Comment, DEMENTIA SEX CULTURE: OUT WITH THE OLD, IN WITH THE NEW

"No man loves life like him that's growing old."
– Sophocles, Acrisius, fragment 64.[1]

The ability to have sex with whomever we want, whenever we want, is a fundamental human right that is often taken for granted. That concept was not lost on Henry Rayhons and Donna Lou Young after Donna received a diagnosis of early-onset Alzheimer's. The couple, both in their seventies, grew smitten with each other in their church choir.[2] Both were widowed after the deaths of their longtime spouses.[3] Henry had four adult children and was the Iowa Republican State Representative for the Eighth District.[4] Donna had three adult children, was an avid beekeeper, and sold honey.[5] On December 15, 2007, the pair married in their church, surrounded by children and grandchildren.[6] A few years into the marriage, Donna received a diagnosis of early-onset Alzheimer's.[7] She suffered headaches and forgetfulness, and drove on the wrong side of the road.[8] Donna's daughter, Linda, took her to lunch in March 2014 and noticed that under her coat, Donna was wearing only a night

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1 John Bartlett, Bartlett's Familiar Quotations 66 (Geoffrey O'Brien, 18th ed. 2012).

2 Sarah Kaplan, *In an Iowa Courtroom, an Astonishing Case of Sex and Alzheimer's*, Wash. Post (Apr. 7, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/04/07/in-an-iowa-courtroom-an-astonishing-case-of-sex-and-alzheimers/.

3 *Id.*

4 Pam Belluck, *Iowa Man Found Not Guilty of Sexually Abusing Wife With Alzheimer's*, N.Y. Times (Apr. 22, 2015), http://www.nytimes.com/2015/04/23/health/iowa-man-found-not-guilty-of-sexually-abusing-wife-with-alzheimers.html?_r=1; *Henry Rayhons*, Wikipedia, https://en.wikipedia.org/wiki/Henry_Rayhons (last visited Oct. 25, 2016); Kaplan, *supra* note 2.

5 Belluck, *supra* note 4; *Donna Lou Young Rayhons*, Globe Gazette, Aug. 10, 2014, http://globegazette.com/news/local/obituaries/donna-lou-young-rayhons/article_35161895-106b-54dc-a6a3-1d409532039f.html.

6 *Donna Lou Young Rayhons*, *supra* note 5; Kaplan, *supra* note 2.

7 Kaplan, *supra* note 2.

8 *Id.*

teddy, which left her breasts exposed.[9] While in the restaurant bathroom, she put her hands in the toilet bowl.[10] In late March, Donna's children moved her out of the marital home and into Concord Care Center, a nursing facility, approximately five minutes from Henry.[11] Henry began to quarrel with Donna's family, because he objected to Donna's move and disagreed with the kind of care she received at the nursing home.[12]

Donna quickly reached a point where she could not repeat the words "sock" and "blue."[13] On May 15, 2014, during a care plan meeting between Donna's family and nursing home staff, the state's affidavit says that Henry was informed that Donna no longer had the cognitive ability to consent to sexual activity.[14] In a matter of less than two months, Donna moved out of the marital home and into a care facility, and Henry was told he could no longer have sex with his wife. It is important to note that at the time this decision was made, Donna was not under a legal guardianship and did not have a healthcare power of attorney.[15] On May 23, 2014, Donna's roommate, Polly Schoneman, reported to nursing home staff that Henry came to visit and pulled the curtains shut, whereupon Mrs. Schoneman heard noises indicating that the couple was engaging in sexual intercourse.[16] The staff contacted the Garner Police Department.[17] Upon reviewing surveillance video, they discovered that Henry had been in Donna's room for approximately thirty minutes, and on his way out, had

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Belluck, *supra* note 4.

[13] Sarah Kaplan, *Former Iowa Legislator Henry Rayhons, 78, Found Not Guilty of Sexually Abusing Wife With Alzheimer's*, WASH. POST (Apr. 23, 2015), https://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/.

[14] Complaint at 1, Iowa v. Rayhons, Iowa Dist. Ct., http://www.dps.state.ia.us/commis/pib/Releases/2014/Rayhons_Complaint_&_Affidavit.pdf.

[15] Rae Yost, *Daughter Appointed Temporary Guardian of Rep. Rayhons' Wife*, GLOBE GAZETTE (June 18, 2014), http://globegazette.com/news/local/daughter-appointed-temporary-guardian-of-rep-rayhons-wife/article_c7cc7709-cee5-5edf-913f-6110e73d2536.html.

[16] Complaint at 1, Iowa v. Rayhons, *supra* note 14.

[17] *Id.*

discarded Donna's underwear in the hallway laundry hamper.[18] Soon after, during an interview between Henry and a special agent with the Division of Criminal Investigation (DCI), Henry stated that he had sexual contact with Donna on the day in question and also that he possessed a copy of the care plan stating Donna was no longer able to give cognitive consent to sexual activities.[19] It was not until June 17, 2014 that a judge ordered Donna's daughter temporary guardian of her mother.[20] A final hearing to appoint her full guardian of her mother and conservator of her estate was set for August 12, 2014.[21] However, Donna succumbed to Alzheimer's and passed away on August 8, 2014.[22] Officers arrested Henry just a week after his wife's death and charged him with sexual abuse in the third degree, a felony, for the alleged sexual activities of May 23, 2014.[23]

Henry pled not guilty to the charges, testifying that the couple merely held hands and kissed on the night in question.[24] His attorney stated that Henry's former confession to the DCI agent was coerced.[25] The hospital examination and rape kit completed the evening of the alleged sexual encounter were inconclusive as to whether Donna even had sex that evening.[26] Though a semen stain found on her sheets matched Henry's DNA, the lab technician testified that the age of that sample could not be determined.[27] A juror who participated in the case, Angela Nelson, said that the judge instructed the jury to answer three questions: Did Henry have sexual contact with Donna on the night of May 23, 2014;[28] did Henry commit the sexual act

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18 *Id.*

19 *Id.*

20 Yost, *supra* note 15.

21 *Id.*

22 *Id.*

23 Kaplan, *supra* note 2.

24 Kaplan, *supra* note 13.

25 *Id.*

26 *Id.*

27 *Id.*

28 Angela Nelson, *Top 10 Stories of 2015: #2 The Rayhons Trial: A Juror's Perspective*, KIOW (Dec. 31, 2015), http://kiow.com/2015/12/31/rayhons-trial-a-jurors-perspective/.

while Donna was incapable of consent;[29] and did this act occur while Henry and Donna were no longer living together?[30]

Ms. Nelson said the jury based its not guilty verdict on several points.[31] For many jurors, a fitted sheet taken from Donna's bed was the most important piece of evidence.[32] Out of thirty stains found on that sheet, there was only one semen stain that matched Henry's DNA.[33] Strangely, investigators found none of Donna's DNA on the sheet, though she had been sleeping on it for an unknown amount of time.[34] Further, no witness could conclusively say whether the sheet originated from Concord Care Center or the condo the couple shared as their marital home.[35] There was no witness called to testify as to the laundry schedule or the last time that particular sheet had been washed.[36] This meant that the semen stain could possibly have dated back to when the couple was living in the marital home.

