

## DISABLING CONSENT, OR RECONSTRUCTING SEXUAL AUTONOMY

JOSEPH J. FISCHEL\* & HILARY R. O'CONNELL\*\*

### *Abstract*

*Does a right to sexual autonomy criminalize the embellished pick-up line? Or does a right to sexual autonomy permit each and every consensual sex act, however life-threatening, or even life-ending? This Article defends (by reconstructing) sexual autonomy as the governing principle of modern rape law. Powerful criticisms of sexual autonomy otherwise normatively opposed share an antecedent assumption: that sexual autonomy can be read off and as first person present active (or passive) consent (Part I). This Article argues against the conflation of sexual autonomy with sexual consent. Instead, and in conversation with competing liberal and feminist political theoretic accounts of sexual autonomy, this Article defines sexual autonomy as the capability to codetermine sexual relations (Part II). By interfacing a revised concept of sexual autonomy against and alongside State v. Fourtin, a 2012 Connecticut Supreme Court decision overturning a conviction of sexual assault against a severely mentally and physically disabled woman (Part III), the Article proposes three possibilities for statutory reform: refurbishing consent; expanding restrictions on status relations; and applying an accommodation model of disability entitlements to sexual relations (Part IV). After synthesizing our interventions, the Conclusion reminds readers that our brief for sexual autonomy, relationally reconstructed, presumes and propounds the ordinariness, not the extraordinariness, of sex.*

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\* Assistant Professor, Women's, Gender, & Sexuality Studies, Yale University. Many thanks to Shelley Fischel, Katherine Franke, Diana Kim, Luke Maher, Matt Shafer, and Igor Souza.

\*\* Research Analyst, AccessMatters (formerly Family Planning Council), Philadelphia, PA; B.A., Yale University. I would like to thank Stephen, David, and Virginia Adams O'Connell, Maureen McCarthy, and Joshua Stein.

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## INTRODUCTION

In 2012, the Connecticut Supreme Court found Richard Fourtin not guilty of sexually assaulting a severely mentally and physically disabled woman,<sup>1</sup> contravening his 2008 trial conviction.<sup>2</sup> Referred to as “L.K.” in court hearings,<sup>3</sup> the alleged victim is wheelchair bound and suffers hydrocephalus and cerebral palsy.<sup>4</sup> L.K. is nonverbal and communicates via a messaging board.<sup>5</sup> She is also the daughter of Fourtin’s then-girlfriend. The trial jury’s decision hinged on whether L.K. is “physically helpless” and thus unable to consent to sexual relations.<sup>6</sup> The Connecticut Appellate Court reversed the trial jury’s conviction: because L.K. has a demonstrable history of registering displeasure or discomfort through “biting, kicking and scratching,” she could not be deemed, by any reasonable trier of fact, physically helpless. Acting, perhaps, as a “thirteenth juror,”<sup>7</sup> the Connecticut Supreme Court affirmed the appellate decision.

Needless to say, *State v. Fourtin* has infuriated feminists, anti-sexual violence activists, disability rights advocates, and many others.<sup>8</sup> By most accounts, *Fourtin* is an unmitigated disaster—it declares open sexual season on persons with disabilities.<sup>9</sup> Unless a person with disabilities is functionally and physiologically equivalent to someone who is unconscious, asleep, or blackout drunk, she is unprotected by the “physically helpless” subsections of the Connecticut sexual assault statutes.<sup>10</sup> Worse still: if a person with disabilities kicks, bites, and scratches her assailant, this conduct will be used as evidence *against* her alleged

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1 *State v. Fourtin*, 52 A.3d 674 (Conn. 2012).

2 *Id.* at 679–80. The trial jury found Fourtin guilty of attempt to commit sexual assault in the second degree, CONN. GEN. STAT. §§ 53a–71(a)(3), 49(a)(2) (2015), and sexual assault in the fourth degree, CONN. GEN. STAT. § 53a–73a(a)(1)(C) (2015). As a result of the *Fourtin* decision, the Connecticut General Assembly revised Connecticut’s sexual assault statutes. *See infra* notes 315–322 and accompanying text.

3 *See* Daniel Tepfer, *Supreme Court Sets Accused Rapist Free*, CONN. POST, Oct. 1, 2012, <http://www.ctpost.com/news/article/Supreme-Court-sets-accused-rapist-free-3910077.php> [<http://perma.cc/5432-RJBP>].

4 *Fourtin*, 52 A.3d at 677.

5 *Id.*

6 *Id.* at 676.

7 *Id.* at 701 (Norcott, J., dissenting) (internal citation omitted).

8 *See infra* notes 299–306 and accompanying text.

9 *See infra* notes 299–301 and accompanying text.

10 *See infra* notes 288–293 and accompanying text.

physical helplessness. Resistance, in this instance, is proof not of *nonconsent*, but of *capacity to consent*.<sup>11</sup>

This Article revisits the facts, findings, and fallout of *Fourtin* circuitously, by way of and in order to vindicate a reconstructed, relational right to sexual autonomy. For normative and material reasons to be elaborated below, we are cautious of liberal efforts to stretch the protective net of “physically helpless” or similar subsectional clauses.<sup>12</sup> We worry about ableism<sup>13</sup>: We worry that such paternalist legislation may unjustifiably impede persons with disabilities’ wanted sexual relations, reflect the phobic conjunction of disability with asexuality or pathological sexuality, and reiterate the common, careless equivalence of disabled adults and children.<sup>14</sup> Instead, we argue that sexual autonomy, relationally reconceived as the capability to codetermine sexual relations, might better protect L.K. while also better protecting sex.<sup>15</sup> A sexual autonomy right, irreducible to first

11 *Fourtin*, 52 A.3d at 683, 687; see also *infra* note 289.

12 See *infra* Part III.C.

13 See, e.g., FIONA KUMARI CAMPBELL, CONTOURS OF ABLEISM: THE PRODUCTION OF DISABILITY AND ABLEDNESS 6 (2009) (“Central to regimes of ableism are two core elements that feature irrespective of its localised enactment, namely *the notion of the normative* (and normate individual) and the enforcement of a *constitutional divide* between perfected naturalised humanity and the aberrant, the unthinkable, quasi-human hybrid and therefore non-human.”); MICHAEL GILL, ALREADY DOING IT: INTELLECTUAL DISABILITY AND SEXUAL AGENCY 106 (2015) (“Sexual ableism is the system of imbuing sexuality with determinations of qualification to be sexual based on criteria of ability, intellect, morality, physicality, appearance, age, race, social acceptability, and gender conformity.”); DAN GOODLEY, DIS/ABILITY STUDIES: THEORISING DISABLISM AND ABLEISM 21 (2014) (“Ableis[m] . . . privileges able-bodiedness; promotes smooth forms of personhood and smooth health; creates space fit for normative citizens; encourages an institutional bias towards *autonomous*, independent bodies; and lends support to economic and material dependence on neoliberal and hyper-capitalist forms of production.”) (emphasis added). Our reconstruction of sexual autonomy, we hope, enlarges the eligibility of its membership. An “institutional bias towards” autonomy might then promote, rather than prevent, persons with disabilities’ flourishing.

14 See, e.g., Robert McRuer, *Disabling Sex: Notes for a Crip Theory of Sexuality*, 17 GLQ 107, 113–14 (2011) [hereinafter McRuer, *Disabling Sex*] (cautioning that disability may also be selectively championed, but for potentially chauvinist purposes); Tom Shakespeare, *Disabled Sexuality: Toward Rights and Recognition*, 18 SEXUALITY & DISABILITY 159, 164–65 (2000) (cautioning against partitioning and/or prioritizing disability sexual politics from other disability rights activism).

15 Our understanding of sexual autonomy as a capability, and not merely a noninterference right, derives from Martha Nussbaum’s extension of Amartya Sen’s Capabilities Approach. See *infra* note 25 and accompanying text and Part II.D; see also Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201 (2015). Our reconstruction of sexual autonomy aligns with Boni-Saenz’s definition and defense of “sexual capability.” *Id.* at 1224–25. Although first positing sexual capability as “an alternative to sexual autonomy,” *id.* at 1224, Boni-Saenz later suggests the former is elemental to the latter once relationally reconceived. *Id.* at 1227, 1253.

person present active (or passive) consent, redraws statutory lines of sexual permissibility and impermissibility. As a governing principle of modern rape law, this version of sexual autonomy would reach sexual conduct and relations heretofore unregulated, while retreating from conduct and relations heretofore proscribed.

Part I critically reviews two recent, tour-de-force criticisms of sexual autonomy: Jed Rubenfeld's *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy* and Marc Spindelman's *Sexuality's Law*.<sup>16</sup> Rubenfeld insists, and Spindelman implies, that sexual autonomy is a dangerously misguided principle of modern rape law. Both argue too that "sexual autonomy" is a contradiction in terms.<sup>17</sup> Yet, these authors' criticisms of sexual autonomy could not be further apart. Whereas Rubenfeld argues that sexual autonomy, as a governing principle of rape law, licenses nearly totalitarian state interference over the intimate lives of its citizens,<sup>18</sup> Spindelman is equally alarmed that sexual autonomy, as a governing principle of rape law, licenses harmful, violent, life-destroying sex.<sup>19</sup> Despite their seemingly incongruent broadsides against sexual autonomy, each author presumes sexual autonomy is equivalent to and fully exhausted through first person present active (or passive) consent.<sup>20</sup> Once we rupture the equivalence between sexual consent and sexual autonomy, the force of these authors' critiques may be recalculated, recalibrated, and redirected; new problems become more perceivable; and new remedies begin to present themselves.

But what could it really mean to suspend consent as the necessary and sufficient

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16 Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372 (2013) [hereinafter Rubenfeld, *Riddle*]; Marc Spindelman, *Sexuality's Law*, 24 *COLUM. J. GENDER & L.* 87 (2013) [hereinafter Spindelman, *Law*].

17 Rubenfeld, *Riddle*, *supra* note 16, at 1418–21; Spindelman, *Law*, *supra* note 16, at 173–78. It should also be noted that while both authors assume "sexual autonomy" to be a triumph of modern rape law reform, the phrase never appears in state codes.

18 See *infra* notes 37–48 and accompanying text.

19 See *infra* notes 49–66 and accompanying text.

20 Rubenfeld, *Riddle*, *supra* note 16, at 1380–81, 1403 ("[A] rape law genuinely committed to sexual autonomy would reject the force requirement, defining rape solely in terms of consent."); Spindelman, *Law*, *supra* note 16, at 173–79. Our phrase "first person present active (or passive) consent" captures both the notion of affirmative consent (e.g., "yes, let's do this") and acquiescence (the consent standard of many criminal sexual assault statutes). Our reference to person, tense, and voice recalls just how much current thinking about sex and sexual assault is really thinking about speech acts or their absence. Speech acts, this Article argues, may express sexual autonomy; but speech acts do not constitute sexual autonomy.

condition of sexual autonomy? Isn't consent good, right, non-moralized, even sexy?<sup>21</sup> Part II canvasses competing accounts of sexual autonomy to reveal a more promising, more feminist-inflected constitution of the term. Sexual autonomy need not be a performative contradiction, as it appears to be with Immanuel Kant,<sup>22</sup> and it need not presuppose the fiction of the fully developed, wholly independent, adult rational actor.<sup>23</sup> Nor, alternatively, must sexual autonomy be reduced simply to adult choice, as it appears to be with Stephen Schulhofer.<sup>24</sup> Part II rehearses and defends sexual autonomy as the capability to codetermine sexual relations, a definition developed directly from Jennifer Nedelsky's relational reconstruction of autonomy and indirectly from Martha Nussbaum's Capabilities Approach.<sup>25</sup> Such a capability entails: a noninterference right to most, but not all, chosen sexual relations; restrictions on sex in certain status relations; and positive provisions for sexual education and information. This version of sexual autonomy accords consent significant but not primary jurisdiction. And it is keyed, in the final instance, to human flourishing.

Part III returns to *Fourtin*, detailing the facts of the case, subsequent criticisms, and legislative aftermath. We offer, respectfully, a metacritique: dominant activist and political responses to *Fourtin* peremptorily disqualify L.K., as well as those similarly situated, from sexual autonomy. Like Spindelman and Rubinfeld, critics of *Fourtin* synonymize sexual autonomy with sexual consent, and reserve sexual consent for the fiction of the adult, rational, able-bodied, able-minded actor.<sup>26</sup>

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21 See, e.g., CONSENT IS SEXY, <http://www.consentissexy.net> [<http://perma.cc/X4VU-PX9F>] (last visited Aug. 5, 2015); see also JOSEPH J. FISCHL, SEX AND HARM IN THE AGE OF CONSENT (2016) (providing a broader critique against the consent paradigm of late modern sexuality).

22 See *infra* notes 135–150 and accompanying text.

23 From Kant's *œuvre*, our interlocution presses most heavily on IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor & Jens Timmerman eds., 2012) [hereinafter KANT, GROUNDWORK], as well as on secondary political theoretic sources. See *infra* Part II.A.

24 STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 112 (1998). See *infra* Part II.B.

25 See generally JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW (2011). From Nussbaum's *œuvre*, our interlocution presses most heavily on MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2007) [hereinafter NUSSBAUM, FRONTIERS], and Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, in COGNITIVE DISABILITY AND ITS CHALLENGE TO MORAL PHILOSOPHY 74, 75 (Eva Feder Kittay & Licia Carlson eds., 2010) [hereinafter Nussbaum, *Capabilities*].

26 See *infra* notes 302–306 and accompanying text.

Part IV asks: how might sexual autonomy as the capability to codetermine sexual relations—as a right not exhaustively dispatched through first person present active (or passive) consent—govern sex and disability? How might the law, in Connecticut and beyond, enshrine a sexual autonomy right for persons with disabilities (which might be all of us)?<sup>27</sup> Dispelling the presumptive incompatibility between “autonomy” and “disability,” we delineate three options for reforming sexual assault law: 1) refurbish (by reprioritizing and redefining) consent; 2) expand status restrictions on sexual relations: prohibit sexual conduct not only between parents and their children and teachers and their students, but also across other relations of dependence; 3) specify persons with disabilities as a protected sex class: apply an accommodation model of disability—that is not merely an antidiscrimination model—to sex law. Thus, obligate the state to accommodate sex.<sup>28</sup> After summarizing the philosophic and policy interventions addressed in this Article, the Conclusion reminds readers that fostering sexual autonomy ultimately dedramatizes, rather than aggrandizes, sex.

### I. Sexual Autonomy Trashed: Overinclusive, Underinclusive<sup>29</sup>

In recent years, we have witnessed renewed popular and media attention around campus sexual assault,<sup>30</sup> sexual assault in the United States military (and retaliation for

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27 See Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 530 (2008) (“Vulnerability to disability (and other impairments) is universal and constant; we are all one curb step away from disability.”); Tobin Siebers, *A Sexual Culture for Disabled People*, in *SEX AND DISABILITY* 37, 52 (Robert McRuer & Anna Mollow eds., 2012) (“Because every citizen will become sooner or later a disabled citizen, the struggle of people with disabilities for sexual rights belongs to everyone.”); see also DON KULICK & JENS RYDSTRÖM, *LONELINESS AND ITS OPPOSITE: SEX, DISABILITY, AND THE ETHICS OF ENGAGEMENT* 172 (2015) (“[I]t isn’t just that everybody is a mere car accident . . . away from disability . . . . [I]t’s that disability—the structure that comprises both absence and excess—is at the center of everyone’s existence.”). Kulick and Rydström arrive at this point via Anna Mollow, who figures sex itself as disability, a fantasy structure sustained through the subject’s desire for disintegration and rupture. Anna Mollow, *Is Sex Disability? Queer Theory and the Disability Drive*, in *SEX AND DISABILITY*, *supra*, at 285, 310 (“[A]ll sex is incurably, and perhaps desirably, disabled.”).

28 See generally KULICK & RYDSTRÖM, *supra* note 27. Kulick and Rydström likewise apply Nussbaum’s Capabilities Approach to disability and sexual flourishing. *Id.* at 277–95.

