note 1 (discussing the alleged sex abuse by Henry Rayhons of Donna Rayhons).

234. Reed, *supra* note 182, at 814.

235. *See* Pies, *supra* note 59 (discussing the importance to allow for the continuation of sex for individuals with dementia as a part of medical ethics).

236. *See* MODEL PENAL CODE § 213 (1962) (discussing sexual offense law in the MPC).

237. *See* Belluck, *supra* note 1 (discussing the prosecution of Henry Rayhons for sexually harming his wife with dementia).

physical manifestations reasonably interpreted as requesting sexual activity. In addition, a marital exception should protect a spouse with dementia. Hence, this proposal requires a cognizant spouse to cease sexual activity when it reasonably appears to be physically or mentally distressing.

A. *Prior and Existing Marital Relationship*

A prior and existing marital relationship refers to the spouse with dementia being married prior to her diagnosis and at the time of the alleged sexual abuse. Henry Rayhons would have satisfied this element because he was married to Donna Rayhons since 2007 and at the time of the alleged sex abuse in 2014.²³⁸ This requirement protects the sexual benefits of marriage for a spouse afflicted with dementia.²³⁹ Part of the reason to limit the requirement to couples with a prior and existing marital relationship is because marriage is a manifestation of sexual self-determination.²⁴⁰ Even if a married couple is not monogamous, when two individuals marry under existing cultural norms, they essentially declare a preference to engage in sexual activity with each other.²⁴¹ An individual with dementia presumably would prefer to engage in sexual activity with his spouse over an individual who is not his spouse.²⁴² Therefore, when a person with dementia engages in marital sex prior to being diagnosed with dementia, it is more likely that he would consent to doing so after diagnosis.

This requirement is helpful in offsetting the difficulties in ascertaining consent where medical tests have been ill-equipped to do so.²⁴³ A prior marital relationship affirms the affection and intimacy desired between partners.²⁴⁴ It further seeks to protect

238. *See id.* (discussing the alleged sex abuse by Henry Rayhons of Donna Rayhons).

239. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (stating, “The fundamental liberties protected by the Fourteenth Amendments Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs Applying these tenets, the Court has long held the right to marry is protected by the Constitution.”) (citations omitted).

240. *See id.* (stating that sexuality can be presumed as part of “intimate choices defining personal identity and beliefs.”)

241. *See Joseph Henrich et al.*, *supra* note 219, at 659 (stating, “Being married comes with economic, social and sexual expectations, prescriptions and prohibitions for both parties, who are accordingly evaluated—formally or informally—by their community.”).

242. *See Gruley*, *supra* note 7 (stating, “[Alzheimer’s patients] might be unable to balance a checkbook while they’re perfectly capable of deciding whether they desire a partner’s affections.”).

243. *See id.* (discussing the use of medical tests to determine capacity to consent to sexual activity by Alzheimer’s patients).

244. *See Sex and Intimate Relationships*, *supra* note 93 (discussing sexual

the dignity of the spouse affected by Alzheimer's from being exploited by non-spouses for embarrassing and inappropriate sexual behavior.²⁴⁵ This protects any wishes of the spouse affected by dementia to remain monogamous. A prior and existing marital relationship can also protect a spouse with dementia from sexually transmitted disease stemming from sexual contact with non-spousal partners.²⁴⁶

B. Sexual Activity Initiated by the Spouse with Dementia

This second requirement states that a spouse afflicted with dementia initiate sexual activity either verbally or through physical manifestations. Testimony that Donna Rayhons initiated sexual activity played a role in Rayhons's prosecution.²⁴⁷ The power of initiating sexual activity empowers a spouse suffering dementia with more control over her physical autonomy and allows her to decide for herself when to have sex. The previously discussed medical tests have demonstrated the difficulties in determining the capacity of an individual with Alzheimer's to consent to sex.²⁴⁸ Concentrating the power to initiate sex in the spouse with dementia ensures against unwanted sexual relations, where it is possible that the spouse with the disease cannot communicate a desire against sex due to unawareness or feelings of vulnerability to a more cognizant individual.²⁴⁹ This element recognizes the susceptibility of a person with dementia to sexual exploitation and abuse.²⁵⁰

This requirement attempts to rectify issues of ascertaining consent. Because a spouse suffering dementia initiates sex, it is more likely that he actually desires sex. This element protects spouses with dementia and Alzheimer's who exhibit a diminished sex drive because of the disease,²⁵¹ by allowing them to not have

needs of Alzheimer's patients).