Moreover, Polly, Donna's roommate, testified that she saw nothing on the night in question, but heard whispers, and felt as though she was intruding.[37] When examined by defense counsel, Polly said the noises she heard were *not* sexual.[38] However, when cross-examined by the prosecution, she said those noises *were* sexual.[39] Moreover, she stated that in her opinion, Donna was capable of caring for herself, making her own decisions, and communicating with others.[40] Henry testified that Donna had a continued interest in sexual activity, sometimes initiating it.[41] There was no testimony that Donna resisted intimacy from Henry.[42] This forced the jury consider the possibility that Donna possessed capacity to understand and desire the sexual contact.

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Belluck, *supra* note 4.
[42] *Id.*

The Iowa state statute said that a person is guilty of sexual abuse, in part, if "the other person is suffering from a mental defect or incapacity which precludes giving consent."[43] However, the statute offered no definition of mental defect or incapacity. The Iowa statutes left unclear whether dementia qualified as a mental defect or incapacity which precludes giving consent. The jury found Henry not guilty from the evidence and the lack of a prosecutorial case, due in part to the unspecific statute.[44] This is not the first case involving sexual abuse in a nursing home.[45] However, this circumstance, in which the state charged a *spouse* of an Alzheimer's patient with sexual abuse, appears to be the first of its kind in the United States.[46] It raised serious issues into the public spotlight. The first is that there is no clear cut point at which a dementia patient can no longer consent to sexual activity. Nursing and assisted living facilities are thus challenged in creating and maintaining effective and amiable policies regarding sexual behaviors in dementia patients. Further, many state statutes fall short of encompassing a non-consenting dementia patient in their sexual assault statutes by omitting any formal definition of mental defect.

As a proactive measure, facilities caring for persons living with dementia should destigmatize the dementia sex culture and develop practical protocol for responding to sexual encounters and interpreting consent in questionable situations. In addition, there must be a safety net, in the form of effective, comprehensive state statutes, in place for states to charge and successfully prosecute offenders. Part I of this comment explores the phenomena of dementia. Part II delves into diagnosis, treatment, and prevention. Part III discusses patients' continued desire for touch and Part IV allows readers to consider the sensitivity of precluding sexual conduct in a pre-dementia relationship. Part V investigates a variety of means used to determine capacity to consent and Part VI sets forth alternative motives for behavior wrongly interpreted as sexual, and activities to redirect boredom

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[43] IOWA CODE § 709.4 (2013).

[44] Kaplan, *supra* note 13.

[45] Robert A. Hawks, *Grandparent Molesting: Sexual Abuse of Elderly Nursing Home Residents and Its Prevention*, 8 MARQ. ELDER'S ADVISOR 159, 162-64 (2006) (discussing facts of elder sex abuse cases).

[46] Kaplan, *supra* note 13.

and needs for physical and emotional closeness. Part VII explains the roots of dementia sex culture and why nursing facilities tend to strip dementia patients of their independent decision making. Part VIII presents prompting questions to ask of any prospective care facility to ensure a clear understanding of its policies. Part IX explores state law shortfalls, specifically lack of completeness and usefulness in dementia sex cases. Part X concludes with possible solutions.

I. What Is Dementia?

Dementia is a comprehensive term that refers to loss of memory and other brain function that interferes with a person's life, caused by physical changes in the brain.[47] There are many forms of dementia.[48]

Type	Description	Brain Transformations
Alzheimer's	Most common, occurring in 60 to 80% of cases. Signs include difficulty remembering recent conversations, names, and events; impaired communication such as difficulty speaking; poor judgment; frequent disorientation and confusion; trouble swallowing and walking; and mood changes like sadness and depression.	Deposits of the protein fragment beta-amyloid (plaques), twisted strands of the protein tau (tangles), and nerve cell damage and death in the brain.
Vascular dementia	Accounts for 10% of dementia cases. Visible symptoms include impaired judgment, ability to make decisions, plan or organize.	Occurs because of brain injuries like microscopic bleeding and blood vessel blockage. The location, number, and size of the brain injury determines how the individual's thinking and physical functioning are affected.
Dementia with Lewy bodies	Marked by memory loss, thinking issues, sleep disturbances, well-formed visual hallucinations, and muscle rigidity or other parkinsonian movement features.	Abnormal clumps of the protein alpha-synuclein in the cortex.

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47 *Types of Dementia*, ALZHEIMER'S ASSOCIATION http://www.alz.org/dementia/types-of-dementia.asp (last visited Oct. 25, 2016).

48 *Id.*

Mixed dementia	More than one type of dementia occurs simultaneously in the brain.	Abnormalities of more than one type of dementia, most commonly, Alzheimer's and vascular dementia, but also other types, such as dementia with Lewy bodies.
Parkinson's disease	Progressive dementia similar to dementia with Lewy bodies or Alzheimer's. Problems with movement and symptoms similar to dementia with Lewy bodies.	Alpha-synuclein clumps in the substantia nigra, thought to cause degeneration of the nerve cells that produce dopamine.
Frontotemporal dementia	Includes dementia-like behavioral variant FTD, primary progressive aphasia, Pick's disease and progressive supranuclear palsy. Symptoms include changes in personality, behavior, and difficulty with language.	No distinguishing microscopic abnormality. Symptoms develop at a younger age (around 60), and patients survive fewer years than those with Alzheimer's. Nerve cells in the front and side regions of the brain are particularly affected.
Creutzfeldt-Jakob disease	Group of rare, fatal brain disorders affecting humans and certain other mammals. Variant CJD ("mad cow disease") occurs in cattle, and has been transmitted to people under certain circumstances. Rapidly fatal disorder that impairs memory, coordination, and causes behavior changes.	Misfolded protein that causes a "domino effect" in which prion proteins throughout the brain misfold and malfunction.
Normal pressure hydrocephalus	Difficulty walking, memory loss, and inability to control urination.	Buildup of fluid in the brain, which can sometimes be corrected with surgical installation of a shunt to drain excess fluid.
Huntington's disease	Progressive brain disorder caused by a single, defective gene on chromosome 4. Symptoms include abnormal, involuntary movements, a severe decline in thinking and reasoning skills, mood changes like irritability and depression.	Abnormalities in a brain protein that lead to worsening symptoms.
Wernicke-Korsakoff Syndrome	Chronic memory disorder caused by severe deficiency of thiamine (vitamin B-1). The most common cause is alcohol misuse. Memory problems are severe while other thinking and social skills are unaffected.	Thiamine levels, which help brain cells produce energy from sugar, fall too low and brain cells cannot generate enough energy to function properly.