29 A version of Part I appears in FISCHER, *supra* note 21.

30 See, e.g., KNOW YOUR IX: EMPOWERING STUDENTS TO STOP SEXUAL VIOLENCE, <http://www.knowyourix.org> [<http://perma.cc/5QJU-ATCS>] (last visited Aug. 5, 2015); *Ending Campus Sexual Assault Toolkit*, AAUW, <http://www.aauw.org/resource/campus-sexual-assault-tool-kit/> [<http://perma.cc/JCQ4-2VB4>] (last visited Dec. 3, 2015).

reporting),<sup>31</sup> sexual violence in international conflict zones,<sup>32</sup> and legislative and judicial attempts to limit women's reproductive rights.<sup>33</sup> One might think now would be a prescient moment for legal scholars to carry a brief, once again,<sup>34</sup> for sexual autonomy. Instead, two such scholars, Jed Rubenfeld and Marc Spindelman, took sexual autonomy to the junkyard, to be disposed of along with seduction laws,<sup>35</sup> *Lochner*,<sup>36</sup> and all those other noble ideas whose detriments were obfuscated by presentism. Both authors offer sustained, smart, and relentless broadsides against sexual autonomy; both see sexual autonomy as a contradiction in terms. Yet, their normative and consequentialist concerns are antipodal.

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31 See, e.g., Gopal Ratnam, *The U.S. Military's Continuing Sexual Assault Problem*, FOREIGN POL'Y, Dec. 4, 2014, <http://foreignpolicy.com/2014/12/04/the-u-s-militarys-continuing-sexual-assault-problem> [<http://perma.cc/BVT5-3G2U>].

32 See, e.g., Aki Peretz & Tara Maller, *The Islamic State of Sexual Violence*, FOREIGN POL'Y, Sep. 16, 2014, <http://foreignpolicy.com/2014/09/16/the-islamic-state-of-sexual-violence> [<http://perma.cc/5C9K-43UQ>]. For an important corrective to dominant, sensational narratives of rape in conflict areas as only or even primarily ethnically terroristic, see Kerry F. Crawford et al., *Wartime sexual violence is not just a 'weapon of war'*, WASH. POST, Sept. 24, 2014, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/24/wartime-sexual-violence-is-not-just-a-weapon-of-war> [<http://perma.cc/K5XQ-RNN8>].

33 See, e.g., *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (recognizing protected religious beliefs of for-profit, closely-held corporations that exempt them from federal law; in this instance, a mandate for employers to fund certain forms of contraception for female employees under the Affordable Care Act); Erik Eckholm, *Access to Abortion Falling as States Pass Restrictions*, N.Y. TIMES, Jan. 3, 2014, <http://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html> [<http://perma.cc/53CH-V9M2>].

34 For earlier legal theoretic advocacy of sexual autonomy (often equated to an affirmative consent requirement) as a successor principle of rape law, see, for example, SCHULHOFER, *supra* note 24; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993).

35 There is an affinity between Rubenfeld's criticism of sexual autonomy as laced with the "defilement logic of traditional rape law" through rape-by-deception anomalies (spousal impersonation and medical misrepresentation), and (post hoc) feminist criticism of seduction laws as premised on women's alleged fragility and "feminine virtue" (sexual restraint). See Rubenfeld, *Riddle*, *supra* note 16, at 1401. For a rehearsal of feminist responses to, and a revisionist account of, seduction laws, see generally Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction", 93 COLUM. L. REV. 374 (1993).

36 There is an affinity between Spindelman's criticism of sexual autonomy as authorizing unfettered sexual conduct, injuries notwithstanding, and progressive criticism of *Lochner*-era Court rulings constitutionalizing unfettered labor contracts, exploitation notwithstanding. See Spindelman, *Law*, *supra* note 16, at 173; see also *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."); *infra* notes 102–106 and accompanying text.

Rubinfeld worries that sexual autonomy overreaches and patronizes women. Spindelman worries that sexual autonomy underachieves and imperils gay men. Both Rubinfeld's and Spindelman's arguments are underpinned—and ultimately undermined—by the conflation of sexual autonomy with sexual consent.

### A. Overinclusive: Rubinfeld's Riddle

In *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, Jed Rubinfeld argues that sexual autonomy is ascending as the governing principle of rape law in the United States and other postindustrial nations, indexed by the substitution of nonconsent for force as the gravamen of sexual assault.<sup>37</sup> In the 1970s, liberal and feminist legal scholars and activists spearheaded reforms to modern rape law.<sup>38</sup> The force requirement was nearly impossible to prove; only the narrowest subset of sexual misconduct was actionable.<sup>39</sup> Presupposing that the problem of rape is the problem of the stranger-predator-in-the-bushes-with-a-knife, the force requirement was inhospitable to cases of acquaintance rape, coercive sex, and even sex that was resisted (but not resisted in a form masculinist enough to register “force” to judges and juries).<sup>40</sup> Nonconsent, it was hoped, would capture a wider range of sexual misconduct, emphasizing infringement of choice rather than the violent violation of the (woman's) body.<sup>41</sup>

It is against the backdrop of these progressive reforms and several outlier sexual assault

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37 Rubinfeld, *Riddle*, *supra* note 16, at 1392–94.

38 See SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 13 (2009).

39 *Id.* at 14–15.

40 See generally SUSAN ESTRICH, REAL RAPE (1988); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 649 (1983).

Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation.

*Id.*

41 However, initial 1970s liberal/feminist reforms to United States rape law sought to replace or relax the resistance requirement in favor of a force requirement, precisely to shift attention away from the behavior of the victim and onto the conduct of the perpetrator. See CARINGELLA, *supra* note 38, at 14–15. For accounts of reforms to modern rape law (and their shortcomings), see *id.* at 12–27; ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 21 (2014); SCHULHOFER, *supra* note 24, at 17–46.



convictions in its wake that Rubenfeld's riddle surfaces.<sup>42</sup> According to Rubenfeld, if we take sexual autonomy seriously, deception of any kind must be actionable, as it corrupts consent.<sup>43</sup> Under the principle of sexual autonomy, "fraud is as great an evil as force."<sup>44</sup> Any deception that induces sex—lying about your alma mater, your net worth, or your profession, or even the application of make-up—manipulates consent.<sup>45</sup> Under a sexual autonomy regime, all such deceivers should be convicted of sexual assault. Rubenfeld warns: seventeen-year-olds who lie about their age in order to have sex with older partners would be both victims and perpetrators of sexual assault.<sup>46</sup> For Rubenfeld, this outcome is inevitable and ridiculous. Seeing no plausible side constraint to the ambit of autonomy, Rubenfeld proposes that we jettison sexual autonomy from rape law, advocating instead a re-installment of the force requirement. Rape violates not a choice-right but "a right to bodily self-possession," abrogated only by force (imprisonment, overpowering, physical restraint) or threat of force.<sup>47</sup> Consent reenters sex law singularly as an affirmative defense against *forcible* subjection, transforming rape into permissibly rough, kinky, and/or BDSM sex.<sup>48</sup>

### B. Underinclusive: Spindelman's 'Sexual Death-Blow'

In "Sexuality's Law," Marc Spindelman's attack is launched not chiefly at sexual autonomy, but rather at what he calls the "ideology of sexual freedom," an ideology he

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42 Rubenfeld, *Riddle*, *supra* note 16, at 1375–79.

43 *Id.* at 1402–04, 1416.

44 *Id.* at 1379.

45 *Id.* at 1416; *see also* Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 *YALE L.J. ONLINE* 389, 391 (2013), <http://www.yalelawjournal.org/forum/rape-by-deception-a-response> [<http://perma.cc/S7CB-CBA6>] [hereinafter Rubenfeld, *Response*].

46 Rubenfeld, *Riddle*, *supra* note 16, at 1414; Rubenfeld, *Response*, *supra* note 45, at 391–92, 402–03; *see infra* Part I.D.1.

47 Rubenfeld, *Response*, *supra* note 45, at 390, 403.

48 Rubenfeld, *Riddle*, *supra* note 16, at 1437–38. For the peculiar consequences of Rubenfeld's sole consent exception, *see* Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception,"* 123 *YALE L.J. ONLINE* 321, 326–27 (2013), <http://yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubenfeld-on-rape-by-deception> [<http://perma.cc/H2RK-7RZG>]. ("[S]uppose Jones is willing to engage in sadomasochistic sex with Smith only if Smith has gone to Yale. Smith lies that he has gone to Yale . . . . It is hard to believe that the sex is innocent up until the point at which Jones requests that Smith bind her with rope, at which point the encounter suddenly becomes rape.").

holds responsible for the “lay[ing] waste” of gay men.<sup>49</sup> The ideology finds its intellectual progenitors in writers and philosophers like the Marquis de Sade, Georges Bataille, Jean Genet, Jean-Paul Sartre, and Michel Foucault;<sup>50</sup> it is refracted through hegemonic masculinity, the HIV/AIDS epidemic, and homophobia;<sup>51</sup> and its recent and contemporary flag-bearers—not always consciously, not without contradictions, and never univocally—are gay male theorists like Douglas Crimp, David Chambers, Richard Mohr, Leo Bersani, and Tim Dean.<sup>52</sup>

Under the ideology of sexual freedom, sex “is the value of all values.”<sup>53</sup> Sex is life-generating, life-destroying, subject-creating, subject-shattering, world-generating, and world-excluding.<sup>54</sup> Sex obliterates social order as it catalyzes new vistas of the possible.<sup>55</sup> Where the ideology inexorably devolves, for Spindelman, is an “erotics of death,”<sup>56</sup> the sacralization of violence that, at its limitless limit, “entails a right to die for sex and also a right to kill in its name.”<sup>57</sup> On Spindelman’s account, it is gay men’s allegiance to and interpellation by the ideology that results in internalized homophobia, the equation of sexual freedom with sexual violence, the underreporting and trivializing of sexual abuse within gay communities, the eroticization of HIV/AIDS and seroconversion, and the censoring or self-censoring of dissent.<sup>58</sup>

One might think sexual autonomy would provide a glimmer of hope in this otherwise grim account. As a recognizable legal limit, sexual autonomy is the liberal side-constraint to the ideology of sexual freedom’s corresponding injuries and violence.<sup>59</sup> Not so, argues

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49 Spindelman, *Law*, *supra* note 16, at 227.

50 *Id.* at 98–121.

51 *Id.* at 98–212.

52 *Id.* at 98–212. *See also* Marc Spindelman, *Review Essay: Sexual Freedom’s Shadows*, 23 *YALE J.L. & FEMINISM* 179 (2011).

53 Spindelman, *Law*, *supra* note 16, at 102.

54 *See id.* at 101–07.

55 *Id.* at 105.

56 *Id.* at 117.

57 *Id.* at 112.

58 *Id.* at 139–40, 184–85, 207–08, 214–15.

59 Spindelman, *Law*, *supra* note 16, at 172–73, 187–88, 192.

Spindelman, whose deep skepticism is occasioned by Richard Mohr's defense of sexual autonomy in *Gays/Justice*.<sup>60</sup> First, given how phenomenologically fabulous sex is, for Mohr, and given that sex, if done right, is supposed to break all our boundaries, sexual autonomy is a rearranged deck chair on the Titanic.<sup>61</sup>

Second, though, and more pertinent for the purposes of this Article, sexual autonomy is immanently hospitable to an erotics of death: "If autonomy means anything, it is that one must be able to sacrifice oneself and one's life for one's deepest belief."<sup>62</sup> Consent grants "an immunity . . . to deal a sexual death blow. [One's] partner's underlying consent vitiates any notion that his death, sexually achieved as a result, is a harm. There can be no victims in this sex."<sup>63</sup> Sexual autonomy, by licensing all consensual sexual activity, licenses any injury attendant to sex, even death, because sex is the best. For Spindelman, HIV/AIDS is "sexual death" *par excellence*.<sup>64</sup> Sexual autonomy permits seroconversion. A fortiori, sexual autonomy equals sexual death.<sup>65</sup> By enshrining sexual death into sexual assault law, sexual autonomy violates the obligation of the liberal democratic state to prevent and punish individual harmful conduct.<sup>66</sup>

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60 *Id.* at 157–92; *see also* RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 219–22 (1988).

61 Spindelman, *Law, supra* note 16, at 189 ("Unlike the right to sexual autonomy, which figures the boundaries of the autonomous self as fully self-managed (even to the very end), the phenomenology of sex recognizes they need not be, and may be anything but.").

62 *Id.* at 185. This predicate, however, is dubious. Many autonomy theorists explicitly reject that autonomy vindicates self-sacrifice (let alone self-sacrifice motored by belief as opposed to second-order calculations [such as signing a Do Not Resuscitate order out of concerns for one's family's well-being]). *See, e.g.*, GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 20, 128 (1997) (speculating that his conception of autonomy may justify voluntary slavery, but only if such servitude is based on the "second-order capacity of persons to reflect critically upon their first order preferences"); JOHN STUART MILL, *ON LIBERTY* 87 (2002) ("But by selling himself for a slave he abdicates his liberty . . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.").

63 Spindelman, *Law, supra* note 16, at 186.

64 *Id.* at 97–98, 174–75.

65 *Id.* at 184–85.

66 *Id.* at 88, 223–27. More precisely, Spindelman argues that the de jure consent gravamen of sexual assault law combined with the de facto material reality of the ideology of sexual freedom alchemizes and authorizes sexual violence by and against gay men.

### C. Sexual Autonomy ≠ Consent

Despite Rubinfeld's and Spindelman's otherwise contrary critiques of sexual autonomy—overreaching and under-protective, respectively—both authors equate sexual autonomy with consent. If sexual assault law is premised on consent, warns Rubinfeld, we are obliged to send teenagers to prison for lying about their age in order to have sex.<sup>67</sup> If sexual assault law is premised on consent, warns Spindelman, gay men can infect one another with HIV with impunity, and there is no actionable harm.<sup>68</sup>

But what if sexual autonomy denotes something other than, or something more than, first person present active (or passive) consent? Before elaborating that something—that is, before retrieving and then defending a reconstructed, relational, and feminist sexual autonomy—we revisit Rubinfeld's and Spindelman's cases of sexual autonomy gone wild. What inklings are there, in these authors' own examples, of sexual autonomy theorized otherwise?

### D. Three Seventeen-Year-Olds

In his gauntlet-thrown offensive, as well as in the reply to his critics,<sup>69</sup> Rubinfeld repeatedly circles back to teenagers and teenage sex, and specifically to sex with and between seventeen-year-olds.<sup>70</sup> The seventeen-year-old, on the eroticized precipice of majority,<sup>71</sup> is the character that dramatizes the deficiencies of sexual autonomy. But each of his three teen sex scenarios could and should be spun differently, shoring up the possibilities, rather than the pitfalls, of sexual autonomy. We briefly summarize each of his scenarios and amend them with a few provocations—provocations to be fleshed out in Parts II and IV.

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67 See *supra* note 46.

68 Spindelman, *Law*, *supra* note 16, at 88–89, 118, 173–78 (recognizing statutes for prosecuting HIV transmission, but complaining they are underutilized by gay men).

69 Rubinfeld, *Response*, *supra* note 45.

70 *Id.* at 391–92, 402; Rubinfeld, *Riddle*, *supra* note 16, at 1414, 1435, 1441–42.

71 On the “erotic innocence” of the modern construction of childhood, see, e.g., JAMES R. KINCAID, *EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING* (1998); on adolescence as a construction differentially gendered and hyper-sexualized, see KENT BAXTER, *THE MODERN AGE: TURN-OF-THE-CENTURY AMERICAN CULTURE AND THE INVENTION OF ADOLESCENCE* (2008); NANCY LESKO, *ACT YOUR AGE! A CULTURAL CONSTRUCTION OF ADOLESCENCE* (2012).

### 1. Seventeen-Year-Old #1

If sexual autonomy is equivalent to consent, then sex-by-deception—any deception—is, concludes Rubinfeld, equivalent to sexual assault. If a seventeen-year-old lies to have sex with an older partner, consent is thereby compromised, the teen therefore assaultive. Rubinfeld appeals to a liberal-leaning, feminist-friendly audience. Are we prepared to incarcerate a seventeen-year-old girl for lying about her age to have sex with an older man?<sup>72</sup> If not, there is but one plausible option: junk nonconsent and reinstate force requirements.<sup>73</sup>

First, we should recognize the statistical infrequency of this teen lie, or mootness of the lie (if the lie is told to convince an otherwise law-abiding but libidinal citizen). Rubinfeld mistakenly (or misleadingly) presupposes that the age of consent for sexual conduct is eighteen, a commonly held misperception. But in nearly all states the age of consent is sixteen;<sup>74</sup> so too, nearly all states include age-span provisions in their sexual assault codes.<sup>75</sup> In many states, for example, it is legal for anyone of any age to have sex with a sixteen-year-old, but only those seventeen and under are permitted to have sexual relations with fourteen-year-olds.<sup>76</sup> To the extent that this lie occurs, and occurs to convince a suitor of the ensuing sex's legality, the more likely scenario would be the following: a fourteen-year-old lies about her age to have sex with someone eighteen or nineteen.<sup>77</sup> To compete on Rubinfeld's rhetorical plane: a high school freshman lies about her age to have sex with a college freshman or college sophomore. In this circumstance, we may more justifiably conclude that the high school freshman is not accountable for sexual assault, but because she is not accountable to sex. In other words, we do not hold her criminally accountable for the lie for the same reason the law proscribes sex with her: she is not as capable a decision maker—on account of experiential, educational, and developmental differences—as an older teenager or adult. This legal fiction—an incompetent and thus

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72 Rubinfeld, *Riddle*, *supra* note 16, at 1414; Rubinfeld, *Response*, *supra* note 45, at 391–92, 402.