245. See Benjamin Black et al., *supra* note 105, at 158 (discussing forms of inappropriate sexual behavior in dementia patients).

246. Ryan Jaslow, *Sexually transmitted disease rates rise among elderly*, CBS NEWS (February 6, 2012), www.cbsnews.com/news/sexually-transmitted-disease-rates-rise-among-elderly-why/ (discussing the increase in sexually transmitted diseases in nursing homes).

247. Nelson, *supra* note 63.

248. See Gruley, *supra* note 7 (discussing the use of medical tests to determine capacity to consent to sexual activity by Alzheimer's patients).

249. See Fulmer et al., *supra* note 147, at 302 (stating, "Reports of [elder mistreatment] may be unjustified. Furthermore, reports may cause caregivers to withdraw from their roles and devastate social support. Older adults may be fearful of retribution or abandonment if a caregiver knows they have discussed mistreatment with a clinician.").

250. See generally *Statistics/Data*, *supra* note 49; see also Holly Ramsey-Klawnsnik, *supra* note 146, at 73.

251. Jayanthi D. Subramani et al., *Sexuality in older people*, 41 GM: PEER-

sex when they lack the ability to refuse sexual activity. Allowing sex to proceed when initiated by a spouse with dementia recognizes the sexual needs and intimacy of both marital partners, especially where they desire sexual intimacy to cope with changes caused by the disease.²⁵²

*C. A Reasonable Person Under the Circumstances
Would Not Perceive the Sexual Activity at Issue to be
Physically or Mentally Distressing to the Spouse
Afflicted with Dementia, and Immediately
Discontinue such Activity Where it Becomes
Apparent*

This final requirement is supposed to mitigate issues where the statutory marital exception may be perceived as a license to sexual abuse. Satisfying this element requires two parts. First, there is a presumption of physical or mental distress where the defendant performs sexual acts not reasonably inferred as requested from his spouse's initiation. If applied to the *Rayhons* prosecution, Henry Rayhons would first need to prove that the sexual act was objectively reasonable considering the initiation from the spouse with dementia. When penetrative sexual activity is involved, initiation, under the circumstances, would need to be objectively interpreted as not being limited to a non-penetrative act. The second part would require Mr. Rayhons to show his wife was not showing signs reasonably perceived as discomfort, anxiety, or pain during the sexual act in question, and if she did exhibit such signs, that the sexual act was discontinued.

The emphasis on the distress of the spouse with dementia discourages extreme sexual behavior that the spouse otherwise would not desire. It essentially mirrors an individual's right to withdraw her consent to sexual activity by placing a duty on the cognizant spouse to discontinue sex when there are signs of distress.²⁵³ This element encourages the cognizant spouse to

REVIEWED MEDICINE FOR THE 50+ PATIENT 31, 31 (2011).

252. See *Sex and intimate relationships*, *supra* note 93 (discussing sexual needs of individuals with Alzheimer's).

253. See *In Re John Z*, 60 P.3d 183, 186 (Cal. 2003) (stating "forcible rape occurs when the act of sexual intercourse is accomplished against the will of the victim by force or threat of bodily injury and it is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.") (citation omitted). The California Supreme Court found:

[A]ssuming arguendo that Laura initially consented to, or appeared to consent to, intercourse with defendant, substantial evidence shows that she withdrew her consent and, through her actions and words, communicated that fact to defendant. Despite the dissent's doubt in the matter, no reasonable person in defendant's position would have

respect his counterpart's sexual autonomy where the activity appears to inflict mental and physical harm. This element further allows for a physician or medical care provider to notify an individual when sexual activity with her spouse could become chronically distressing. Such medical notice would thereby constitute the cognizant spouse as perceiving the sexual activity as distressing.²⁵⁴