In 2015, 5.3 million Americans were living with a diagnosis of Alzheimer's.[49] Two-thirds were women.[50] Seven hundred thousand people died from Alzheimer's in the same year.[51] Dementia is often misconceived as senility, an "incorrect belief that serious mental decline is a normal part of aging."[52] Although deaths from other diseases are decreasing, unfortunately death from an underlying Alzheimer's diagnosis is increasing.[53] With these astonishing statistics in mind, it is important to ensure sufficient laws are in place to meet challenging sexual concerns as they arise, especially as members of the Baby Boomer generation reach the age where demand for elderly care will increase. A diagnosis may be at the forefront of the mind when a family or facility is considering stripping a person of his or her ability to consent to sex.

II. Diagnosis, Treatment, and Prevention

There is not one test to determine whether a person has dementia.[54] Diagnosis is based on medical history, physical examination, laboratory testing, assessing changes in daily functioning and behavior, and tests to determine changes in thinking.[55] Genealogists have identified the APOE-e4 gene as an indicator of greater risk for developing Alzheimer's.[56] However, it is a common myth that Alzheimer's must run in the family for a person to

49 *2016 Alzheimer's Disease Facts and Figures*, ALZHEIMER'S ASSOCIATION, http://www.alz.org/facts/#prevalence (last visited Oct. 25, 2016).

50 *Id.*

51 *Id.*

52 *What Is Dementia?* ALZHEIMER'S ASSOCIATION, http://www.alz.org/what-is-dementia.asp (last visited Oct. 25, 2016).

53 *2016 Alzheimer's Disease Facts and Figures*, *supra* note 49. Alzheimer's does not cause death *per se*. Alzheimer's causes immobility, swallowing disorders and malnutrition, which in turn significantly increase the risk of other serious conditions that can cause death. *See 2014 Alzheimer's Disease Facts and Figures*, ALZHEIMER'S ASSOCIATION 27 (2014), https://www.alz.org/downloads/facts_figures_2014.pdf.

54 *What Is Dementia?, supra* note 52.

55 *Id.*

56 *Tests for Alzheimer's Disease and Dementia*, ALZHEIMER'S ASSOCIATION, http://www.alz.org/alzheimers_disease_steps_to_diagnosis.asp#mental (last visited Oct. 25, 2016).

be at risk for the disease.[57] The mini-mental state exam (MMSE) and Mini-Cog test are two common tools used by doctors to discover whether a person can be classified as having dementia.[58] During the MMSE, the doctor asks a series of questions that are designed to test a range of mental skills. A score of 0 to 12 indicates severe dementia, 13 to 20 moderate dementia, 20 to 24 mild dementia, and the maximum score of 30 points indicates no dementia.[59] It is commonly understood that a person with Alzheimer's will decline two to four points per year.[60] During the Mini-Cog, the patient is asked to complete two undertakings.[61] First, he or she is asked to remember the name of three common objects or words, and repeat the names a few minutes later.[62] Second, to draw the face and hands of a clock showing all twelve numbers with a time selected by the examiner.[63] The ability to repeat the words and draw an accurate depiction of the clock determines the score.[64]

Dementia has no cure.[65] Treatment availability depends on specific diagnosis.[66] For instance, Alzheimer's and other progressive dementias have no treatment that stops or slows progression.[67] Some drugs may temporarily improve symptoms in other forms of the disease.[68] Research has thus far concluded that risks of developing dementia can be reduced by maintaining a healthy heart, regular exercise, and sustaining a healthy diet.[69] A healthy heart can be achieved by not smoking, maintaining blood pressure, cholesterol, and blood sugar within limits, and preserving a healthy weight.[70] A Mediterranean diet, consisting of very little

57 *2014 Alzheimer's Disease Facts and Figures*, *supra* note 53.

58 *Tests for Alzheimer's Disease and Dementia*, *supra* note 56.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *What Is Dementia?*, *supra* note 52.

66 *Id.*

67 *Id.*

68 *Treatments for Alzheimer's Disease*, ALZHEIMER'S ASSOCIATION, http://www.alz.org/alzheimers_disease_treatments.asp (last vistied Oct. 25, 2016). *Id.*

69 *What Is Dementia?*, *supra* note 52.

70 *Id.*

red meat, and an emphasis on whole grains, fruits and vegetables, fish and shellfish, nuts, olive oil, and healthy fats is currently thought by researchers to be the best diet for heart and brain health.[71] Another common misconception is that after a dementia diagnosis, a person will lose all capabilities of a healthy adult, or is no longer entitled to certain rights.

III. The Desire for Touch

Though sexuality is a natural human function, sex between two elderly adults with dementia is often stigmatized as inappropriate and the fundamental human right to sex is denied to them for a variety of reasons. One major reason is that other people are uncomfortable with the elderly having sex, with mentally impaired people having sex, and, in the case of two elderly adults with dementia, with both of these. However, many individuals with dementia find that, though communication and normal routines have broken down, they still enjoy sex.[72] Physical intimacy provides closeness, comfort, and pleasure, and may do so for many years into the diagnosis.[73] There is no timeline with which to determine how a dementia patient will feel at a certain time toward sex.[74] Dementia affects the brain in unpredictable ways, and depending on the severity, which part of the brain is damaged, and also which medications are taken, a person with dementia at any time, could:

- Feel more interest in sex;
- Feel less or no interest;
- Have more or less ability to perform;
- Have changes in sexual 'manners' - for example, appearing less sensitive to the other person's needs or appearing sexually aggressive; or
- Have changes in levels of inhibitions – people may do or say things that they would not have done previously.[75]

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71 *Id.*

72 *Sex and Intimate Relationships*, ALZHEIMER'S SOCIETY, https://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=129 (last visited Oct. 25, 2016).

73 *Id.*

74 *Id.*

75 *Id.*

Dementia patients have the legal right to consent to sex with spouses or sexual partners inside or outside the facility, as long as it is in an appropriate and healthy manner.[76] It is important to remember a significant other's feelings in these cases as well.

IV. Inhibiting Sexual Conduct in a Marriage or Pre-Existing Relationship

> It was very comforting; there were periods when we were very anxious, devastated, scared . . . and being sexual with each other was real important. It 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 a time that felt good.[77]

A partner will feel a variety of emotions from the diagnosis and throughout the progression of the disease. These sentiments may be exacerbated if the partner is a caretaker for any period of time. "Once the diagnosis came through, we had a period of great tenderness in our relationship - affection, holding, being able to look at each other deeply was very special. As time has gone on that has really shifted, my partner has become much more withdrawn."[78] A caring partner can feel alienated if what that partner thought was consensual sexual activity is suddenly withdrawn as an option by a person outside the relationship, especially if sex is one of the only ways left in which the couple is able to feel close. However, even the caring partner may have difficulty determining when the spouse no longer has the ability to consent.