73 See Rubinfeld, *Riddle*, *supra* note 16, at 1432–35.

74 See Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 800, 809 (2001).

75 See Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL'Y 373, 390 (2003).

76 *Id.* at 390–91.

77 See, e.g., Julie Bosman, *Teenager's Jailing Brings a Call to Fix Sex Offender Registries*, N.Y. TIMES, Jul. 5, 2015, at A1, [http://www.nytimes.com/2015/07/05/us/teenagers-jailing-brings-a-call-to-fix-sex-offender-registries.html?\\_r=0](http://www.nytimes.com/2015/07/05/us/teenagers-jailing-brings-a-call-to-fix-sex-offender-registries.html?_r=0) [<http://perma.cc/Y5UA-8DTJ>].

innocent fourteen-year-old—is more palatable to liberals and sex progressives than the fiction of the incompetent and thus innocent seventeen-year-old.<sup>78</sup>

This observation about the extant age of sexual consent law segues to the second and more important criticism of the lying teenager hypothetical. In the rare jurisdictions where the lie would be advantageous, *maybe it is the jurisdiction, not the teenager, that is in the wrong*.<sup>79</sup> And that wrong is a violation of sexual autonomy, both the teen's and her partner's. The seventeen-year-old lies because the law infringes on her sexual autonomy. In that case, the restructuring of legal relations, rather than the simple performance of individual consent, is componential of sexual autonomy.<sup>80</sup> This initiates a broader, de-dramatized (and de-eroticized) perspective unthinkable in Rubinfeld's focus on immediate sexual encounters. The corrective in criminal law in the case of the lying teenager is to expand rather than contract the ambit of sexual autonomy, extending its normative and material coverage to older adolescents.

## 2. Seventeen-Year-Old #2

If we jettison sexual autonomy as Rubinfeld advises, we cannot, he concedes, convict a high school principal of sexual assault for coercing a seventeen-year-old into sex on the threat of expulsion (the principal could, though, be charged with some form of professional misconduct).<sup>81</sup> Like deception, explains Rubinfeld, coercion vitiates consent. Coercion is thus no longer a touchstone for sexual assault once the question of consent is immaterial to rape.<sup>82</sup> But this only holds true if autonomy is equivalent to consent. If sexual autonomy also entails protecting choice and choice structure from undue interference, and entails guarantees against impermissible impediments to future decisions and decision-making, then the law might more strenuously regulate status relations and relations of dependence, regardless of consent. In other words, there might be a version of sexual autonomy that

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78 For a provocative counterclaim, see JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 68–89 (2002) (defending a thirteen-year-old girl's sexual relationship with her twenty-one-year-old boyfriend, and rejecting statutory rape law as a suppressant of young female desire); *see also infra* notes 191–197 and accompanying text.

79 In California, for example, all sex under eighteen is a criminal offense (albeit graduated by age difference), unless the partners are married. CAL. PENAL CODE § 261.5(a) (West 2015)

80 *See generally* NEDELSKY, *supra* note 25; *see also infra* Part II.C; Part II.D.1.

81 Rubinfeld, *Riddle*, *supra* note 16, at 1435.

82 *Id.* at 1435. *But see* Dougherty, *supra* note 48.

prohibits sexual relations between high school principals and their students, whether or not the sex is consensual.<sup>83</sup>

### 3. Seventeen-Year-Old #3

If the open secret of age of consent laws is that we all know seventeen-year-olds can consent to sex, writes Rubinfeld, then his revised rape law, tethered only to force, does not reach sex between minors or between minors and adults.<sup>84</sup> But morality does, assures Rubinfeld.<sup>85</sup> States are free (within the limits of other constitutional guarantees, like equal protection or privacy) to enact statutes proscribing sexual conduct deemed immoral.<sup>86</sup> This backstop to Rubinfeld's obliteration of modern sex law comes at an unacceptably high cost: the very totalitarian reach into citizens' intimate lives that animated Rubinfeld's critique from the outset.<sup>87</sup> If morality is reintroduced as a legitimate basis for the regulation of sexual conduct, what is to stop the state from restricting sex among unattractive people, overweight people, gay people,<sup>88</sup> or people with disabilities? Rather than re-open the door that *Lawrence v. Texas* shut,<sup>89</sup> it is both more

83 See *infra* notes 264–269 and accompanying text; *infra* notes 415–417 and accompanying text.

84 Rubinfeld, *Riddle*, *supra* note 16, at 1441–42.

85 *Id.* at 1441–42.

86 See *id.* at 1441.

87 *Id.* at 1441; see also *id.* at 1376 (“Many—perhaps most of us—don’t think rape-by-deception is rape at all. Neither, as a rule, do our courts. The problem is that we ought to think it *is* rape, and courts ought to so hold, given what we say rape is.”).

88 Rubinfeld argues that his excision of sexual autonomy from rape law would nullify *Lawrence v. Texas*, 539 U.S. 558 (2003). This is mistaken. Just because John may permissibly infringe my sexual autonomy does not mean the State can do so. John might refuse Joe’s entry into his home because Joe is Jewish. The state cannot likewise refuse Joe’s entry into a public university. See Corey Rayburn Yung, *Rape Law Fundamentals*, 27 *YALE J.L. & FEMINISM* 1, 46 (2015); *id.* at 30–31 (“The right to sexual autonomy, as conceived of in *Lawrence*, is only a protection from government punishment of consensual sexual activity. Private actors who violate other people’s sexual autonomy do not abridge that right under current law.”).

It is not that *Lawrence* is nullified by Rubinfeld’s excision of sexual autonomy from rape law. Rather, once sexual autonomy is excised, “morality” must clean up the questionable sex left outstanding, so *Lawrence* must be liquefied. Rubinfeld pretends that the nullification of *Lawrence* is a logical consequence of his critique of sexual autonomy, when in fact it is a normative antecedent.

89 *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (holding state sodomy laws unconstitutional); *supra* note 88. For an argument extending *Lawrence*’s sexual rights to minors (and thereby proscribing morality as a constitutional basis for the regulation of minor sexual conduct), see Daniel Allender, *Applying Lawrence*:

practically feasible and normatively defensible to retain consent while reconstructing sexual autonomy.

### E. Other Sexual Death-Blows

Spindelman's most dangerous misstep in "Sexuality's Law" is the equation of HIV/AIDS with death, the *sine qua non* predicate of Spindelman's broadside. For Spindelman's critique to find traction, for there to be an ideology of sexual freedom "laying waste" to gay men, Spindelman must figure HIV/AIDS, and HIV nondisclosure and transmission, in a particularly invidious and phobic way.<sup>90</sup> At Spindelman's rhetorical peak, HIV appears as a weapon brandished by sex-crazed, death-crazed homosexuals hell-bent on spreading, with impunity, their virus.<sup>91</sup> Spindelman conjures Patient Zeroes, predators primarily responsible for the stubborn incidence and prevalence of HIV among United States gay men.<sup>92</sup> HIV-positive men are both Spindelman's sex victims and sex offenders. In this way, HIV/AIDS literalizes the "erotics of death" that sits at the heart of gay men's alleged fidelity to sexual freedom.<sup>93</sup>

Spindelman might counter that our critique performs a disavowal of gay male responsibility for the perpetuation of sexual injury and "sexual death" in the form of HIV/AIDS.<sup>94</sup> But such a rebuttal misapprehends opposition to HIV criminalization laws. HIV nondisclosure and transmission laws were codified mostly mid-epidemic and mid-panic.<sup>95</sup> They overestimate risks of certain sexual activities, assume risk where none exists, add stigma to an already stigmatized identity category, take little or no account of risk-reducing behavior (like taking antiretrovirals), and may very well deter HIV-testing by incentivizing ignorance.<sup>96</sup> Enforcement of potential HIV exposure laws is often vindictive,

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*Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825 (2009).

90 Spindelman, *Law*, *supra* note 16, at 227.

91 *Id.* at 91–92.

92 *Id.* at 138.

93 *Id.* at 208–10.

94 *Id.* at 129–33, 138–39.

95 See Trevor Hoppe, *From Sickness to Badness: The Criminalization of HIV in Michigan*, 101 SOC. SCI. & MED. 139, 140 (2014); Stan J. Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 1000 (2014).

96 See Hoppe, *supra* note 95, at 145–47; Lehman et al., *supra* note 95, at 999, 1003.



racially disparate in impact, and disproportionately targeted against straight-identified men of color.<sup>97</sup> There is no evidence that criminalization lowers either risks or rates of HIV transmission.<sup>98</sup> Meanwhile, safer sex campaigns, antiretroviral therapies, serosorting, harm reduction practices, and pre-exposure prophylaxis did not materialize solely so that men could have sex with other men without consequence.<sup>99</sup> These are efforts to redress the harms of HIV without assuming maniacal evildoers and to change the medical and cultural import of HIV so it is not a death sentence but a manageable health condition. If we care about reducing HIV rates of infection and if we care (like Spindelman does) about generating less-toxic sexual relations, we should advocate for lowering the costs of treatment, making screening and treatment more accessible, and increasing funding for comprehensive sexuality and prevention education.<sup>100</sup> Because Spindelman is wrong about the medical and cultural meaning of HIV, he is wrong to support the criminalization of HIV transmission.

On the other hand, Spindelman expositis another equation: sexual autonomy as realized

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97 See Kim Shayo Buchanan, *When is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1294–1322 (2015); Zita Lazzarini & Robert Klitzman, *HIV and the Law: Integrating Law, Policy, and Social Epidemiology*, 30 J.L. MED. & ETHICS 533, 537–40 (2002); see also Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1469, 1515–16 (2009). Buchanan argues too that the state’s singling out HIV for compelled disclosure is discriminatory and violative of HIV-positive persons’ sexual autonomy. Buchanan, *supra*, at 1328, 1334–38.

98 See Lehman et al., *supra* note 95, at 998–99, 1004. Spindelman argues that HIV criminalization laws are ineffective because gay men underutilize them. See Spindelman, *Law, supra* note 16, at 96–98.

99 See *Serosorting among Gay, Bisexual and Other Men Who Have Sex with Men*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/msmhealth/serosorting.htm> [<http://perma.cc/9NYA-JWJC>] (last visited Jan. 24, 2016) (“Serosorting is a practice some gay, bisexual and other men who have sex with men (MSM) use in an effort to reduce their HIV risk. This means they try to limit unprotected anal sex to partners with the same HIV status as their own.”); *Pre-Exposure Prophylaxis*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/prevention/research/prep> [<http://perma.cc/KT3M-ZRDD>] (“Pre-exposure prophylaxis . . . is a way for people who do not have HIV . . . to prevent HIV infection by taking a pill every day. The pill . . . contains two medicines . . . that are used in combination with other medicines to treat HIV . . . [and] these medicines can work to keep the virus from establishing a permanent infection.”).

100 See generally Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN’S L.J. 363 (2013); UNAIDS, ENDING OVERLY BROAD CRIMINALIZATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: CRITICAL SCIENTIFIC, MEDICAL AND LEGAL CONSIDERATIONS (2013), [http://www.unaids.org/sites/default/files/media\\_asset/20130530\\_Guidance\\_Ending\\_Criminalisation\\_0.pdf](http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf) [<http://perma.cc/ELL7-VGZS>]; Sean Strub, *Prevention vs. Prosecution: Creating a Viral Underclass*, POZ BLOGS (Oct. 18, 2011, 12:55 PM), [http://blogs.poz.com/sean/archives/2011/10/prevention\\_vs\\_prosec.html](http://blogs.poz.com/sean/archives/2011/10/prevention_vs_prosec.html) [<http://perma.cc/F555-TG4L>].

through any consensual sexual activity whatsoever.<sup>101</sup> And *this* equation, not the equation of HIV with death, rightly troubles the good liberal's normative priors. Hiding in the shadows (and the footnotes) of "Sexuality's Law" are accounts of other kinds of injuries and harms, that, however consensual, may be impermissible from the liberal, democratic state's point of view. They also may be intolerable from the perspective of a feminist, relationally reconstructed conception of sexual autonomy.<sup>102</sup> Spindelman references the "German Cannibal" case, in which one partner castrated, killed, further dismembered, and then consumed the other partner—acts partially videotaped and demonstrably consensual.<sup>103</sup> He references BDSM sex more generally, questioning its advocates' kneejerk recourse to consent as morally, summarily determinative.<sup>104</sup> He worries that *Lawrence*, if not counterbalanced by some additional doctrine, authorizes same-sex sexual violence under the sign of "freedom."<sup>105</sup> And he laments, rightfully we think, that gay men underreport sexual harassment, abuse, and rape, and that when gay men do report sexual injury, their accounts are readily dismissed or trivialized.<sup>106</sup>

We agree then that the state might have a role to play in regulating, even proscribing, some harms of consensual sexual conduct—but we disagree with Spindelman that HIV nondisclosure is one of those harms (in part because nondisclosure neither necessarily nor categorically violates sexual autonomy and in part because seropositive status is not a sexual death blow).<sup>107</sup> And the solution to addressing these other injuries is not to abandon sexual autonomy but to reconstruct its meaning by reconceiving it relationally. One question we pose in Parts II and IV is: must sexual autonomy green-light every act of consensual sex, however physically or psychologically devastating? Or are there alternative versions of sexual autonomy that rein in the parameters of regulable consensual sex? In other words, might the democratic state permissibly restrict certain forms of consensual

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101 See Spindelman, *Law*, *supra* note 16, at 186–88, 186–187 n.439, 187 n.40.

102 *Id.* at 186–88, 186–187 n.439, 187 n.440.

103 *Id.* at 186 n.439.

104 *Id.*

105 *Id.* at 226.

106 *Id.* at 98, 221–23.

107 In the course of writing this Article, the authors realized they might not agree with one another on the legitimate scope of state intervention over adult (and some minor) consensual sexual activity. However, both authors agree that first person present active (or passive) *consent* is componential of, but not comprehensive for, *sexual autonomy*. See *infra* Part IV.

conduct, not despite sexual autonomy but because of it? Might a relationally reconstructed concept of sexual autonomy place less emphasis on disqualifying certain persons (like the disabled or minors) from consent's eligibility and more emphasis on regulating certain consensual relations? This outcome is facially paradoxical—a concept of autonomy that relaxes competency requirements while it reins in the moral force of “choice”—but it is one we will come to hesitantly endorse.

## II. Sexual Autonomy Reconstructed: Feminist, Relational

But what could it really mean for consent to no longer be the filament of sexual autonomy? Does not consent sit at autonomy's very core?<sup>108</sup> Is not individual choice the premium value under liberalism, for which autonomy provides the theoretical armature? In this Part we offer a grossly truncated genealogy of (sexual) autonomy, and we canvass some of its leading critics and revisionists. We do so to arrive at a conception of sexual autonomy as the capability to codetermine sexual relations. This definition of sexual autonomy accords consent critical but not dispositive normative value.

### A. Autonomy as Self-Governance: Kant

Most liberal philosophic defenses of autonomy reach back to (and often problematize) Kant's account of autonomy and his Formula of Humanity, which enjoin us to act in such a way that respects our humanity and the humanity of others as ends, and “never merely as a means.”<sup>109</sup> Kant's notion of autonomy derives from action in accordance with universal law. Such universal law is keyed to the recognition of humanity as the core of dignity; and the inhabitants of humanity are entitled to moral respect and equal treatment because they are rational beings.<sup>110</sup>

These links of Kantian logic are not self-evident, especially to the contemporary reader who associates autonomy with uncoerced (adult, able-minded) choice, full stop. Thus, this section (partially) parses this account of autonomy, delineates why this account appears so incompatible—even contradictory—with sex, and then explains, in broadest stroke, why the account has seemed so troubling from feminist and other critical theoretic perspectives. Interestingly, it is these very concerns with Kantian autonomy that helped pare down the

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108 See *supra* Part I. Or the inverse: is not autonomy “at the center of the justificatory basis for informed consent”? DWORKIN, *supra* note 62, at 101.