D. Problems with the Statutory Marital Exception

The statutory marital exception is not without its problems in enforcement. Perhaps the most obvious problem with this statutory proposal is that many cases of rape and sexual assault go unreported.²⁵⁵ Similarly, elder abuse can go unreported as well.²⁵⁶ In fact, Rayhons's prosecution was a case of first impression, meaning that it was the first time a defendant was prosecuted for sexual activity with a spouse suffering dementia.²⁵⁷ This statutory proposal fails to mention issues of reporting sexual abuse. Another problem with this statutory proposal is that it can be interpreted as too intrusive into the sexual decision-making of married couples.²⁵⁸ For instance, this statutory proposal can create problems for couples where one spouse normally initiates sex. In these cases, married couples can become sex-deprived if a spouse afflicted with dementia both desires sex and expects his spouse to initiate sexual activity.

There can also be evidentiary issues in proving sex abuse. For instance, a cognizant spouse who perpetrates sexual abuse can

believed that Laura continued to consent to the act.

Id. at 186-87 (citations omitted).

254. Medical distress to a spouse with Alzheimer's caused by sex should not become a significant issue because of recognition in the medical community of the sexual needs of Alzheimer's patients. *See Sex and intimate relationships, supra* note 93; *see also* Belluck, *supra* note 1 (quoting John Boedeker, "intimacy is beneficial for dementia patients").

255. *See* Truman and Langton, *supra* note 51 (presenting statistics on the reporting of rape and sexual assault).

256. *See* Fulmer et al., *supra* note 147, at 302 (stating, "Reports of [elder mistreatment] may be unjustified. Furthermore, reports may cause caregivers to withdraw from their roles and devastate social support. Older adults may be fearful of retribution or abandonment if a caregiver knows they have discussed mistreatment with a clinician.").

257. Tony Leys, *Rayhons Jury deliberates in 'unprecedented' sex abuse case*, DES MOINES REGISTER, (Apr. 21, 2015) www.desmoinesregister.com/story/news/investigations/2015/04/20/rayhons-alzheimers-sex-trial/26096575/. In his closing statements to the jury, Rayhons's lawyer told jurors, "It's an unprecedented case. The decision that you make here will be debated, discussed, followed for years." *Id.*

258. *See Sex and Intimate Relationships, supra* note 93 (stating, "Where sexual difficulties do arise, it's important to remember that there is no single 'normal' way of dealing with this *very personal* issue.") (emphasis added).

merely claim that the sex was initiated by her spouse with dementia. This can make prosecution of sexual abuse very difficult, if not at times, impossible. However, the statutory proposal is justified under the General Principle of criminal law.²⁵⁹ It would serve the goals of protecting the sexual autonomy and self-determination of spouses with dementia by making a marital partner aware of inappropriate sexual behavior.

Another problem in the statutory marital exception is that it only applies to married individuals. For example, the statutory marital exception would not apply to an unmarried couple who cohabit together or have held a long-term sexual relationship. This makes it susceptible to an Equal Protection challenge under the United States Constitution for only applying to married individuals.²⁶⁰ Proponents of the statutory exception, under such a challenge, could argue that it serves state interests in preserving and encouraging marriage and in protecting the elderly from sexual abuse from non-married individuals.²⁶¹

V. CONCLUSION

The *Rayhons* prosecution presented issues surrounding consent and sexual assault of a spouse with dementia.²⁶² Legislation should protect the sexual desires and needs of individuals who are afflicted with Alzheimer's and dementia. This can be achieved through statutorily adopting a marital exception to sex offense laws. A statutory marital exception should empower a spouse with dementia with the right to initiate sexual activity. It should also require the cognizant spouse to ensure the sexual acts are not distressing to her spouse with dementia.

259. See Fitzpatrick, *supra* note 52, at 127 (discussing the emphasis by Jerome Hall for individuals to be aware of when they are committing a crime).

260. U.S. CONST. amend. XIV § 1 (stating, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") (emphasis added).

261. See *Statistics/Data*, *supra* note 49 (discussing statistics on elder abuse).

262. Belluck, *supra* note 1.