V. The Capacity to Consent

Capacity is the ability to understand the character and consequences of an act.[79] Consent is "a voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, especially given voluntarily by a

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[76] Specifically excluded from this conversation is sexual abuse of dementia patients by nursing home staff.

[77] *Sexuality and Dementia*, Family Caregiver Alliance, https://www.caregiver.org/sexuality-and-dementia (last visited Oct. 25, 2016).

[78] *Id.*

[79] Black's Law Dictionary 249 (10th ed. 2014).

competent person."[80] So, the capacity to consent in the current context may be thought of as the mental ability to understand the ramifications of yielding to sexual activity.

There is currently a wide spectrum of thought regarding how to determine the ability to consent. One test, which has no legal grounding, is that when a person's activities are deemed inappropriate and/or others are put in uncomfortable decision-making situations, judgment is made for the patient with no healthcare power of attorney or guardianship in place, independent of the patient's choice. For example, children of adults in nursing facilities may not want to view their parent as a sexual being and will probably not make a neutral choice with their parent's best interest in mind.[81] This model was demonstrated in the case of Donna Lou Rayhons when her daughter and physician at the nursing home decided she could no longer consent and activated a nursing home care plan in which she was not allowed sexual activity. She did not have a healthcare power of attorney and was not under a guardianship.

Other commentators believe that patients should see their doctor and be evaluated for dementia in order to determine ability to consent. Based on an MMSE or Mini-Cog test score, medical history, physical examination, laboratory testing, and/or determinations of changes in daily functioning and behavior, a person may be diagnosed with dementia which has advanced to the point that he or she is incapable of consent. Activation of an existing power of attorney could take place at this time or a guardianship could be pursued.

An alternative, well-known capacity assessment tool is that of Thomas Grisso and Paul S. Appelbaum, who recommend a four-criteria standard for assessing capacity for decision-making.[82] The person must be able to communicate a choice, under-

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[80] *Id.* at 368.

[81] Laura Tarzia, et. al., *Dementia, Sexuality and Consent in Residential Aged Care Facilities*, 38 J. MED. ETHICS 609, 610 (2012), http://pc8ga3qq6a.search.serialssolutions.com.proxy.library.umkc.edu/?ID=doi:10.1136/medethics-2011-100453&genre=article&atitle=dementia,%20sexuality%20and%20consent%20in%20residential%20aged%20care%20facilities.&title=Journal%20of%20Medical%20Ethics&issn=03066800&isbn=&volume=38&issue=10&date=20121001&aulast=Tarzia%2C%20Laura&spage=609&pages=609-613&sid=EBSCO:Academic%20Search%20Elite:82154460.

[82] *Id.*

stand the relevant information, appreciate the decision and its consequences, and display reasoning.[83] However, some professionals see this approach as too involved, since its focus is on vital decisions, like whether to submit to life-saving surgery.[84]

> That different decisions require different levels of capacity is a theory well supported within the literature, and a resident with dementia may not be able to 'render informed consent to an operation that has a significant risk of death but may be able to decide on what [flavor] of ice cream he would like for dessert.'[85]

These professionals argue that decisions regarding sexual activity are more like deciding what dessert sounds appetizing, because sex is not generally an activity in which one takes significant time to weigh the pros and cons.[86]

Dementia patients are thought of as vulnerable and the term "dementia" is often medicalized.[87] Medicalization and overprotection leads to blurred lines between duty of care and social control.[88] Daniel Kuhn, who holds a master of social work and is the director of the Professional Training Institute – Alzheimer's Association, believes that an "all or nothing" approach is not useful.[89] "Capacity is always specific to a particular decision at a particular time."[90] Though a patient may lose capacity to remember their spouse's or fellow resident's name, they may still recognize that person as an intimate partner or feel comfort upon seeing that person.[91]

Currently, there is no global standard for a caretaker or facility to use to determine capacity to consent. The Hebrew Home at Riverdale by RiverSpring Health, in partnership with The Harry and Jeanette Weinberg Center for Elder Abuse Prevention, developed a two-page set of guidelines for analyzing a

83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.* at 611.
88 *Id.*
89 Daniel Kuhn, *Responding to Intimacy and Sexuality of Residents with Alzheimer's Disease*, 54 CONNECTIONS 2 (Nov. 2006), http://www.alz.org/documents/mndak/308_and_406_HandoutResponding_to_Intimacy_and_Sexuality_of_Residents.pdf.
90 *Sex and Intimate Relationships*, *supra* note 72.
91 Kuhn, *supra* note 89.

difficult sexual situation and determining the next step.[92] When evaluating the patient's ability to express choices or consent, if the patient is verbal, the interviewer should ask the patient directly, "What are your wishes about this relationship? Does your sexual partner make you happy? Do you enjoy sexual contact?"[93] When appraising the patient's ability to appreciate the gravity of sexual activity, the interviewer can ask, "Do you know what it means to have sex? What does it mean to you/your partner? What would you do if you wanted it to stop? What if your partner wanted it to stop?"[94] In a patient who is non-verbal, the interviewer may observe facial expressions and body language after these questions are asked, or emotions and mood before and after the sexual contact.[95]

Laura Tarzia, Deirdre Fetherstonhaugh, and Michael Bauer propose a similar sexual decision-making framework for residents that takes the pursuit of happiness as its guiding principle.[96] They propose a common sense approach of observing interactions, and verbal or non-verbal cues between residents, leading to an informed decision about consent.[97] They do, however, state that sexual relationships in which one resident mistakes the other for a spouse or former partner should be halted, as possible post-activity realization could lead to severe emotional harm.[98]

As demonstrated, there is a wide range of professional opinion regarding when or whether an outsider ever should be involved in the sexual decisions of an individual dementia patient. Notwithstanding this spectrum of views, there are times when some professionals say one's sexual and physical intimacy should be restricted, even if they *do* have capacity to consent. Examples of these instances include when a person recently suffered a heart attack and physical exertion would cause pain, is at high

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92 *Abuse or Intimacy*, The Weinberg Center and the Hebrew Home at Riverdale (2011), http://ltcombudsman.org/uploads/files/issues/Sexual_Consent_Guidelines-Hebrew_Home.pdf.

93 *Id.*

94 *Id.*

95 *Id.*

96 Tarzia, et. al., *supra* note 81, at 612.

97 *Id.*

98 *Id.*

risk for bone fractures, or has a sexually transmitted infection.[99] With such a wide range of opinions, nursing facilities have a hard time pleasing all constituencies and maintaining their duty of care without infringing on individual rights.