109 KANT, *GROUNDWORK*, *supra* note 23, at 41.

110 *Id.* at 17–18, 41–43.

concept to consent, a thinned version of autonomy embraced by Stephen Schulhofer (and accepted as such by Rubenfeld and Spindelman) that we problematize in the next section.

For Kant, autonomy is indexed and achieved through obeying self-generating, not externally imposed, law.<sup>111</sup> Conduct in accordance with one's own law demonstrates a sovereignty of the subject steered from selfishness, the seductions of one's appetite, or others' persuasion or compulsion.<sup>112</sup> And the subject's law is moral law to the degree it is universal law.<sup>113</sup> Hence Kant's categorical imperative: the law one takes as his own must recognize humanity as a "kingdom of ends."<sup>114</sup> Autonomous action respects the autonomous capacities of others.<sup>115</sup> As Claire Rasmussen points out, by rendering adherence to the categorical imperative as freely chosen, Kant bridges two conflicting understandings of autonomy on offer from Rousseau.<sup>116</sup> Kant's autonomy is neither solely generated and dispatched by individuals shielded from the social nor does it materialize only through submission to the general will. Rather, autonomy is moral law freely imposed on the self that "acknowledge[s] living with others."<sup>117</sup>

Such Kantian autonomy, a property of the person yet calibrated to sociality, is a function of and entitled by human rationality.<sup>118</sup> We observe moral law and we act under universal maxims because we are rational beings. And we are able to observe moral law, rather than involuntarily submit to it, because we are rational beings. This sort of human action is reflected upon in light of reason; reason permits us to see the duties we owe

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111 *Id.* at 42–43.

112 *Id.* at 52 (“[T]he moral and hence categorical imperative says: I ought to act in such or such a way, even if I did not want anything else.”); *see also* IMMANUEL KANT, *EDUCATION* 96–97 (Annette Churton ed., 1960) [hereinafter *KANT, EDUCATION*] (“*Morality* is a matter of character . . . . The first step toward the formation of a good character is to put our passions on one side.”).

113 KANT, *GROUNDWORK*, *supra* note 23, at 18.

114 *Id.* at 45–46.

115 *Id.* at 51–52.

116 CLAIRE E. RASMUSSEN, *THE AUTONOMOUS ANIMAL: SELF-GOVERNANCE AND THE MODERN SUBJECT* 4–5 (2011) (citing JEAN-JACQUES ROUSSEAU, *SECOND DISCOURSE ON THE ORIGINS OF INEQUALITY* (Donald A. Cress trans., 1992); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* (Victor Gourevitch ed., 1997)).

117 RASMUSSEN, *supra* note 116, at 5.

118 KANT, *GROUNDWORK*, *supra* note 23, at 57–58; *see also* Stephen Darwall, *The Value of Autonomy and Autonomy of the Will*, 116 *ETHICS* 263, 281–82 (2006).

to ourselves and others, and to act accordingly. We subscribe to the law freely through our own rational calculations, uninfluenced by God, possible consequences, or our own desires.<sup>119</sup> Rationality lifts us out of slavishness to our desires. Our will is free to the extent it is rational; the freeness of our free will wills us to act in accordance with universal law and requires that we respect the same freedom in others.<sup>120</sup>

This, then, is autonomy: acting freely, which means acting rationally, which means acting morally or by moral motivation, in recognition of ourselves and others as ends. Autonomy is thus self-governance through practical rationality: the subordination of emotions, impulses, and inclinations to powers of reason, deliberation, and calculation. It is the deferral of immediate gratification for long term plans—plans that respect others as ends and do not suborn or instrumentalize them.<sup>121</sup>

The enemy of Kantian autonomy is heteronomy: conditions under which either (a) persons obey moral law but by some force other than their own self-originating reason or (b) persons are unable to self-govern (but then are they persons?).<sup>122</sup> Under these lights, children are unable to self-govern but can and should be cultivated, gradually, into reasoning-cum-autonomous subjects.<sup>123</sup>

In most respects, Kantian autonomy is worlds apart from autonomy as it is generally understood in contemporary philosophic and feminist debates.<sup>124</sup> For Kant, autonomy does not moralize choice and the freedom to choose, but rather names humans' alleged capacity to think and behave in accordance with law that is at once self-imposed, universalizable, and moral.<sup>125</sup> Autonomy, far from being choice willy-nilly, is self-imposed constraint on

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119 KANT, *GROUNDWORK*, *supra* note 23, at 57–58; *see also* Christine M. Korsgaard, *Introduction* to IMMANUEL KANT, *GROUNDWORK*, *supra* note 23, at vii, xxvii.

120 KANT, *GROUNDWORK*, *supra* note 23, at 56–57; *see also* KANT, *EDUCATION*, *supra* note 112, at 28 (“[The child] must be shown that he can only attain his own ends by allowing others to attain theirs.”).

121 KANT, *GROUNDWORK*, *supra* note 23, at 51–52; *see also* RASMUSSEN, *supra* note 116, at 6–7.

122 KANT, *GROUNDWORK*, *supra* note 23, at 45, 52; *see also* Darwall, *supra* note 118, at 264.

123 *See* KANT, *EDUCATION*, *supra* note 112, at 20, 77–78, 81; RASMUSSEN, *supra* note 116, at 33.

124 *See, e.g.*, Carlos A. Ball, *This is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, in *FEMINIST & QUEER LEGAL THEORIES: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 289, 293–94 (Martha Fineman et al. eds., 2009) (describing feminist theorists' reclamation of emotions as ingredients for self-reflection and deliberation). *But see* Darwall, *supra* note 118, at 264.

125 *See supra* notes 118–120 and accompanying text.

choice, constraint tailored to treating others as “ends” entitled to such treatment by virtue of their rationality.<sup>126</sup> To the extent that choice matters under Kantian autonomy, it matters because humans respect fellow humans’ life plans, as those plans are made by reasoning humans. Our choices and the choices others make have value because rational persons who see those choices as important and good made them.<sup>127</sup> By binding ourselves to act in lawlike ways that can be universalized, we appreciate others by not impeding upon their choices. The point here is that autonomy does not materialize in choice itself, but in the rational capacity to restrain some of one’s own choices and behaviors to protect the choices and behaviors of others.

In contemporary theoretical reconstructions of autonomy, the concept is more explicitly two-pronged than Kant’s original approach, premised on self-definition and self-determination.<sup>128</sup> Kant emphasizes internal constitution and development of the subject (self-definition, autonomy of the will) over the availability or affordability of choices (self-determination, autonomy of action).<sup>129</sup> Gerald Dworkin’s reconstruction of Kantian autonomy—one he thinks *thins* the concept<sup>130</sup>—in fact accentuates the focus on self-definition. For Dworkin, autonomy is “conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values.”<sup>131</sup> Dworkin understands his notion of autonomy as thinning the Kantian concept

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126 KANT, *GROUNDWORK*, *supra* note 23, at 49–50.

127 See Korsgaard, *supra* note 119, at xxv.

128 We adopt this distinction from Kathryn Abrams, although she shelves “autonomy” in favor of “agency” and teases apart the two prongs as “self-definition” and “self-direction.” Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 806, 824 (1999). Autonomy, for Abrams, is a misguided legal and philosophic fiction; “agency” captures better the fact of (gendered) socialization as well as resistive acts to (gendered) socialization. *Id.* at 823–24. Under a feminist constructivist register, the two prongs of agency, self-definition and self-direction, interpenetrate. The social constitution of the self partially governs the subject’s decisions and choices. *Id.* at 826. External (asymmetric, gendered) constraints on choice partially govern the subject’s conception of self. *Id.* at 830–31. In both her descriptions, *id.* at 829–40, and prescriptions, *id.* at 840–46, Abrams focuses more, as the essay’s title might suggest, on agency as “self-direction” (what we have labeled “self-determination”) than on agency as self-definition.

129 KANT, *GROUNDWORK*, *supra* note 23, at 62; see also Darwall, *supra* note 118, at 263; DWORKIN, *supra* note 62, at 5. However, “self-definition” need not be conceived as a process undertaken solely by the self, absent relations and collectives. See Abrams, *supra* note 128, at 822.

130 DWORKIN, *supra* note 62, at 30.

131 *Id.* at 20.

because its touchstone is procedural, not substantive, independence; whereas for Kant, no amount of rational reflection can render an action that violates the categorical imperative—like making a false promise—autonomous.<sup>132</sup> But the normative centrality of “capacity” and second order reflection for Dworkin, and his criticism of “more choices” as indices of more autonomy,<sup>133</sup> show just how thick (i.e., premised on self-definition) Kantian autonomy is or was. Indeed, the modern and especially late modern shift from self-definition to self-determination leads Stephen Darwall to suggest that while current debates surrounding autonomy may be rooted in Kant’s individuation of the concept, they have little to do facially (but everything to do, substantively<sup>134</sup>) with Kant’s original meditations.

### 1. Sexual Autonomy as Performative Contradiction

On the standard reading, Kantian autonomy does not look so good for sex. Or rather, sex does not look so good for Kantian autonomy. Sex and autonomy are incompatible—seriously incompatible—and for at least two reasons:

First, sex objectifies.<sup>135</sup> The desirer instrumentalizes the desired for purposes of sexual gratification; the desirer objectifies himself in debasing himself to his animality, to his body.<sup>136</sup> To be treated as moral agents, humans must be treated—or rather, their “humanity” must be treated<sup>137</sup>—as ends. Rather than appreciate fellow humans in their complete humanity, sexual desire redirects our focus to humans’ various parts and commodifies them for our own satisfaction.<sup>138</sup> Sex is seemingly about pursuing objects, not principles.<sup>139</sup> Sex therefore contravenes the categorical imperative. Kant’s artful admonition: “Sexual love makes of the loved person an Object of appetite: as soon as that appetite has been stilled,

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132 KANT, *GROUNDWORK*, *supra* note 23, at 17–19.

133 DWORKIN, *supra* note 62, at 62–81.

134 *See* Darwall, *supra* note 118, at 263–64, 284.

135 IMMANUEL KANT, *LECTURES ON ETHICS* 163 (Louis Infield trans., 1930) [hereinafter KANT, *ETHICS*]; *see also* RAJA HALWANI, *PHILOSOPHY OF LOVE, SEX, AND MARRIAGE: AN INTRODUCTION* 200–03 (2010); Rubenfeld, *Riddle*, *supra* note 16, at 1419.

136 KANT, *ETHICS*, *supra* note 135, at 164.

137 HALWANI, *supra* note 135, at 206–07.

138 KANT, *ETHICS*, *supra* note 135, at 164–65.

139 *See* Darwall, *supra* note 118, at 281.

the person is cast aside as one casts away a lemon which has been sucked dry.”<sup>140</sup> Sexual desire dehumanizes humans—I want you not for you, but for your (genital) parts. Kant singles out prostitution in particular as anathema to humanity-as-end, as it puts the body up for use and profit.<sup>141</sup>

Second, sexual desire overwhelms the ability to reason.<sup>142</sup> “What Kant feared most of all, because it was the prime disturber of reason, was sexuality.”<sup>143</sup> For Kant, as for other theorists of political modernity, children’s reason is cultivated through the management of the body and its inconveniences, but the body and its propensity for indulgence also challenge the primacy of reason. Sex poses the greatest of these bodily dangers: “the most important physical capacities subject to self-limitation are sexual urges that are particularly threatening to the capacity to self-govern.”<sup>144</sup> As a singularly destructive force, sexual desire suborns the power to deliberate and plan. It also makes us dissemble, lie, manipulate, and act irresponsibly.<sup>145</sup> While Kant encourages the sexual education of children, such education ought to be tailored to cabin sex safely into marriage, thereby maximizing its societal benefit and minimizing its likelihood of anarchizing the young subject.<sup>146</sup>

Marriage and children provide the ethical exceptions for sex, although children are not, for Kant, necessary to morally vindicate marital sex. Marriage itself, as a reciprocally

140 KANT, ETHICS, *supra* note 135, at 163; see also Timothy J. Madigan, *The Discarded Lemon: Kant, Prostitution and Respect For Persons*, 21 PHIL. NOW 14 (1998), [https://philosophynow.org/issues/21/The\\_discarded\\_Lemon\\_Kant\\_prostitution\\_and\\_respect\\_for\\_persons](https://philosophynow.org/issues/21/The_discarded_Lemon_Kant_prostitution_and_respect_for_persons) [http://perma.cc/7CRR-MUEY].

141 KANT, ETHICS, *supra* note 135, at 165–66. *But see* Madigan, *supra* note 140 (“[I]f one decouples Kant’s repulsion about sexual acts from his overall contractual emphasis, a strong case can be made in favour of reciprocity in sexual relations, outside of a marriage contract.”); see *supra* note 135 and accompanying text.

142 KANT, ETHICS, *supra* note 135, at 164 (“Hence it comes that all men and women do their best to make not their human nature but their sex more alluring and direct their activities and lusts entirely toward sex. Human nature is thereby sacrificed to sex.”); see also HALWANI, *supra* note 135, at 206–09; MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 224 (1999) [hereinafter NUSSBAUM, SEX] (“The [Kantian] idea seems to be that sexual desire and pleasure cause very acute forms of sensation in a person’s own body; that these sensations drive out, for a time, all other thoughts, including the thoughts of respect for humanity that are characteristic of the moral attitude to persons.”).

143 Madigan, *supra* note 140.

144 RASMUSSEN, *supra* note 116, at 29.

145 HALWANI, *supra* note 135, at 204–05, 209.

146 KANT, EDUCATION, *supra* note 112, at 117–18; see also IMMANUEL KANT, METAPHYSICS OF MORALS 61–64 (Mary Gregor ed., 1996) [hereinafter KANT, METAPHYSICS]; RASMUSSEN, *supra* note 116, at 32.



binding partnership (of humans as ends), offers sex its alibi.<sup>147</sup>

All nonmarital forms of sex, especially masturbation, are proscribed. Masturbation, like homosexual sex,<sup>148</sup> is unnatural, leads to nowhere better (like procreation), and saps all energy away from moral enterprises. Self-instrumentalizing (hence self-abuse), masturbation weakens the intellectual constitution of the person and thus of the political collective.<sup>149</sup> So, marital sex exempted, sexual autonomy on Kantian grounds seems to be senseless.<sup>150</sup>

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147 KANT, EDUCATION, *supra* note 112, at 118; *see also* Madigan, *supra* note 140. *But see* KANT, ETHICS, *supra* note 135, at 170 (condemning homosexual sex because “the end of humanity in respect of sexuality is to preserve the species without debasing the person”). Kant’s non-procreative, mutual-use defense of marital sex combined with his *contra naturam* view of gay sex leads one to wonder what position Kant might take on same-sex marriage. *See generally* Matthew C. Altman, *Kant on Sex and Marriage: The Implications for the Same-Sex Marriage Debate*, 101 KANT-STUDIEN 309 (2011); Lara Denis, *Sex and the Virtuous Kantian Agent*, in *SEX & ETHICS* 37, 45–46 (Raja Halwani ed., 2007) (“In sum, where same-sex marriage is possible, sex within such a marriage seems to be . . . in no way incompatible with virtue.”).

148 KANT, METAPHYSICS, *supra* note 146, at 61–62.

*Sexual union* is the reciprocal use that one human being makes of the sexual organs and capacities of another. This is either a *natural* use (by which procreation of a being of the same kind is possible) or an *unnatural* use, and unnatural use takes places either with a person of the same sex or with an animal of a nonhuman species. Since such transgression of laws . . . do wrong to humanity in our own person, there are no limitations or exceptions whatsoever that can save them from being repudiated completely.

*Id.* (internal Latin translations omitted).

149 RASMUSSEN, *supra* note 116, at 33.

150 Rubenfeld rightly points this out, but wrongly levels the same *reduction ad absurdum* charge at Schulhoferian autonomy. *See* Rubenfeld, *Riddle*, *supra* note 16, at 1419–20; *infra* II.B.

In fact, “sexual autonomy” is nonsensical even within marriage for Kant: “For the natural use that one sex makes of the other’s sexual organs is *enjoyment*, for which one gives itself up to the other. In this act a human being makes himself into a thing, which conflicts with the right of humanity in his own person. There is only one condition under which this *is* possible: that while one person is acquired by the other *as if it were a thing*, the one who is acquired acquires the other in turn; for in this way each reclaims itself and restores its personality.” KANT, METAPHYSICS, *supra* note 146, at 62. The non-liquidation of personhood is distinct from its promotion. *See also* KANT, ETHICS, *supra* note 135, at 167–68; Madigan, *supra* note 140 (“Marriage, in a sense, allows two individuals to mutually degrade each other, to treat each other as the property of the other—to use each other.”); Alan Soble, *Sexual Use*, in *THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS* 259, 278–82 (Alan Soble & Nicholas Power eds., 2008).

## 2. Sexual Autonomy (Kind of) Salvaged

Some scholars argue that Kant is wrong about sex as always-instrumentalizing or sexual desire as always-overpowering and dehumanizing.<sup>151</sup> If rational planning for the realization of one's ends, rather than impulse, dictates sexual decisions, then the agent might be in the clear if Kant overstated the disorganizing force of desire. For Raja Halwani, some sex workers might thus not fall afoul of Kantian dignity, although people who cannot stop looking at Internet pornography probably do.<sup>152</sup>

Other scholars argue that Kant is not Kantian enough in his treatment of sex.<sup>153</sup> In some writings, Kant more explicitly argues that emotions and inclinations are formative of—not simply hostile to—autonomy and reasoning capacity, but that such emotions and inclinations must be mastered by reason.<sup>154</sup>

Whether the critique of Kant's sex is empirical<sup>155</sup> or immanent,<sup>156</sup> temperance, rather than marriage, seems to be the saving liberal grace for sex. Subjects capable of moderating, mastering, and integrating their sexual desires into their life plans are redeemed as dignified and autonomous subjects.<sup>157</sup>

151 See, e.g., HALWANI, *supra* note 135, at 200–25; NUSSBAUM, *SEX*, *supra* note 142, at 224–39; Denis, *supra* note 147; Madigan *supra* note 140.

152 HALWANI, *supra* note 135, at 209.

153 See Denis, *supra* note 147.

154 *Id.* at 42–46 (citing passages from Kant's *œuvre* which suggest that “Kant's moral theory engenders acceptance of and concern for one's animal nature”).

155 See, e.g., HALWANI, *supra* note 135, at 224 (“Kant was right to detect something especially suspicious about sex, leading him to worry about objectification. But Kant exaggerated, and, though we should not underestimate the power of the sexual drive, it can be controlled by reason.”); NUSSBAUM, *SEX*, *supra* note 142, at 238–39 (“Denial of autonomy and denial of subjectivity are objectionable if they persist throughout an adult relationship, but as phases in a relationship characterized by mutual regard they can be all right, or even quite wonderful . . . . [W]e have some reasons by now to doubt Kant's account, according to which the baneful form of use is inherent in sexual desire and activity themselves.”).

156 See, e.g., Denis, *supra* note 147, at 46 (“A virtuous Kantian agent . . . will see her body as an extension and a condition of her agency; she will appreciate her animal nature for its reason-supporting role.”).

157 See *supra* notes 155–156; for a Kantian-inflected but mostly Aristotelian brief on/for sexual moderation, see Raja Halwani, *Sexual Temperance and Intemperance*, in *SEX & ETHICS*, *supra* note 147, at 122, 128 (“[P]eople become slavish by, tersely put, turning their reason into an instrument of their desires. Because they are ruled by their desires, they employ their reason to secure, or try to secure, pleasures. Hence, there is a danger to our health from excessive sexual pursuits.”).

This reconciliation of autonomy with sex may nonetheless offer little for women, people of color, minors, and persons with disabilities—those historically (if inconsistently) associated as categorically immoderate, overwhelmed by their desires, and too susceptible to others' influence.<sup>158</sup> Kant, for one, states that only white Europeans are capable of achieving full autonomy, as all others lack the maturity and rationality to self-legislate.<sup>159</sup> And insofar as Kant's writings on education focus on the cultivation of boys' autonomy, it seems girls and women are mostly ineligible as well.<sup>160</sup>

Autonomy premised upon rational reflection, even emptied of substantive criteria and (thus) disarmed against sex, can nonetheless be invidious for persons with disabilities too. Consider Gerald Dworkin: “what makes an individual the particular person he is is his life-plan, his projects. In pursuing autonomy, one shapes one's life, one constructs its meaning. The autonomous person gives meaning to his life”;<sup>161</sup> or “our conception of a person is of a creature who possesses this capacity [to “reflect upon” and “shape” his life] above some

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158 See, e.g., HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 341–43 (2005); LICIA CARLSON, *THE FACES OF INTELLECTUAL DISABILITY: PHILOSOPHICAL REFLECTIONS* 105–24 (2009) (rehearsing—and critiquing for their overgeneralizations—dominant philosophical assessments of intellectual disabilities); RASMUSSEN, *supra* note 116, at 46 (“Autonomy becomes an exclusive category by denying the political agency of the girl; she lacks autonomy and therefore must be subject to political authority and the management of her body.”); Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 727 (2013) (“Children are by definition excluded from the club of liberal citizenship because the status of citizen is defined in opposition to childhood as a place of autonomy and agency.”); Russell P. Shuttleworth, *Disability and Sexuality: Toward a Constructionist Focus on Access in the Inclusion of Disabled People in the Sexual Rights Movement*, in *SEXUAL INEQUALITIES & SOC. JUST.* 174, 184 (Niels Tunis & Gilbert Herd eds., 2007) (“Sexuality as a reflexive project of the self relies on the rhetoric of autonomy and self-sufficiency. Those who fail to find a sexual partner in the sanctioned self-sufficient ways are thus open to negative judgment.”). For a contemporary, pernicious rendering of women as heteronomous and unthinking, see *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained . . . . The State has an interest in ensuring so grave a choice is well informed.”).

159 KANT, *EDUCATION*, *supra* note 112, at 4; see also RASMUSSEN, *supra* note 116, at 115–16 (“Kant's anthropology divides humans into four categories of descending autonomy, from white Europeans to Native Americans.”).

160 KANT, *EDUCATION*, *supra* note 112, at 26, 44, 53; see also RASMUSSEN, *supra* note 116, at 31 (“[Kant] discusses ‘hardening the child’ to prevent him from becoming too ‘effeminate’ . . . . As the language of effeminacy suggests, while Kant is interested in the political education of children, boys, as the future citizens, are his primary concern.”).

161 DWORKIN, *supra* note 62, at 31.

particular level”;<sup>162</sup> or “moral respect is owed to all because all have (*assuming we are dealing with normal persons, not defective or incompetent in serious ways*) the capacity for autonomous development.”<sup>163</sup> Notice this sort of autonomy has little to do with heeding self-legislated universal maxims, not instrumentalizing others, or even insuring reason against (sexual) inclinations. Yet still, Dworkin’s (salvaged Kantian) autonomy would refuse persons with disabilities moral respect (quotation #3), particularity (quotation #1), and even personhood (quotation #2).

One way to rebut these categorical exclusions from the autonomy club is to argue that women, people of color, and persons with disabilities are morally complex, too (or, as Rousseau criticized Plato, to make women “men”).<sup>164</sup> Another is to level down the criteria for autonomy.<sup>165</sup> In philosophic, feminist, and critical race discourses, both strategies have been pursued, but when it comes to sex law and to liberal legal theory regarding the regulation of sex, the latter strategy has triumphed: autonomy has come to mean choice, as reflected in and dispatched through consent.<sup>166</sup> Certainly, the shift in emphasis from self-definition to self-determination has not occurred because theorists and jurists believe people of color, women, and persons with disabilities to be nonrational and appetitive. If anything, the general conceit among liberal legal theorists of autonomy is that none of us do, can, or should reach the threshold of purified, practical rationality Kant so prized.<sup>167</sup> And in fact, the conflation of autonomy with consent and the subsequent normative defense of both have been deployed to better protect women from unwanted sex. As we will see in the next section though, the diminishment of autonomy to consent may leave in place,

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162 *Id.* at 31–32 (emphasis added).

163 *Id.* at 111.

164 JEAN-JACQUES ROUSSEAU, *EMILE, OR ON EDUCATION* 362 (Allan Bloom trans., 1979); *see also* RASMUSSEN, *supra* note 116, at 46. For eloquent reclamations of autonomy for racially and sexually minoritized populations, *see, e.g.*, M. JACQUI ALEXANDER, *PEDAGOGIES OF CROSSING: MEDITATIONS ON FEMINISM, SEXUAL POLITICS, MEMORY, AND THE SACRED* 21–65 (2005); JAFARI S. ALLEN, *¡VENCEREMOS? THE EROTICS OF BLACK SELF-MAKING IN CUBA* 14 (2011).

165 *See* SCHULHOFER, *supra* note 24, at 105 (“A person can be autonomous only if she has mental competence, an awareness of her options, and sufficient information to be able to choose intelligently between the possibilities that external conditions make available.”).

166 *See supra* Part I; *infra* Part II.B.

167 KANT, *GROUNDWORK*, *supra* note 23, at 23; *see also* Abrams, *supra* note 128, at 807–13 (rehearsing prominent liberal legal theorists’ glosses on autonomy, which all, to varying degrees, avow the social/relational constitution of the self).

or even buttress, the expulsion of persons with disabilities (and minors) from the ambit of sexual autonomy.

So sexual autonomy, reconciled through an appeal to what we might call procedural over substantive moderation, no longer appears a contradiction in terms, as it seems from Kant's gloss on sex. Yet, given the insistence on temperance and rationality as sex's alibis, poststructuralist, feminist, queer, and disability scholars nonetheless worry about the kind of subject presumed eligible for autonomy: the atomistic, "unmoved mover," uninfluenced by emotions, obligations, or care for others. Should autonomy even be an ideal worth aspiring towards, they ask, given our interdependence?<sup>168</sup> What sorts of persons or groups of people may be prematurely and/or permanently disqualified from the ambit of autonomy? Should law and institutions be keyed to the liberal fiction of the human subject as coherent, consistent, and fully deliberative, or keyed to more forgiving fictions?<sup>169</sup>

### B. Sexual Autonomy Thinned: Schulhofer

In *Unwanted Sex*, Stephen Schulhofer sidesteps these enduring questions in his advocacy for sexual autonomy as a governing principle for rape law.<sup>170</sup> Instead of dwelling on temperance and rationality, he focuses on individual choice and choice structure.<sup>171</sup> He seemingly—but only seemingly<sup>172</sup>—lowers or all but eliminates the "self-definition" side of autonomy (who, or what kind of subject, is eligible) while valuing up the self-determination side (who or what a subject can choose).<sup>173</sup>

Schulhofer proffers at least three reasons for his normative slide from self-definition to self-determination in his defense of sexual autonomy. First, his is an intervention into

168 See *infra* Part IV.A.

169 For alternative abstractions of the human that ground more expansive models of social justice, see, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); EVA FEDER KITTAY, *LOVE'S LABOR* (1999); NUSSBAUM, *SEX*, *supra* note 142; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1 (2008); B. Honig, *Rawls on Politics and Punishment*, 46 *POL. RES. Q.* 99 (1993); Satz, *supra* note 27. For a critique of these abstractions as they pertain to disability and debility, see Joseph Fischel, *Against Nature, Against Consent: A Sexual Politics of Debility*, 24 *DIFFERENCES* 55, 84–90 (2013).

170 SCHULHOFER, *supra* note 24.

171 *Id.* at 112.

172 *Id.* at 99–101; see *infra* Part II.B.1.

173 *Id.* at 108–09.

a particular (and particularly vexed) vector of criminal law, and he contends, persuasively enough, that “legal and philosophical conceptions of autonomy are not identical.”<sup>174</sup> In other words, autonomy as a protected right may and should mean something other than autonomy as a moral attribute of the human. Second, in what seems to be a direct counterclaim against the Kantian conception of autonomy, Schulhofer refuses the notion that the choices of the autonomous subject must be self-generating or uninfluenced by others.<sup>175</sup> Our choices are all a bit heteronomous—autonomy is in the act of choosing, uncoerced. So too, such choices need not pass the categorical imperative test. By “deciding for herself what goals [are] valuable,” the subject performs autonomy, even if those goals entail non-marital sex, earning money for sex, rough sex, and so forth.<sup>176</sup> Schulhofer defends such activities against certain feminist legal theorists’ (Lois Pineau and Martha Chamallas’) proposed reforms that would narrow the permissible motivations for consensual sex, and he likewise rejects Kantian, content-based criteria for autonomous action.<sup>177</sup> Third, Schulhofer wants the centrality of first person choice to withstand strands of second wave feminist thought that, as he perceives them, implicate heterosexual sex as coercive *tout court* (e.g., Catharine MacKinnon and Andrea Dworkin).<sup>178</sup> While Schulhofer concedes that “background conditions”—conditions like economic dependency, cultural norms, and employment discrimination—may impede women’s sexual autonomy, he insists, convincingly, that only individual behavior ought to be actionable under sexual misconduct law.<sup>179</sup> The slide from self-definition to self-determination suggests, for example, permitting commercial, consensual sex between adults,<sup>180</sup> while proscribing a high school principal’s conditioning a student’s graduation on their having sex.<sup>181</sup>

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174 *Id.* at 105.

175 *Id.* at 106.

176 SCHULHOFER, *supra* note 24, at 86.

177 *Id.* at 84–88 (citing Chamallas, *supra* note 34; see also Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 271 (1989)).

178 SCHULHOFER, *supra* note 24, at 109.

179 *Id.* at 108–10 (citing ANDREA DWORKIN, *INTERCOURSE* (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989)).

180 SCHULHOFER, *supra* note 24, at 87.

181 *Id.* at 196 (“[I]f a teacher initiates contact with a minor, his advances should always be presumed unwelcome, and the teachers should be subject to dismissal, along with personal damage liability for sexual harassment.”).

Schulhofer's premium on choice and the integrity of the choosing subject generates overlapping definitions of sexual autonomy throughout *Unwanted Sex*. Sexual autonomy, he writes, is: the "right to self-determination in matters of sexual life";<sup>182</sup> "every person's right to control the boundaries of his or her own sexual experience";<sup>183</sup> the "right to determine the boundaries of our own sexual lives" (notice the present active infinitives elemental to these definitions);<sup>184</sup> "a woman's right to control her own sexual choices" (this is the definition Rubinfeld so handily dismantles—who is in full control of her sexual choices, asks Rubinfeld, if full control necessitates perfect and perfectly true information?);<sup>185</sup> and finally, "the freedom of every person to decide whether and when to engage in sexual relations" (this definition seems to relax the requirement of perfect and perfectly true information regarding one's sexual partner, but Schulhofer's advocacy of affirmative consent seems to reinstall the requirement, his expressed ambivalences about criminalizing sexual deception notwithstanding).<sup>186</sup> In Schulhofer's reconstruction, any expressed preference (of adult, able-minded persons) is autonomous because sexual autonomy is expressed preference about sex.

Schulhofer's thinned notion of sexual autonomy as sexual self-determination propels three reforms to criminal sexual assault statutes. First, Schulhofer eliminates force and resistance requirements of rape law (or rather, he adds gradations to sexual assault law premised on nonconsent, rather than resistance or force; many jurisdictions both nationally and internationally have adopted and continue to adopt such reforms).<sup>187</sup> Second and subsequently, Schulhofer's sexual autonomy requires a more robust standard of consent as voluntary, freely given, and affirmative, rather than as silent, acquiescent, or coerced.<sup>188</sup> An affirmative consent standard better tracks persons' expressed wants over their reluctant concessions; expressed wants reflect voluntary choices which in turn reflect, without remainder, sexual autonomy.<sup>189</sup> Third, sexual autonomy demands heightened regulation and

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182 *Id.* at 11.

183 *Id.* at 15.

184 *Id.* at 16.

185 *Id.* at 69; Rubinfeld, *Riddle*, *supra* note 16, at 1417–18.

186 SCHULHOFER, *supra* note 24, at 99, 152–59; *see* Rubinfeld, *Riddle*, *supra* note 16, at 1404–05, 1407.

187 SCHULHOFER, *supra* note 24, at 283–84.

188 *Id.* at 267–73.