VI. Meeting Residents' Needs

Researchers advocating less-stigmatizing methods suggest alternate management of behavior that may arise in dementia patients.[100] Aggressive sexual advances toward staff, partners, or other residents should be handled with simple and calm methods: no overreaction or expressions of shock, redirection to another activity or private area if the behavior is public, no anger or argument, no shame or ridicule, and sensitivity and reassuring.[101] Furthermore, there are ways to relieve pent-up sexual frustration.[102] Exercise and energetic activities such as meaningful conversation, knitting, woodwork, painting, drawing, growing plants, puzzles, games, chores, music, group activities, celebrations, and visiting places in the community, if possible, all reduce physical tension.[103] Massage, reflexology, aromatherapy, transcutaneous electrical nerve stimulation, and acupuncture may provide a patient with the physical touch they are missing.[104] Close, platonic friendships can meet the needs of emotional intimacy.[105] It may be that a patient is acting inappropriately in a way that seems to be sexually driven, but there is in fact a totally reasonable, alter-

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99 *Sex and Intimate Relationships*, *supra* note 72; Laura Zera, *It Happened to Me: I Had to Decide Whether to End My Mother's Nursing-Home Affair*, XOJane (Mar. 29, 2016), http://www.xojane.com/it-happened-to-me/nursing-home-affair-between-dementia-patients.

100 *Changes in Sexuality and Intimacy*, Alzheimer's Association, http://www.alz.org/national/documents/topicsheet_sexuality.pdf (last visited Oct. 25, 2016).

101 *Id.*

102 *Id.*

103 *Staying Involved and Active*, Alzheimer's Society, https://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=115 (last visited Oct. 25, 2016).

104 *Complementary and Alternative Therapies*, Alzheimer's Society, https://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=134 (last visited Oct. 25, 2016); *Sex and Intimate Relationships*, *supra* note 72.

105 *Id.*

native motive.[106] Take inappropriate undressing as an example.[107] It may be that a resident is stripping clothing off because he or she wants to take a nap or go to sleep, the clothing is too tight or uncomfortable, the patient is overheating, or the patient needs to use the toilet.[108] It is important for caregivers to remain objective, determine the patient's goal, and not jump to conclusions regarding their capacity for judgment.[109]

VII. Care Facility Uncertainty

It is important to remember that "[p]ersons with dementia have lived with their sexuality for much longer than they have lived with dementia."[110] Although some facilities encourage healthy sexual behavior of their residents, those tend to be the exception rather than the rule.[111] Nursing facilities fear legal action if they do not follow familial wishes regarding the sexuality of their beloved. Therefore, instead of balancing resident rights with a duty of care, the facilities err on the side of caution and strip the residents of their autonomy.[112] The issue is not that laws are against residents' sexual expression, but that there are no formal guidelines on resident sexuality that outweigh the fear of lawsuits. Difficult, uncomfortable sexual scenarios may arise in care facilities where older adults are in close proximity every day. A patient may have sexual or intimate relations with a spouse, friend, or another patient. They may live apart, in the same facility, or even the same room. When one or both patients are married to another person, or a patient mistakes their sexual partner for a spouse, this throws a wrench into an already complicated situation. It can be difficult for staff to decide whether a patient is participating knowingly and voluntarily. Many states have laws regarding privacy in nursing homes. Married couples in Iowa and seventeen other states have legal rights to share rooms or have conjugal visits in nursing homes; Colorado allows "private consensual activity" without stipulating a couple must

106 *Changes in Sexuality and Intimacy*, *supra* note 100.
107 *Id.*
108 *Id.*
109 *Id.*
110 Tarzia, et. al., *supra* note 81, at 612.
111 *Id.* at 610.
112 *Id.* at 612.

be married, according to the Long Term Care Resource Center at the University of Minnesota.[113] Further, for a facility to be Medicare or Medicaid certified, it must meet requirements found in Title 42 of the Code of Federal Regulations.[114] Specifically, it must allow the residents certain rights, including privacy with regards to visits and meetings of family.[115] Additionally, the government's Medicare website explains that residents may have visitors at any time, and as long as they want, so long as the visit does not interfere with care and privacy of the other residents.[116]

There are also matters of patient confidentiality. It is difficult to determine when it is time to involve family, management, police, or the state. This issue is exacerbated when there is no facility policy, staff are not aware of the facility policy, or staff have not been through behavior response training.[117] In a survey of the American Medical Directors Association, composed of physicians who work in long term care, only 25 to 30% had formal training regarding intimacy and sexuality in older adults.[118] Thirty percent had no training at all.[119] Further, only 30% of nursing homes had formal policies on sexual intimacy of their residents.[120] "The lack of such training is widespread," says Andrew Rosenzweig, a geriatric psychiatrist who works with dozens of elder care facilities.[121] "Untrained caregivers tend to rely on

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113 Brian Gruley, *Boomer Sex With Dementia Foreshadowed in Nursing Home*, BLOOMBERG (July 22, 2013), http://www.bloomberg.com/news/articles/2013-07-22/boomer-sex-with-dementia-foreshadowed-in-nursing-home; *NH Regulations Plus*, UNIVERSITY OF MINNESOTA (Aug. 22, 2013), http://www.hpm.umn.edu/NHRegsPlus/NHRegs_by_State/By%20State%20Main.html.

114 42 U.S.C. § 1396r (2011).

115 42 U.S.C. § 1396r(c)(1)(A)(iii).

116 *What Are My Rights & Protections in a Nursing Home?* MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/part-a/rights-in-nursing-home.html (last visited Oct. 25, 2016).

117 *See Intimacy and Sexuality: Resources for Dementia Caregivers*, NAT'L INST. ON AGING, https://www.nia.nih.gov/alzheimers/intimacy-and-sexuality-resources-dementia-caregivers (last visited Oct. 25, 2016) (discussing helpful resources including training videos and articles).

118 *Can a Person With Dementia Consent to Sex?*, National Public Radio broadcast (Apr. 22, 2015), http://www.npr.org/sections/health-shots/2015/04/22/401470785/can-a-person-with-dementia-consent-to-sex.

119 *Id.*

120 *Id.*

121 Gruley, *supra* note 113.

their own religious, ethnic and other personal beliefs to decide what's right for residents."[122] A 2012 study by two Kansas State University researchers found sex among nursing home residents is often viewed "as a behavior problem rather than an indication of an unmet need."[123]

In 2009, staff at Windmill Manor nursing home in Coralville, Iowa discovered that they were not equipped to deal with the resulting fallout from a sexual relationship between patients.[124] The male patient was a retired college professor suffering from dementia, colon cancer, and arthritis.[125] Staff called him "a ladies' man," and "very friendly."[126] He had two daughters and three sons.[127] The woman was a former school district secretary suffering from a more severe form of dementia.[128] She was married and her son had power of attorney.[129] She was described as having behavioral issues, physical aggression, often yelling, refusing medications, pinching, and hitting staff.[130] The families and staff were aware that the two seemed inclined toward each other.[131] They held hands, told stories, and the woman mistook the man for her spouse, calling him by her husband's name.[132] The two were calmed by each other's presence.[133] At one point, they were discovered laying together in bed talking, both naked from the waist down.[134] After the incident, the director of nursing called the residents' children and explained what happened.[135] The man's daughter seemed preoccupied with whether her father was going to be asked to leave the home, but was told that was not the case.[136] She was not otherwise worried.[137] Al-

122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id,*
137 *Id.*

though Iowa law states that nursing homes must notify the Department of Inspections and Appeals of suspected physical or sexual abuse, the administrator decided not to make a report because there was no evidence of force or whether the couple had actually engaged in a sex act.[138] After this occurrence, staff was instructed to check on the man every 15 minutes to "discourage" him.[139] This ended after a week due to staff shortage.[140] A few training sessions on dealing with resident sex followed as well.[141]

On the evening of Christmas 2009, nurses discovered the man and woman engaged in intercourse in the man's room.[142] As a nurse entered the room, the man pulled up his pants, and when staff tried to take the woman back to her room, she screamed, bit, and kicked them.[143] A nurse examined the woman and found that her vaginal area was reddened and she had bruises on her shins.[144] The director of nursing called the woman's son and told him that his mother had intercourse with a fellow resident and asked if he wanted her taken to the hospital.[145] He refused, stating that from how the nurses described the scene, it seemed the intercourse had been mutual.[146] The director of nursing also called the man's daughter, stating only that her father had been "caught naked again with the woman."[147] This time, there was no question that the residents had sex.[148] The administrator again decided not to report the incident because there were no injuries or evidence of force.[149] He thought the woman was entirely capable of letting the man and others know if she was not a willing participant.[150] Staff took further

138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*

action to keep the couple apart and gave the man prescription medication to halt his sexual desires.[151]

But then in 2010, Inspections and Appeals Investigators were looking into another matter at the nursing home and were made aware of the episodes.[152] They concluded that Windmill Manor had failed to protect the woman from the man and considered disqualifying the home for Medicaid and Medicare assistance.[153] In response, the male resident was removed from the home and the director of nursing and facility administrator were fired.[154] After further lengthy investigation, the detectives concluded that the woman was sexually assaulted and Windmill Manor was fined $47,000 by Inspections and Appeals for failing to report.[155] They settled on a $14,500 fine with no admission of guilt.[156]

Further, the woman's family sued the nursing home, its corporate office, and the former director of nursing, stating that the woman had been raped.[157] Later, the director of nursing was removed as a defendant.[158] That case was ultimately settled with terms under seal.[159] The Iowa Board of Nursing stripped the former director of her nursing license, stating she failed to provide adequate care for the patients, and failed to report the sexual incidents to the families.[160] She also faced a criminal charge for interfering with a state investigation, which was later dropped.[161] The Iowa Board of Nursing Home Administrators charged the facility administrator with professional incompetence, negligence, and violation of a regulation which relates to the practice of nursing home administrators.[162] He faced losing his administrator's license. The hearing resulted in a citation and warning

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 Findings of Fact, Conclusions of Law, Decision and Order at 1, In the Matter of Drobot (Case No. 11-003) (DIA No. 12NHA001 Sept. 11, 2012),

since the Board found it persuasive that the sex was consensual.[163]

Windmill Manor had a written Abuse Prohibition policy, the purpose of which was to protect residents from any kind of abuse, including sexual abuse.[164] Required facility training was a four hour video upon hiring, then an educational video once a year.[165] State regulations required that staff be "oriented to the needs of people with chronic confusion or dementing illness within 30 days of the assignment."[166] That orientation was six hours long and included education about "inappropriate" and "problem" behaviors.[167] In addition, staff was required to have a minimum of six hours of training that related to the needs of the residents.[168] Management was unaware of state-required training and there were staff who did not have the required training.[169]

VIII. The Right Facility

When looking for a facility that respects sexuality and protects privacy and safety of its residents, a prospective lessee or his or her representative should ask some of the following initial questions: Does the home have a sexuality policy? What might happen if a resident shows affection or sexual feelings towards another resident, staff member, or partner who visits? If you have a same-sex relationship, will your wishes for privacy be treated with equal respect to those in a heterosexual relationship?[170] Regardless of whether a great nursing home policy exists, an incident may still happen at some point, and state statutes must be in good working order.

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http://www.idph.state.ia.us/IDPHChannelsService/file.ashx?file=83AA8235-5F17-4083-9200-EF83E99CB18A.

163 *Id.* at 25.

164 *Id.* at 3.

165 *Id.* at 6.

166 *Id.*

167 *Id.*

168 *Id.* at 6-7.

169 *Id.* at 7.

170 *Sex and Intimate Relationships*, *supra* note 72.

IX. State Statute Shortfall

Iowa defines sexual abuse in the third degree as it pertains to incapacity to consent, as sex "between persons who are not at the time cohabiting as husband and wife [ ] if . . . the other person is suffering from a mental defect or incapacity which precludes giving consent."[171] However, the statute does not explicitly define mental defect.[172] Herein lies the problem with many current state statutes. The Iowa jury that found Henry Rayhons not guilty did so in part because there was no definition of mental defect and it could not be proven that the legislature intended the phrase to encompass dementia patients. To date, twenty state statutes reference that a lack of consent due to mental defect is an element in sexual offenses, but do not define consent or mental disorder, mental defect, unsoundness of mind, etc.

State	Statute	Reference to Mental State	Omission
California	Rape[173]	"Mental disorder"	Does not define mental disorder
Colorado	Sexual assault; Unlawful sexual contact[174]	"Incapable of appraising the nature of the conduct"	Does not define incapable of appraising the nature of the conduct
Delaware	Rape in the second degree; Rape in the first degree[175]	"Without consent" includes "mental defect"[176]	Does not define mental defect
Illinois	Criminal sexual assault[177]	"Consent" in "lack of knowing consent" is defined	Does not mention mental defect or define knowing
Indiana	Rape; Sexual battery[178]	"Mental deficiency"	Does not define mental deficiency
Iowa	Sexual abuse in the third degree[179]	"Mental defect"	Does not define mental defect

171 Iowa Code § 709.4 (2013).
172 Iowa Code § 709.1A (2013).
173 Cal. Penal Code § 261 (West 2013).
174 Colo. Rev. Stat. §§ 18-3-402, 18-3-404 (2013).
175 Del. Code Ann. tit. 11, §§ 772, 773 (West 2010).
176 Del. Code Ann. tit. 11, § 761(j) (West 2015).
177 720 Ill. Comp. Stat. 5 / 11-1.20 (2016).
178 Ind. Code §§ 35-42-4-1, 35-42-4-8 (2014).
179 Iowa Code § 709.4 (2013).