189 *Id.* at 269; *see id.* at 273 ("By requiring affirmative permission . . . we can insist that any person who engages in intercourse show full respect for the other person's autonomy."); *id.* at 283 ("Consent . . . means

sometimes prohibition of sex in relations of dependence where consent may be too easily coerced: bosses and employees, teachers and students, psychotherapists and patients.<sup>190</sup> For Schulhofer, such restrictions on sex are not premised on the fact of status differentials themselves, but on the likelihood of unduly polluted consent within those differentials.<sup>191</sup>

### 1. Sexual Autonomy's Stubborn Eligibility Requirements

Adult women are the primary beneficiaries of Schulhoferian sexual autonomy: the purpose of the proposed reforms in *Unwanted Sex* is to better protect women and women's sexual choices.

Minors and persons with intellectual disabilities are not main characters in *Unwanted Sex*. More importantly, when they do appear they do not fare well. Schulhoferian sexual autonomy, it turns out, may be more inhospitable to minors and persons with intellectual disabilities than Kantian autonomy. Peppered through *Unwanted Sex* are figurations of minors and persons with intellectual disabilities as, perhaps unwittingly, the constitutive outer limits for sexual autonomy. When Schulhofer tells us, approvingly, that "only rarely does the law seek to punish the uncoerced choices of mature adults," we begin to see who will pay the price for this newfound sexual autonomy.<sup>192</sup> He asserts without argument that "teenaged prostitutes" lack the "capacity to make competent decisions."<sup>193</sup> He states, as if a predicative and not a postulate of sexual autonomy, that "if a fifteen-year-old girl initiates a

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. . . actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration.").

190 *Id.* at 168–253.

191 *Id.* at 162.

A proposal that puts our rights at risk is coercive even when we have other choices . . . . An illegitimate sexual proposal should be considered coercive—whether or not the woman who is targeted has other options—if turning it down can leave her worse off . . . . If [a supermodel] agrees to a film producer's proposal to exchange sex for fame and riches, she was, in a sense, free to do otherwise . . . . What the woman may prefer, however, is a third option—the chance to compete for the film role on fair terms, without sexual submission. The film producer constrains her decision by foreclosing this choice.

SCHULHOFER, *supra* note 24, at 162. Schulhofer carves out an exception for minors. No matter how much a teenager under eighteen wants to have sex with her teacher, supervisor, etc., the sex is proscribed, and not because consent is likely polluted, but because teenagers, he assumes, are unable to consent. *Id.* at 101, 283.

192 *Id.* at 86.

193 *Id.* at 87.



sexual encounter with a twenty-year-old man, he violates her autonomy by having sex with her” because of “her incapacity.”<sup>194</sup> And Schulhofer equates minority status with disability only to eject both from autonomy: “intercourse with an apparently willing fifteen-year-old or with a mentally incompetent woman is not prohibited because the [assailant] is a potential killer; it is prohibited because the preconditions for meaningful choice are absent.”<sup>195</sup> Moreover, Schulhofer’s Model Criminal Statute for Sexual Offenses adopts the retired language of the Connecticut Penal Code: “(c) Consent is not freely given . . . whenever: (1) the victim is physically helpless, mentally defective, or mentally incapacitated.”<sup>196</sup>

So it appears sexual relations with teens and the disabled are categorically banned. These subjects are rendered incapable of meaningful choice and self-determination, and one gets the sense that they must be for this revisionist sexual autonomy to be cogent.<sup>197</sup> By focusing exclusively on individual choice as the nexus for sexual autonomy—even while thinning the self-definition prerequisites left over from Kant—Schulhofer rhetorically and normatively relies upon a clean distinction between competence and incompetence, meaningful and illegitimate choice.

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194 *Id.* at 111.

195 *Id.* at 102.

196 SCHULHOFER, *supra* note 24, at 283.

197 *Id.* at 101.

Violent threats are just one possible source of a *defect* in consent, and the law already recognizes a few others in the contexts of sexual relations. The best-known example is *immaturity*: the law has long prohibited consensual intercourse with a girl who is below the legally prescribed age of consent. The law likewise punishes acts of intercourse with a woman who is sleeping, unconscious, *mentally incompetent*, or unaware that a sexual act is being performed . . . . In these instances we do not say that consent was obtained by force. The man’s conduct is illegal *because valid consent was never obtained at all*.

*Id.* (emphasis added). Notice the chain of equivalences from immaturity to consciousness to competence, as if all are binary existential categories. Notice too how the “legally prescribed age of consent” seamlessly reflects and summarily resolves “immaturity.” Laws regulating sex across age have a checkered, gendered, and generally unsavory history, and have only recently been justified by minors’ presumptive incapacity to consent. *See, e.g.*, CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 9–28* (2004); FISCHER, *supra* note 21; ESTELLE B. FRIEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 125–56* (2013); MATTHEW WAITES, *THE AGE OF CONSENT: YOUNG PEOPLE, SEXUALITY, AND CITIZENSHIP* (2005).

We want to make clear that we are not arguing that all minors and all persons with intellectual disabilities should have an unfettered right to wanted sex. But the ease with which Schulhofer writes off these characters from autonomy's reach is troubling and telling. It seems as though, in order to make adult choice carry all the normative and morally transformative weight Schulhofer wants it to, these other characters are rendered immediately, unquestionably, and without any distinctions, ineligible for autonomy. Anything other than able-minded adult choice is heteronomous choice and can therefore be supervised by law. And whereas Kant sees autonomy as cultivated in and teachable to young (admittedly male) subjects, Schulhofer's down-staging of background conditions, cultural context, and social structure ultimately dehistoricize and atomize his subjects.<sup>198</sup> Autonomy is thing-like, and there (or not) on arrival: either you have it or should (adult women) or you do not have it and cannot (minors and persons with intellectual disabilities). Indeed, it is this ascendancy of first person choice and its attendant binaries (rationality/irrationality, capacity/incapacity, adult/minor, abled/disabled) that may underlie well-intentioned but potentially regressive political campaigns to shield L.K. (the alleged victim of *Fourtin*) and similarly situated persons from sex.<sup>199</sup>

### C. Sexual Autonomy Thickened: Nedelsky

Unlike Kant's meditations on autonomy, Jennifer Nedelsky's *Law's Relations* severs autonomy from both "independence" and "control."<sup>200</sup> Because Nedelsky understands the self as multidimensional, relational, and (variably) dependent on others, independence and control are neither possible nor desirable. Independence and control are bad aspirations. Independence, were it achievable, would lead to both an impoverished and isolated existence.<sup>201</sup> And total control ultimately necessitates domination.<sup>202</sup> Attempting to master intimate relations, social scenes, and political bodies implicates a refusal of receptivity to others' creativity, spontaneity, and input; control requires the refusal of others' autonomy.<sup>203</sup> And because we are relational beings, because we become autonomous through "constructive relations," dependency may be exemplary of autonomy. Those relations

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198 SCHULHOFER, *supra* note 24, at 108–09; *supra* note 112 and accompanying text.

199 *See infra* Part III.C.

200 *See* NEDELSKY, *supra* note 25, at 118–19, 163, 285 (“[We are] embodied beings who participate in creating ourselves and our world but control neither.”).

201 *Id.* at 145.

202 *Id.* at 279.

203 *Id.* at 297–98.

that are explicitly or particularly dependent—say between a teacher and student—reflect acutely how intersubjectivity amplifies autonomous action.<sup>204</sup>

And unlike Schulhofer’s *Unwanted Sex*, Nedelsky points to broader social restructuring for the realization of autonomy.<sup>205</sup> Autonomy, like subjects themselves, is realized through relations, textured through emotion and care.<sup>206</sup> This means that state-sanctioned relations like marriage, for example, which might otherwise be understood as a threat to autonomy (mandating commitments and obligations), can be reconceived as a condition of possibility for autonomy.<sup>207</sup> Thus relationally reconceived, autonomy is not merely a right to be let alone.<sup>208</sup> As entailing but not synonymous with the “capacity for creative interaction” with others, autonomy requires positive provisions and state support, not merely noninterference.<sup>209</sup>

Poignantly, Nedelsky writes, “I see autonomy as the core of a capacity to engage in the ongoing, interactive creation of our selves—our relational selves.”<sup>210</sup> Nedelsky qualifies that she takes this “capacity for creative interaction” as “just one component”<sup>211</sup> of autonomy, but it is nonetheless a “key”<sup>212</sup> one. For Nedelsky, the “creative” of creative interaction refers to human thought and action that generate something new, unpredicted, and not routinized.<sup>213</sup> The “interaction” of creative interaction nods to her notion of the self

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204 *Id.* at 152, 305.

205 *See id.*

206 NEDELSKY, *supra* note 25, at 5, 118–19; *see also* MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 95 (2003) (“[R]elationships of certain sorts are necessary for the realization of autonomy whereas relationships of certain other sorts can be irrelevant or positively detrimental to it . . . . Social relationships can either promote or hinder the development of autonomy competency.”).

207 *See* Ball, *supra* note 124, at 302–03. *But see* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting) (“[O]ne would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie.”).

208 NEDELSKY, *supra* note 25, at 97, 105; *see also* Ball, *supra* note 124, at 311.

209 NEDELSKY, *supra* note 25, at 31, 45, 74–75.

210 *Id.* at 45.

211 *Id.* at 166.

212 *Id.*

213 *Id.* at 48. Nedelsky writes:

as relational. Autonomy materializes with and because of others. Even famed inventors and entrepreneurs of American lore are supported by a set of “nested relations.”<sup>214</sup> (In Part IV, it will be useful for readers to think of sex itself as a form of creative interaction).<sup>215</sup>

Earlier, we traced the notion of autonomy as self-definition (e.g., Kant) to autonomy as self-determination (e.g., Schulhofer).<sup>216</sup> Nedelsky lobbies for “self-creation” over “self-determination.”<sup>217</sup> The latter, she suggests, obscures the many ways we are “determined” by forces outside ourselves, and clings to the fiction of the rational agent whose choices summarily govern her life course.<sup>218</sup> The former values up human inventiveness and imagination but without disavowing our social enmeshment. Nedelsky’s shift to “self-creation” follows from her shift to the “multidimensional self.”<sup>219</sup> As opposed to the rational agent presupposed by Anglo-American law (whose rational agency is the guarantor of her equality),<sup>220</sup> Nedelsky’s subject is affective, embodied, and relational.<sup>221</sup> Self-creation is not the exclusive jurisdiction of the intellect but registers through all sorts of human activity.

Nedelsky’s reconstruction of autonomy resonates with Anna Yeatman’s advocacy for

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The positive dimension of the Western attachment to autonomy has to do with this capacity to undertake, to envision something new, to do something surprising, to shift the terms of relations . . . . All of that requires a capacity not to be bound by existing patterns of thought, institutions, or relationships. It requires a capacity . . . to be imaginative and innovative, to shift things slightly to create a moment of joy so that they suit one better, or improve things for others.

*Id.*

214 NEDELSKY, *supra* note 25, at 45; *see also* Live Smart Videos, “Elizabeth Warren on Debt Crisis, Fair Taxation,” YOUTUBE (Sept. 18, 2011), <https://www.youtube.com/watch?v=htX2usfqMEs> [<http://perma.cc/9RKK-SJFL>].

215 NEDELSKY, *supra* note 25, at 45; *see also* LiveSmartVideos, *supra* note 214.

216 *See supra* Parts II.A, II.B.

217 NEDELSKY, *supra* note 25, at 167.

218 *Id.* at 162–67. However, we recognize that “self-determination” has served as a core political value for, and rhetorical petition of, the disability rights movement. *See* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US 17 (2000).

219 NEDELSKY, *supra* note 25, at 160.

220 *Id.* at 162.

221 *Id.* at 158.

persons with disabilities to participate more fully in their own lives.<sup>222</sup> Like Nedelsky, Yeatman rejects the equivalence of autonomy with independence and rejects too independence as a prerequisite for participation.<sup>223</sup> She suggests instead that “participation” “enables people to be and become autonomous individuals within their social words and connections.”<sup>224</sup> Participation, as Yeatman understands it, refers to “whether an individual is invited to be and become his or her own agent . . . .”<sup>225</sup> Under this definition, all sorts of people can participate in the course of their own lives, including people “who cannot achieve independence . . . children and individuals whose level of intellectual disability means that they cannot reason on their own behalf.”<sup>226</sup> Synopsizing the contributions of other disability scholars, Yeatman argues that upping the participation level of persons with intellectual disabilities entails, inter alia: encouraging such persons to practice making choices; providing “support people” to offer “appropriate guidance and information for choice making”;<sup>227</sup> and specialized interpreting of persons with disabilities’ communicative behavior (which is too often rendered as nonsense).<sup>228</sup> Thus, social restructuring facilitates participation, participation facilitates autonomous action, and autonomous action “facilitate[s] the individuation of individuals,” individuation Yeatman takes as morally paramount.<sup>229</sup> While Yeatman’s chain of equivalences (participation = autonomy = individuality) is not philosophically substantiated as rigorously as Nedelsky’s reworking of autonomy, both authors point to autonomy as a normative ideal predicated neither on independence nor reason, but rather on creative capacity and participation.<sup>230</sup>

Evidently, Nedelsky’s reconstruction (and Yeatman’s unsupported but appealing redefinition) of autonomy bodes far better than either Schulhofer’s or Kant’s for persons

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222 Anna Yeatman, *What Can Disability Tell Us About Participation?*, in *EXPLORATIONS ON LAW AND DISABILITY IN AUSTRALIA* 181, 181 (Melinda Jones & Lee Ann Basser Marks eds., 2000). Nedelsky aligns her relational autonomy with Yeatman’s appeal for social participation. NEDELSKY, *supra* note 25, at 27.

223 Yeatman, *supra* note 222, at 182, 190, 195.

224 *Id.* at 182.

225 *Id.* at 183.

226 NEDELSKY, *supra* note 25, at 183; *see also* CHARLTON, *supra* note 218, at 21–22.

227 Yeatman, *supra* note 222, at 191.

228 *Id.* at 190–92.

229 *Id.* at 196.

230 However, Nedelsky cautions against collapsing autonomy into participation, as the latter can be purely procedural and the former is a “substantive value.” NEDELSKY, *supra* note 25, at 149, 151.

with intellectual disabilities. This is in part because, as Nedelsky advises, “those who value autonomy (e.g., Kant, Schulhofer) must not simply posit it as a human characteristic (e.g., Schulhofer) but also inquire into the conditions for its flourishing.”<sup>231</sup>

So also unlike Schulhofer, but like Kant, Nedelsky is attentive to autonomy as a human achievement that must be nourished through social relations. That fact—that autonomy requires investment, care, and “constructive relations”—explains why Nedelsky focuses more on administrative law (to restructure background social conditions) whereas Schulhofer focuses more on criminal law (to prevent or punish interference with already-autonomous agents).<sup>232</sup> That fact also explains why Nedelsky’s examples of statutory reforms that “foster autonomy” include a guaranteed annual income neither means-tested nor conditioned by unannounced state surveillance;<sup>233</sup> legislation that facilitates parents’ greater involvement in educational policies affecting their disabled children’s lives;<sup>234</sup> and revisions to Canadian sexual assault law that relaxed *mens rea* as an element of the crime<sup>235</sup> (consent or nonconsent are now determined under a “standard of reasonableness”).<sup>236</sup> These sorts of reforms, argues Nedelsky, structure social relations in such a way that permit and promote a greater degree of autonomy across a larger and more diverse population.<sup>237</sup>

But *contra* Kant, Nedelskian autonomy is not pegged to rationality, nor is it available only to the fiction of the rational agent. For Kant, training toward autonomy involves management of body by mind, and self-legislation through powers of reason.<sup>238</sup> For Nedelsky, training toward autonomy involves supporting relations of care and dependence that allow persons’ capacity for creativity to flourish.<sup>239</sup> Under a Nedelsky register (as under a Yeatman register), dependents—children, the elderly, and most pertinently, persons with intellectual disabilities—can or could, with the help of others, be autonomous to some

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231 *Id.* at 167.

232 *Id.* at 157.

233 *Id.* at 154–55.

234 *Id.* at 141–43.

235 Yeatman, *supra* note 222, at 218–21.

236 *Id.* at 219.

237 *See* NEDELSKY, *supra* note 25, at 315–17.

238 *See supra* notes 109–167 and accompanying text.

239 *See* NEDELSKY, *supra* note 25, at 54–56, 65–69, 167.

degree, provided autonomy is linked to embodied creativity and delinked to disembodied rationality.<sup>240</sup> So persons with intellectual disabilities may be capable of achieving some degree of autonomy, but that achievement is guaranteed through social, not just subject, transformation. While Nedelsky does not reference disabilities too often or too deeply in *Law's Relations*, one example is telling. She recalls a colleague's story of a quadriplegic Swedish law student who "was entitled to four attendants who, on a rotational basis, cared for her twenty-hours a day so that she was able to attend law school and did not have to rely on her family for care."<sup>241</sup> For Nedelsky, this scenario is exemplary of relational autonomy, of state action that structures relations so that all persons—the student, the student's family members, and the student's attendants—are institutionally buoyed to act autonomously. The story references a physical, not intellectual, disability, but it is not difficult to imagine analogous restructuring of relations that enhance the autonomy of persons with intellectual disabilities. Yeatman, as we saw, calls for restructuring relations for persons with intellectual disabilities to enhance their autonomy in social life.<sup>242</sup> Martha Nussbaum calls for restructuring relations for persons with intellectual disabilities to enhance their autonomy in political life.<sup>243</sup> In Part IV, we will call for restructuring relations for persons with disabilities to enhance their autonomy in erotic life.

However, just as Nedelsky and Yeatman warn that we cannot assume autonomy as a presocial, innate fact of able-minded adults, nor can we assume that every single human is capable of autonomous activity, were only relations restructured accordingly. The "capacity for creative interaction" is a "key component" of Nedelskian autonomy, but not the only one.<sup>244</sup> For Nedelsky also takes the etymology seriously, and suggests autonomy is "finding one's own law," abiding "commands that one recognizes as one's own, requirements that constrain one's life but come from the meaning or purpose of

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240 *Id.* at 162–66, 168–73.

241 *Id.* at 192–93.

242 *See supra* notes 223–229 and accompanying text.

243 Nussbaum, *Capabilities*, *supra* note 25, at 86–94. Nussbaum grounds her argument for political inclusion of persons with severe intellectual disabilities through recourse to "dignity" and "equal respect," not "autonomy," but the extant injustice she identifies, *id.* at 91, registers as a deprivation of autonomy, relationally reconstructed: "at present, a large group of citizens are simply disqualified from the most essential functions of citizenship. They do not count. Their interests are not weighed in the balance." *Id.*

244 *See supra* notes 210–213 and accompanying text.

one's life."<sup>245</sup> This law need not be Kant's rationally deduced categorical imperative,<sup>246</sup> but finding one's own law presupposes a minimal degree of self-consciousness. To "act autonomously" is to "see situations clearly, make good judgments, and feel competent to act."<sup>247</sup> Even Yeatman, for whom participation *cum* autonomy is thinned to persons having a "voice," if not complete "choice," over their social lives and interactions,<sup>248</sup> stipulates that participation is conditioned in part on the individual [achieving] a sense of self that permits him or her to own his or her self-action.<sup>249</sup> We must confront the reality that not all people can (ever) find their own law, make good judgments, or even achieve a sense of self.

We admit this limitation to rein in any utopic or hedonic misreading of our argument. We are not sure L.K. could ever conduct autonomous or sexually autonomous action; but the point is to build the world so that everyone at least has a shot at (sexual) autonomy, and is not categorically precluded from a more flourishing life.

#### D. Sexual Autonomy as the Capability to Codetermine Sexual Relations

In light of our critiques of Kantian autonomy of the will and Schulhofer's sexual autonomy, and in light of Nedelsky's reconceived relational autonomy, we define sexual autonomy as the *capability to codetermine sexual relations*. Below, we defend our selection of the term "capability" over "capacity," describe what we do and do not mean by "codetermination", and roughly delineate the parameters of "sexual" in sexual autonomy.<sup>250</sup>

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245 NEDELSKY, *supra* note 25, at 123.

246 *Id.* at 403 n.16.

247 *Id.* at 141.

248 Yeatman, *supra* note 222, at 187–88.

249 *Id.* at 181.

250 Judith Butler argues that the rupturing element of what we term gender or sexuality belies any resignification of autonomy, even of the relational sort (i.e., what "relational autonomy" patches over is the very psychical dispossession that is elemental to desire/gender/sexuality/grief). JUDITH BUTLER, UNDOING GENDER 17–34 (2004). But Butler's staging of vulnerability/precarity/grievability *against* autonomy is persuasive only if we retreat to Kantian autonomy. *Id.* at 32. This claim against autonomy might make sense as a linguistic or metaphysical claim. Butler's send-up of autonomy, though, is irrelevant to, or as she might say, "beside" law. *Id.* at 20, 25. Despite her own reservations on sexual autonomy and its implications for our understandings of subjectivity and subject formation, Butler emphasizes repeatedly that, under liberal legal regimes, we "must" mobilize autonomy for the protection of minoritized genders and sexualities. *Id.* at 19, 20, 21, 32. This is not strategic essentialism; this is about surviving and thriving. *Id.* at 21.



## 1. Capability

Unlike other autonomy theorists, we emphasize “capability” over “capacity.” In common parlance this might be a distinction without a difference, but theoretical expositions of autonomy “capacity” veers us toward determinations of individual competencies and toward categorical qualifications and disqualifications; “capability” veers us to institutional reforms, statutory provisions, and alternative divisions of labor and play that cultivate human (sexual) flourishing. While Nedelsky’s conception of autonomy includes a “capacity for creative interaction” that can and ought to be enhanced through legal and institutional restructuring, capacity is more often associated with the supposed internal constitution of the subject.<sup>251</sup> Despite Nedelsky’s measured reservations with the individualistic aspects of Martha Nussbaum’s Capabilities Approach (CA) to social justice,<sup>252</sup> it strikes us that “capability” as Nussbaum specifies the term more adequately directs us to the kinds of reforms Nedelsky’s ecological accounting of autonomy as a “key component of a core human value” would require.<sup>253</sup>

Nussbaum’s CA, developed from Amartya Sen’s work on capabilities in global economics, is a model of social justice offered against, although indebted to, John Rawls’ justice as fairness. Disability and the fact of human dependency lead Nussbaum to reject Rawlsian justice.<sup>254</sup> Rawls keys the “basic structure” of society to persons who

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Moreover, although the key terms/concepts of UNDOING GENDER are *sexual autonomy*, *gender violence*, *sexual difference*, *survival*, *grief*, *unthinkability*, *gender as norm*, and *norm as reiterative practice*, Butler never mentions rape. The closest Butler comes to addressing sexual assault is her canvassing of “sexual harassment.” *Id.* at 53–56. Butler argues, *contra* Catharine MacKinnon, that sexual harassment codes, rather than sexual harassment, install heterosexuality as gendered subordination and gender as binary. *Id.* at 54. This is an easy target (and misconstrues sexual harassment law, Title VII, and Title IX). More importantly, perhaps a different form of sexual autonomy materializes when the paradigmatic form of sex/gender injury is not, or not only, dignitarian violence aimed against LGBTI people (and so diminished autonomy correlates as diminished identity integrity), but also sexual violence aimed against women (and so diminished autonomy correlates as the diminished capability to codetermine sexual relations). At a minimum, Butler’s idiom of the “unthinkable”—of violence as a way to relocate persons off the grid of cultural legibility, *id.* at 35, 130, is questioned. Subordination and erasure are nonidentical injuries.

251 See, e.g., *supra* notes 162–163 and accompanying text.

252 NEDELSKY, *supra* note 25, at 30, 433 n.23 (“While I am at times troubled by the Rawlsian dimensions of some of Nussbaum’s later work, I find the Aristotelian aspects of her work (i.e., the focus on goals and goods as realized in activity) to be useful.”).

253 *Id.* at 159.

254 See NUSSBAUM, FRONTIERS, *supra* note 25, at 127.

are presumptively reasonable and rational, assumes persons' collective enterprise will be mutually advantageous, and indexes well-being through material redistribution alone.<sup>255</sup> It is these three tenets, especially the first two, that lead Rawls himself to suppose that "justice as fairness" might "fail" for persons with severe disabilities, persons who might be objects of charity but not subjects of social justice.<sup>256</sup> This conclusion is unacceptable for Nussbaum, who instead argues that the purpose of political institutions and distribution mechanisms is not to stabilize mutual advantage, but to guarantee a set of enumerated capabilities that realize our common human dignity. It is dignity, not reason or rationality, that bestows on humans equal moral worth.<sup>257</sup> Nussbaum's state is thus far more robust than Rawls', responsible for providing meaningful opportunities across a range of social, educational, political, and economic dimensions for persons to reach a minimum threshold of predetermined capabilities.<sup>258</sup>

Sexual autonomy is not a central human capability for Nussbaum, and when Nussbaum discusses persons with intellectual disabilities she is concerned primarily with their educational, employment, and social accommodation<sup>259</sup> and their political integration<sup>260</sup>—not their erotic lives.<sup>261</sup> But there is no *prima facie* reason sex, sexuality, and intimacy should be any less important, or any less possible, for persons with intellectual disabilities, than, say, attending school or voting. Insofar as Nussbaum's Central Human Capabilities do include "being able to have good health, including reproductive health"; "[being] secure against violent assault, including sexual assault[;] *having opportunities for sexual satisfaction* and for choice in matters of reproduction"; "being able to use the senses, to imagine, think, and reason[;] *being able to have pleasurable experiences* and to avoid nonbeneficial pain"; "to love those who love and care for us"; "to engage in various forms of social interaction"; and "being able to laugh, to play, to enjoy recreational activities," there seems to be more than enough material for a composite capability in sexual

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255 *Id.* at 167.

256 *Id.* at 118, 120 (citing JOHN RAWLS, *POLITICAL LIBERALISM* 21 (1996)); *see also* KULICK & RYDSTRÖM, *supra* note 27, at 21, 280.

257 NUSSBAUM, *FRONTIERS*, *supra* note 25, at 160.

258 For a similar comparative analysis of Rawls' and Nussbaum's modeling of social justice and disability, *see* Fischel, *supra* note 169, at 87.

259 NUSSBAUM, *FRONTIERS*, *supra* note 25, at 195–216.

260 Nussbaum, *Capabilities*, *supra* note 25, at 86–94.

261 *See* KULICK & RYDSTRÖM, *supra* note 27, at 22.

autonomy.<sup>262</sup> Syllogistically: all humans are dignified to the degree they are equipped with such capabilities; sexual autonomy is such a capability; persons with disabilities morally deserve dignity by virtue of their humanity; and persons with disabilities are entitled to sexual autonomy as a capability cultivated through institutional support. Enshrining sexual autonomy as a non-fungible central human capability also means that the sexuality and erotic flourishing of persons with (and without) disabilities cannot be so readily trivialized in relation to other human needs, rights, and aspirations.<sup>263</sup>

As Nussbaum and Nedelsky make clear, capabilities, including sexual autonomy, require institutional promotion and sociolegal restructuring.<sup>264</sup> But the realization of capabilities also requires certain kinds of prevention. Insofar as sexual autonomy has a temporal element—the capability to generate and codetermine present and *future* sexual relations—there may be more defensible grounds to restrict some consensual sex. Certain sexual relations—say between nieces and uncles or daughters and mothers’ boyfriends—and certain sexual conduct—say the eroticized removal of limbs—may so impermissibly impede codetermination that they confound sexual autonomy as a capability.<sup>265</sup> Some activities damage functioning to such a great degree that they completely or severely corrode capability.<sup>266</sup> Teachers cannot have sex with their students not because students

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262 NUSSBAUM, *FRONTIERS*, *supra* note 25, at 76–77 (emphases added); *see also* KULICK & RYDSTRÖM, *supra* note 27, at 286 (arguing “three of [Nussbaum’s] capabilities . . . are directly relevant to disability and sexuality.” These are, for the authors, *Bodily Integrity*, *Emotions*, and *Affiliation*.); CHRISTOPHER A. RIDDLE, *DISABILITY AND JUSTICE: THE CAPABILITIES APPROACH IN PRACTICE* 80 (2014) (“According to Nussbaum, sexual or romantic pleasures are things all individuals ought to have a genuine opportunity to pursue.”).

263 *See* KULICK & RYDSTRÖM, *supra* note 27, at 285, 292. In an otherwise meticulous synthesis of the Capabilities Approach and disability accommodations, Christopher Riddle performs just such a trivialization of sex and sexuality. RIDDLE, *supra* note 262, at 77–85. Among other (sympathetic) criticisms he levels at the CA, Riddle suggests that Nussbaum’s list of central capabilities ought to be ranked by moral priority to give guidance to theorists and policymakers. *Id.* at 42–44, 85. If the denial of opportunities to realize certain capabilities leads to “corrosive disadvantage”—damaged functioning in other arenas of social life—those capabilities are more important than others. *Id.* at 82. This may or may not be reasonable, but to evidence the point, Riddle characterizes “health” as a capability of highest moral importance (because unhealthiness infects so many other functionings) and opportunities for sexual satisfaction as relatively morally unimportant. RIDDLE, *supra* note 262, at 82–85. Given the ignominious history of degrading or denying the sexuality of persons with disabilities, one would think Riddle might have selected other examples.

264 *See infra* Part IV.

265 *See supra* notes 103–107 and accompanying text; *infra* Part IV.D.

266 *See, e.g.*, NUSSBAUM, *SEX*, *supra* note 142, at 124–27 (arguing that female genital mutilation is wrong because it viscerates the capability to sexually function).

cannot, categorically, consent, but because students cannot reasonably extricate themselves from the ensuing relation.<sup>267</sup> Autassassinophilic sex might be restricted on the grounds that a dead self cannot codetermine future sexual relations.<sup>268</sup> Spindelman's other "sexual death-blow[s]"<sup>269</sup> (like erotic, consensual cannibalism) are not the unfortunate byproducts of sexual autonomy, but may violate sexual autonomy relationally reconceived as a capability.

## 2. Codetermination

Codetermination is not synonymous with equality or reciprocity. Codetermination need not require equal abilities, education, experience, income, strength, and so forth between or among sexual agents.<sup>270</sup> "The relational approach does not require a utopia of (impossible) relations of perfect equality."<sup>271</sup> Codetermination instead approximates that all parties can plan the existence, directions, and trajectories of their sexual relations. "Codetermination," like "capacity for creative interaction," avows the relationality at the heart of autonomy; not incidentally, codetermination sounds with Kantian respect for others' aims and goals.<sup>272</sup>

As a "capability," such codetermination need not be actualized, its function not required for sexual justice and sexual autonomy.<sup>273</sup> But codetermination must be possible.

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267 See Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 318 (2010).

268 But see Lisa Downing, *On the Limits of Sexual Ethics: The Phenomenology of Autassassinophilia*, 8 SEXUALITY & CULTURE 3 (2004); see also FISCHEL, *supra* note 21.

269 See Spindelman, *Law*, *supra* note 16, at 186.

270 The stipulation comports with Nussbaum's Capabilities Approach, which "recommends, as a necessary condition of social justice, bringing all citizens above a rather ample threshold on each of the ten capabilities, not complete equalizing of all the capabilities." Nussbaum, *Capabilities*, *supra* note 25, at 78.

271 NEDELSKY, *supra* note 25, at 303.

272 See *supra* notes 109–110 and accompanying text.

273 See NUSSBAUM, *FRONTIERS*, *supra* note 25, at 79–80 ("Many people who are willing to support a given capability as a fundamental entitlement would feel violated were the associated functioning made basic . . . . My own view is that people should be given ample opportunities to lead a healthy lifestyle, but the choices should be left up to them; they should not be penalized for unhealthy choices."); see also Boni-Saenz, *supra* note 15, at 1226.

### 3. The “Sexual” in Sexual Autonomy

Kant’s autonomy is autonomy of the will, Schulhofer’s is sexual autonomy, and Nedelsky’s is relational. Ours is a *relational* approach to *sexual* autonomy. We place a premium on sexual choice and decision-making, but also step back from the immediacy of the sexual (or sexually assaultive) encounter to inquire about the laws, institutions, and social and educative practices that cultivate or diminish sexual autonomy.

We are reticent to restrictively define the sexual. As feminist, queer, and disability studies have made clear, the borders of the “sexual” are permeable, variable, historically and culturally contingent, not always genitized but too often masculinist, and eroticized if not necessarily saturated by social inequality.<sup>274</sup> For our purposes, it is sufficient to (under)define “sexual” conduct as conduct that generates or is intended to generate erotic pleasure. To avoid tautology, erotic pleasure can be understood as pleasure phenomenologically distinct from other sorts of embodied pleasures.<sup>275</sup> And (sometimes) excepting masturbation, what is sexual is relationally determined between or among parties. Thus, whipping someone might be a) a homosocial prank, b) assault, or c) sexual, depending on the relations and the relational determination.