Kansas	Rape; Sexual battery; Aggravated sexual battery[180]	"Mental deficiency"	Does not define mental deficiency
Missouri	First degree sexual abuse[181]	"Incapacity" and "Lack of capacity to consent"	Does not define incapacity[182]
Montana	Sexual assault; Sexual intercourse without consent[183]	Defines "without consent" as "mentally disordered"[184]	Does not define mentally disordered
Nebraska	Sexual assault in the first degree; Sexual assault in the second or third degree[185]	"Mentally incapable"	Does not define mentally incapable
Nevada	Sexual assault[186]	"Mentally incapable"	Does not define mentally incapable
New Jersey	Aggravated sexual assault in the first degree[187]	"Mental defect"	Does not define mental defect
North Dakota	Gross sexual imposition; Sexual assault statutes[188]	"Mental defect"	Does not define mental defect
Ohio	Rape; Sexual battery[189]	"Mental condition"	Does not define mental condition
Oklahoma	Rape[190]	"Unsoundness of mind"	Does not define unsoundness of mind
Pennsylvania	Rape; Involuntary deviate sexual intercourse; Aggravated indecent assault; Indecent assault[191]	"Mental disability"	Does not define mental disability

180 Kan. Stat. Ann. §§ 21-5503, 21-5505 (West 2011).
181 Mo. Rev. Stat. § 566.100 (West 2013).
182 Mo. Rev. Stat. § 566.010 (West 2014).
183 Mont. Code Ann. §§ 45-5-502, 45-5-503 (West 2015).
184 Mont. Code Ann. § 45-5-501 (West 2015).
185 Neb. Rev. Stat. § 28-319, 28-320 (2016).
186 Nev. Rev. Stat. § 200.366 (2015).
187 N.J. Stat. Ann. § 2C:14-2(a) (West 2014).
188 N.D. Cent. Code §§ 12.1-20-03, 12.1-20-07 (2015).
189 Ohio Rev. Code Ann. §§ 2907.02, 2907.03 (West 2008).
190 Okla. Stat. tit. 21, § 1114 (2008).
191 18 Pa. Cons. Stat. §§ 3121, 3123, 3125, 3126 (2003).

South Dakota	Sexual contact with a person incapable of consenting[192]	"Mental incapacity"	Does not define mental incapacity
Utah	Rape; Object rape[193]	"Mental defect"	Does not define mental defect
Wisconsin	Second degree sexual assault[194]	"Mental deficiency"	Does not define mental deficiency
Wyoming	Sexual assault in the first degree; Sexual assault in the second degree; Sexual assault in the third degree[195]	"Mental deficiency"	Does not define mental deficiency

In comparison, there are twenty-one state statutes that refer to a mental defect, or the like, in ability to consent to sexual activity, and then actually define the phrase mental defect or the like:

State	Statute	Key Phrase	Definition
Arkansas	Rape; Sexual assault in the second degree[196]	"Mentally defective"	"[A] person suffers from a mental disease or defect that renders the person: (i) Incapable of understanding the nature and consequences of a sexual act; or (ii) Unaware a sexual act is occurring."[197]
Alabama	Sodomy in the second degree; Sexual abuse in the second degree[198]	"Mentally defective"	"[A] person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct."[199]

192 S.D. Codified Laws § 22-22-7.2 (2013).
193 Utah Code Ann. §§ 76-5-402, 76-5-402.2 (West 2013).
194 Wis. Stat. § 940.225(2) (2013).
195 Wyo. Stat. Ann. §§ 6-2-302, 6-2-303, 6-2-304 (2015).
196 Ark. Code Ann. §§ 5-14-103, 5-14-125 (2013).
197 Ark. Code Ann. § 5-14-101 (2009).
198 Ala. Code §§ 13A-6-64, 13A-6-67 (2016).
199 Ala. Code § 13A-6-60(5) (2016).

Alaska	Sexual assault in the first degree; Sexual assault in the second degree; Sexual assault in the third degree.	"Mentally incapable"	"[S]uffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person."[200]
Arizona	Sexual assault; Sexual abuse[201]	"Mental defect"	"[V]ictim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another."[202]
Connecticut	Sexual assault in the second degree[203]	"Impaired because of mental disability or disease"	"[A] person suffers from a mental disability or disease which renders such person incapable of appraising the nature of such person's conduct."[204]
Florida	Sexual battery[205]	"Mentally defective"	"[M]ental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct."[206]

200 Alaska Stat. § 11.41.470(4) (2016).
201 Ariz. Rev. Stat. Ann. §§ 13-1406, 13-1404 (2009).
202 Ariz. Rev. Stat. Ann. § 13-1401(A)(7)(b) (2015).
203 Conn. Gen. Stat. § 53a-71 (2013).
204 Conn. Gen. Stat. § 53a-65(4) (2013).
205 Fla. Stat. § 794.011 (2016).
206 Fla. Stat. § 794.011(1)(b) (2016).

Hawaii	Sexual assault in the first degree; Sexual assault in the third degree	"Mentally defective"	"[A] person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct."[207]
Louisiana	Aggravated rape; Simple rape; Sexual battery; Oral sexual battery[208]	"Mental infirmity"	"[A] person with an intelligence quotient of seventy or lower."[209]
Maryland	Rape in the second degree; Sexual offense in the second degree; Sexual offense in the third degree[210]	"Mentally defective"	"[A]n individual who suffers from mental retardation or a mental disorder, either of which temporarily or permanently renders the individual substantially incapable of: (1) appraising the nature of the individual's conduct; (2) resisting vaginal intercourse, a sexual act, or sexual contact; or (3) communicating unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact."[211]

207 HAW. REV. STAT. § 707-700 (2016).
208 LA. REV. STAT. ANN. §§ 14:42, 14:43, 14:43.1, 14:43.3 (2015).
209 LA. REV. STAT. ANN. § 42(C)(2) (2015).
210 MD. CODE ANN., Criminal Law §§ 3-304, 3-306, 3-307 (West 2013).
211 MD. CODE ANN., Criminal Law § 3-301(b) (West 2011).

Michigan	Criminal sexual conduct in the second, third, fourth degree[212]	"Mentally incapable"	"[A] person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct."[213]
Minnesota	Criminal sexual conduct in the second degree, third degree, fourth degree[214]	"Mentally impaired"	"[A] person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration."[215]
Mississippi	Sexual battery[216]	"Mentally defective person"	"[O]ne who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct."[217]
New York	Rape in second degree and third degree; Sexual misconduct; Criminal sexual act in the second degree and third degree[218]	"Mentally disabled"	"[A] person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct."[219]

212 Mich. Comp. Laws § 750.520c, d, e (2013).
213 Mich. Comp. Laws § 750.520a(j) (2014).
214 Minn. Stat. §§ 609.343, 609.344, 609.345 (2007).
215 Minn. Stat. § 609.341(6) (2013).
216 Miss. Code Ann. § 97-3-95 (2016).
217 Miss. Code. Ann. § 97-3-97(b) (1980).
218 N.Y. Penal Law §§ 130.30, 130.25, 130.20, 130.45, 130.40 (McKinney 2001).
219 N.Y. Penal Law § 130.00(5) (McKinney 2010).

North Carolina	Second degree forcible rape; Second-degree forcible sexual offense; Sexual battery[220]	"Mentally disabled"	"(i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act."[221]
Oregon	Rape in the first degree; Unlawful sexual penetration in the first degree; Sexual abuse in the first degree[222]	"Mentally defective"	"[A] person suffers from a mental disease or defect that renders the person incapable of appraising the nature of the conduct of the person."[223]
Rhode Island	Second degree sexual assault[224]	"Mentally disabled"	"[A] person who has a mental impairment which renders that person incapable of appraising the nature of the act."[225]

220 N.C. Gen. Stat. §§ 14-27.22, 14-27.27, 14-27.33 (2015).
221 N.C. Gen. Stat. § 14-27.20(1) (2015).
222 Or. Rev. Stat. §§ 163.375, 163.411, 163.427 (2016).
223 Or. Rev. Stat. § 163.305(3) (2016).
224 R.I. Gen. Laws § 11-37-4 (2016).
225 R.I. Gen. Laws § 11-37-1(4) (2016).

South Carolina	Criminal sexual conduct in the third degree[226]	"Mentally defective"	"[A] person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her condition. 'Mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause."[227]
Tennessee	Rape; Sexual battery[228]	"Mentally defective"	"[A] person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of the person's conduct."[229]

226 S.C. Code Ann. § 16-3-654 (2016).
227 S.C. Code Ann. § 16-3-651 (2016).
228 Tenn. Code Ann. §§ 39-13-503, 39-13-505 (2016).
229 Tenn. Code Ann. § 39-13-501(3) (2013).

Virginia	Rape[230]	"Mental incapacity"	"[C]ondition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known."[231]
Washington	Rape in the second degree[232]	"Mental incapacity"	"[C]ondition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause."[233]
West Virginia	Sexual assault in the third degree[234]	"Mentally defective"	"[A] person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct."[235]

230 VA. CODE ANN. § 18.2-61 (2013).
231 VA. CODE ANN. § 18.2-67.10(3) (2015).
232 WASH. REV. CODE § 9A.44.050 (2007).
233 WASH. REV. CODE § 9A.44.010(4) (2007).
234 W. VA. CODE § 61-8B-5 (2000).
235 W. VA. CODE § 61-8B-1(3) (2000).

Five states do not mention mental condition or consent in their statutes at all. These are Georgia, Maine, Massachusetts, Texas, and Vermont.

Four states have particularly odd statutes that are worth mentioning. In Idaho, no person can be charged with or convicted of rape of a spouse unless "that person resists, but is overcome with violence or prevented from resisting by bodily harm, threat of bodily harm, or narcotics."[236] This statute loosely excludes a situation where a spouse with dementia does not consent to sex with his or her spouse but cannot physically resist, and is not hurt or threatened with harm. It also seems to preclude those with dementia who do not consent to sex with a spouse and are verbally resistive, but cannot physically resist and are not hurt or threatened with harm. In Kentucky, rape in the second degree and sexual abuse in the first degree and second degree mention mental incapacity, but someone may only be mentally incapacitated by the use of intoxicating substances or an act committed causing the incapacitation.[237] The definitions do reference mental illness, and that may include dementia or Alzheimer's, but the rape and sexual abuse statutes do not mention mental illness.[238] In New Hampshire, the exception to aggravated felonious sexual assault is legal marriage.[239] New Mexico only mentions "without consent" in its criminal sexual contact statutes and does not include a mental condition at all.[240] A mental condition is mentioned only in the definition of force or coercion.[241] It states, "'force or coercion' means . . . the per-

236 "No person shall be convicted of rape for any act or acts with that person's spouse, except. . ." IDAHO CODE ANN. § 18-6107 (2010) "[w]here she resists but is overcome by force or violence" (IDAHO CODE ANN. § 18-6101(4) (2010)) or "[w]here she is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm, accompanied by apparent power of execution; or is unable to resist due to any intoxicating, narcotic, or anesthetic substance." (IDAHO CODE ANN. § 18-6101(5) (2010)).

237 *See* KY. REV. STAT. ANN. §§ 510.040, 510.110, 510.120 (West 2016).

238 *See* KY. REV. STAT. ANN. § 510.010 (West 2012).

239 "When, except as between legally married spouses, the victim has a disability that renders him or her incapable of freely arriving at an independent choice as to whether or not to engage in sexual conduct, and the actor knows or has reason to know. . . ." *See* N.H. REV. STAT. ANN. § 632-A:2(I)(h) (2015).

240 N.M. STAT. ANN. § 30-9-12 (2016).

241 New Mexico criminal sexual contact (*see* N.M. STAT. ANN. § 30-9-12(A),(C)(1)-(2),(D) (2016)).

petration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim . . . suffers from a mental condition that renders the victim incapable of understanding the nature . . . of the act."[242]

Glitches have remained uncorrected in these statutes. The reason probably lies in the novelty of the problem. As previously stated, the case of Donna Lou Rayhons was the first time such a question was brought to a jury. It may be that the problem went unnoticed up to this point. But now, states do not have the crutch of naiveté to lean on. Barely a year has passed since Henry Rayhons was found not guilty. Currently, Iowa has no proposed legislation to add a definition of mental defect to its criminal statute, let alone a definition that includes a dementia patient. Based on the wide variance of opinion on when a dementia patient can consent, it may be that no state is courageous enough to be the first to make a formal decision on the matter.

X. Conclusion

The fundamental right to sexuality remains even after a person is diagnosed with dementia. The medicalization of the disease has led some caretakers toward a paternalistic social control of the group of dementia patients, which is only worsened by the threat of lawsuits by overzealous, biased family members if a facility does not prohibit sexual conduct. To maximize natural human rights, caretakers should adopt the Tarzia, Fetherstonhaugh, and Bauer pursuit of happiness model, in which they take a down-to-earth approach of observing interactions and verbal or non-verbal cues between residents to determine whether intimacy is consensual. In more serious or uncertain instances, facilities may interview residents using the Hebrew Home and Weinberg Center model, asking questions related to the resident's sexual wishes, enjoyment, meaning, and "what ifs." Care facilities should keep rights of the residents at the forefront of their concern and train management and staff on the topic. Changing stigmatizing language may be key to changing attitudes. It is as simple as referring to sex between the elderly as natural rather than inappropriate. In addition, it is each individual state's responsibility to maintain functional, current criminal

[242] *See* N.M. Stat. Ann. § 30-9-10(A)(4) (2016).

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statutes. The flood gates were opened with the Rayhons case, and it will likely not be the last of its kind. It will be easier for courts to dispense with such cases if statutes are geared toward the issue. In most states, the solution is as simple as updating or adding a definition of mental defect to include dementia.

> "I never knew so young a body with so old a head."
> – Shakespeare, IV, i, l. 163.[243]

Jessica Foxx

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243 JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 185 (Geoffrey O'Brien, 18th ed. 2012).