Part IV delineates the kinds of legal and institutional reforms regarding sex, sexual violence, and disability that our reconstructed principle of sexual autonomy would promote. Part III momentarily shelves these considerations in order to revisit the facts, findings, and fallout of *Fourtin* in greater detail.

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274 On the ways disability and disability studies render sex as polysemous (as queer studies would have liked to), see *infra* notes 550–554 and accompanying text.

275 See, e.g., Linda Martín Alcoff, *Dangerous Pleasures: Foucault and the Politics of Pedophilia*, in *FEMINIST INTERPRETATIONS OF MICHEL FOUCAULT* 99, 127–28 (Susan J. Hekman ed., 1996):

[T]he phenomenology of sex itself . . . involves uniquely sensitive, vulnerable, and psychically important areas of the body, a fact that persists across cultural differences. Thus sexual experiences have the capacity to impart crucial meanings concerning one’s body and, therefore, one’s self . . . It is not that social context alone that makes sexual acts significant, but social context in relation to the phenomenology of embodiment.

### III. *State v. Fourtin* (2012)

#### A. *Fourtin*

On October 2, 2012, the Connecticut Supreme Court held Richard Fourtin not guilty of sexual assault.<sup>276</sup> The decision was a controversial end to a drawn-out case, and the story briefly ballooned in regional news and social media due to the outrage of commentators who saw Fourtin's acquittal as a blow to disability rights.<sup>277</sup>

Part III delineates the facts and case history of *State v. Fourtin*; the precedents and statutes that eventuated in Fourtin's acquittal; and the public response to the Connecticut Supreme Court decision. After summarizing extant criticisms and relaying the legislative response to *Fourtin*, we offer a metacritique: by proposing to safeguard disabled victims of sexual assault like L.K. under the shelter of "physically helpless" and/or "mentally defective" statutory subsections, advocates and legislators may prematurely disqualify the sexual autonomy of all severely disabled adults.<sup>278</sup>

At trial, the state alleged that the defendant, Richard Fourtin, sexually assaulted L.K., a twenty-five-year-old woman whose mother was Fourtin's girlfriend at the time.<sup>279</sup> L.K. lives with cerebral palsy, mental retardation, and hydrocephalus. She is unable to verbally communicate or walk without assistance, but has a history of communicating with others by "gesturing and vocalizing and through the use of a communication board."<sup>280</sup> The alleged assault took place in February 2006, at the victim's home, which Fourtin was known to visit—usually accompanying his girlfriend, L.K.'s mother, referred to as "S." Appearing "'aggravated' and 'scared'"<sup>281</sup> to a staff member of her adult day care program, L.K. communicated through gestures and her message board that Fourtin had sexually assaulted her. "A subsequent medical examination disclosed physical symptoms consistent with the complainant's report that she had been sexually assaulted."<sup>282</sup>

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276 *State v. Fourtin*, 52 A.3d 674 (Conn. 2012).

277 *See infra* section III.B.

278 *See infra* notes 317–326 and accompanying text; Part III.C.

279 *Fourtin*, 52 A.3d at 677.

280 *Id.* at 691.

281 *State v. Fourtin*, 982 A.2d 261, 264 (Conn. App. Ct. 2009).

282 *Id.*

The state charged Fourtin with sexual assault in the second degree<sup>283</sup> and sexual assault in the fourth degree.<sup>284</sup> The applicable subsections of both statutes extend protections to victims who are “physically helpless,” defined as “unconscious or for any other reason . . . physically unable to communicate unwillingness to an act.”<sup>285</sup> Although prosecutors presented evidence suggesting L.K. was able to communicate through gestures and limited vocalizations, they nonetheless argued that the victim was “physically helpless” due to her inability to verbally communicate, her dependence on others, and her “limited cognitive abilities.”<sup>286</sup>

Convicted under both statutes, Fourtin appealed, arguing that the state failed to present sufficient evidence to prove L.K. was “physically helpless.” The appeal asserted “the complainant could communicate [displeasure] using various nonverbal methods, including screeching, biting, kicking and scratching” thereby proving her physical abilities (or her non-helplessness, as it were).<sup>287</sup> In 2009, the Connecticut Appellate Court overturned Fourtin’s conviction: L.K.’s nonverbal communication in commonplace, nonsexual circumstances contravened a jury finding of physical helplessness.<sup>288</sup> The intermediary court was “not persuaded that the state produced any credible evidence that the complainant was either unconscious or so uncommunicative that she was physically incapable of manifesting to the defendant her lack of consent to sexual intercourse at the time of the alleged sexual assault.”<sup>289</sup>

In 2012, the Connecticut Supreme Court upheld the state appellate court’s ruling in a 4-3 decision, affirming that the statutory definition of “physically helpless” excludes L.K.<sup>290</sup> Like the appellate ruling, the state supreme court majority cites as precedent *State v. Hufford*, which acquitted an emergency medical technician of sexual assault.<sup>291</sup> Although

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283 CONN. GEN. STAT. ANN. § 53a-71(a)(3) (West 2015).

284 CONN. GEN. STAT. ANN. § 53a-73(a)(1)(C) (West 2015).

285 CONN. GEN. STAT. ANN. § 53a-65(6) (West 2015).

286 *State v. Fourtin*, 52 A.3d 674, 688–89 (Conn. 2012).

287 *State v. Fourtin*, 982 A.2d 261, 266 (Conn. App. Ct. 2009).

288 *Id.* at 266.

289 *Id.* at 267.

290 *Fourtin*, 52 A.3d at 689–90.

291 *State v. Hufford*, 533 A.2d 866 (Conn. 1987).

Hufford's alleged victim was "restrained on a stretcher" while being "transported to the hospital," Hufford's conviction was overturned because the victim was able to verbally "communicate unwillingness to an act" and was therefore not "physically helpless."<sup>292</sup> Despite the *Fourtin* majority's concession that "no one would dispute that [L.K.] is physically helpless in the ordinary sense of that term," the court was bound by *Hufford*: "even total physical incapacity does not, by itself, render an individual physically helpless."<sup>293</sup>

Dissenting from the state supreme court ruling, Justice Norcott accused the lower court of acting as a "thirteenth juror," substituting its preferences over a jury's fact-finding.<sup>294</sup> Justice Norcott argued that the determination of physical helplessness to communicate nonconsent was properly put before, and a reasonable conclusion of, the jury.<sup>295</sup> He emphasized that the trial court required four full days to gather L.K.'s testimony due to her exhaustion.<sup>296</sup> In a final footnote, the dissent departs from the facts of *Fourtin* to the uncertain future of Connecticut sexual assault law.<sup>297</sup> The dissent suggests that the majority ruling attests to the inadequacy of existing statutes to provide sufficient protection for persons with disabilities from sexual assault.

## B. Critics and Consequences

Prior to the Connecticut Supreme Court's ruling, the facts surrounding the *Fourtin* case received little public media attention.<sup>298</sup> After the Court affirmed the reversal of Fourtin's conviction, mainstream and progressive news outlets released scathing criticisms of the decision.<sup>299</sup> These responses lambasted the Connecticut Supreme Court for what they

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292 *Fourtin*, 52 A.3d at 682.

293 *Id.*

294 *Id.* at 701 (Norcott, J., dissenting) (internal citation omitted).

295 *Id.*

296 *Id.* at 695 (Norcott, J., dissenting).

297 *Id.* at 701 n.22.

298 Although public media frenzy around *Fourtin* did not ignite until the 2012 Connecticut Supreme Court decision, legislative reform advocacy began earlier. Following the 2009 Connecticut Appellate Court ruling, a small group of state legislators and organizers began proposing revisions to existing statutes—especially Connecticut General Statute §§ 53a-71(a)(2) and -71(a)(3). See *infra* notes 320–326 and accompanying text.

299 See, e.g., Tepfer, *supra* note 3; Zack Beauchamp, *Court Requires Disabled Rape Victim to Prove She Resisted, Calls for Evidence of 'Biting, Kicking, Scratching,'* THINKPROGRESS (Oct. 3, 2012), <http://thinkprogress.org/justice/2012/10/03/947981/court-requires-disabled-rape-victim-to-prove-she-fought-back->



perceived to be the injection of a “resistance requirement” for physically and mentally disabled victims of sexual assault.<sup>300</sup> Titled, for example, “Court Requires Disabled Rape Victim to Prove She Resisted, Calls for Evidence of ‘Biting, Kicking, Scratching’” or “Richard Fourtin Case: Connecticut Court Sets Accused Rapist Free, Says Handicapped Victim Did Not Resist,” these articles opine, incorrectly, that the court affirmed Fourtin’s overturned conviction because of a lack of evidence that L.K. physically resisted his sexual advances.<sup>301</sup> Reporters, bloggers, and activists underlined L.K.’s physical and mental disabilities—“she is so physically restricted that she is able to make motions only with her right index finger”;<sup>302</sup> she “reportedly cannot speak and has little body movement.”<sup>303</sup> Many argued that L.K.’s mental disabilities and limited communication rendered her equivalent to a three-year-old child (L.K. was twenty-five-years-old at the time of the alleged assault) and therefore unable to either consent to or appropriately understand sexual contact.<sup>304</sup>

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calls-for-evidence-of-biting-kicking-scratching/?mobile=nc [http://perma.cc/8BMR-G8HF]; *State Supreme Court Tosses Sex Assault Conviction*, NBC CONN. (Oct. 4, 2012), <http://www.nbcconnecticut.com/news/local/State-Supreme-Court-Tosses-Sex-Assault-Conviction-172269281.html> [http://perma.cc/U76V-R7Q7]; *Richard Fourtin Case: Connecticut Court Sets Accused Rapist Free, Says Handicapped Victim Did Not Resist*, HUFFINGTON POST (Oct. 4, 2012), [http://www.huffingtonpost.com/2012/10/04/richard-fourtin-case-supreme-court-accused-rapist-sexual-assault-handicapped-victim\\_n\\_1937528.html](http://www.huffingtonpost.com/2012/10/04/richard-fourtin-case-supreme-court-accused-rapist-sexual-assault-handicapped-victim_n_1937528.html) [http://perma.cc/D628-6U37]; Charlie Wells, *Connecticut Supreme Court Tosses Richard Fourtin Jr.’s Guilty Verdict for Sexually Assaulting Woman with SEVERE Cerebral Palsy*, N.Y. DAILY NEWS (Oct. 4, 2012), <http://www.nydailynews.com/news/national/guilty-verdict-tossed-sex-assault-woman-cerebral-palsy-article-1.1175342> [http://perma.cc/8EDB-ZCLG]; Women: Rise Up Now, *State of Connecticut v. Fourtin*, RISING TIDE BLOG (Oct. 5, 2012), <http://risingtideblog.com/2012/10/05/state-of-connecticut-v-fourtin> [http://perma.cc/DDR8-XAQ5]; Women: Rise Up Now, *One More Word About Fourtin*, RISING TIDE BLOG (Oct. 14, 2012), <http://risingtideblog.com/2012/10/14/one-more-word-about-fourtin> [http://perma.cc/33S5-EYQV].

300 For criticisms of the resistance requirement of rape law, see *supra* notes 40–41 and accompanying text; Patricia J. Falk, *‘Because Ladies Lie’: Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio’s Sexual Offenses*, 62 CLEV. ST. L. REV. 343 (2014); Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A. L. REV. 567 (1983).

301 See, e.g., Beauchamp, *supra* note 299; *Richard Fourtin Case*, *supra* note 299. But see Women: Rise Up Now, *One More Word About Fourtin*, *supra* note 299.

302 Tepfer, *supra* note 3.

303 *Richard Fourtin Case*, *supra* note 299.

304 Neither the *Fourtin* majority nor dissent claims that L.K. “has the intellectual functional equivalent of a three-year-old,” a statement repeated by multiple news sources. See, e.g., Beauchamp, *supra* note 299. However, the majority cites testimony from a clinical psychologist “describ[ing] the victim’s total functioning as akin to that of a person between the ages of two and five years old” and comparing L.K. to “a five year old child who has been ‘isolated’ and has ‘not had contact with anything other than a certain limited world.’” *State v. Fourtin*, 52 A.3d 674, 677 n.7 (Conn. 2012).

Sexual assault and disability advocates and policymakers also protested *Fourtin*. Anna Doroghazi, Director of Public Policy and Communication at Connecticut Sexual Assault Crisis Services (CSACS), asserted that “the court’s interpretation of what it means to be ‘physically helpless’ jeopardizes the safety of people with disabilities[,] . . . effectively hold[ing] people with disabilities to a higher standard than the rest of the population when it comes to proving lack of consent in sexual assault cases.”<sup>305</sup> Both anti-violence and disability activists warned that *Fourtin* leaves mentally and physically disabled persons unable to seek justice against sexual assault, due to the narrow statutory and case law meaning of “helplessness.” “Our justice system should provide [people with disabilities] with protection,” remonstrated James McGaughey, executive director of the Connecticut Office of Protection and Advocacy for Persons with Disabilities, “not require them to resist their attackers.”<sup>306</sup>

Dissatisfied with the popular media misconstrual and melodramatizing of *Fourtin*, lawyers and legal commentators next weighed in on the ruling and its aftermath.<sup>307</sup>

These authors decried the caricature of *Fourtin* feverishly rehearsed by the media and re-directed attention to the issue at law. Rejecting progressive assaults, commentators explained that *Fourtin* does not install a resistance requirement for disabled victims of sexual assault:

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The discursive equivalence of mentally and physically disabled adults with children—both in terms of cognition and social/sexual propriety—is widespread and pernicious. On the infantilizing of disabled adults, see, e.g., ELI CLARE, EXILE AND PRIDE: DISABILITY, QUEERNESS, AND LIBERATION 108–09 (1999) (“I think about the perpetual childhood many disabled people are forced into . . . pictured as passive and awkward, child-like without the least hint of sexuality.”). Alternatively, on the discursive construction of persons with disabilities as sexually unruly and predatory, see, e.g., Pamela Block, *Sexuality, Fertility, and Danger: Twentieth Century Images of Women with Cognitive Disabilities*, 18 SEXUALITY & DISABILITY 239, 245 (2000). See also *infra* notes 442–444 and accompanying text. On modern and late modern constructions of children as innocent and incompetent, see, e.g., BREWER, *supra* note 158; Appell, *supra* note 158.

305 *Richard Fourtin Case*, *supra* note 299.

306 Wells, *supra* note 299.

307 See, e.g., Gideon, *Supreme Court hates disabled people and eats children for lunch. Probably.*, A PUBLIC DEFENDER (Oct. 4, 2012), <http://apublicdefender.com/2012/10/04/supreme-court-hates-disabled-people-and-eats-children-for-lunch-probably> [<http://perma.cc/9FRZ-FB7P>] [hereinafter Gideon, *Supreme Court*]; Gideon, *Why we can't just make stuff up as we go along; or, Due Process*, A PUBLIC DEFENDER (Oct. 9, 2012), <http://apublicdefender.com/2012/10/09/why-we-cant-just-make-stuff-up-as-we-go-along-or-due-process> [<http://perma.cc/3ZJN-8GAW>] [hereinafter Gideon, *Why we can't*]; Ken White, *Frankly, I Don't Care How Due Process Makes You Feel*, POPEHAT (Oct. 9, 2012), <http://www.popehat.com/2012/10/09/frankly-i-dont-care-how-due-process-makes-you-feel> [<http://perma.cc/666X-RSA3>].

Fourtin was acquitted not because L.K. did not resist his advances, but rather because her history of physically and vocally expressing discontent and/or nonconsent disqualified her from the ambit of “physically helpless.”<sup>308</sup> Evidence of L.K.’s resistance—like evidence of verbal nonconsent—would be grounds for acquittal, not conviction, as resistance disproves “helplessness.” Journalists and advocates were so disgusted by Fourtin’s acquittal that they seemed unwilling to seriously interrogate the relevant case law and precedent surrounding “physical helplessness.”<sup>309</sup> No process was due process for progressive journalists and advocates, argued some legal commentators. The overturned conviction of a rapist—and one who assaulted a person with disabilities, no less—emotionally outweighed any import of statutory technicality.<sup>310</sup>

Notably, the point of unanimous agreement across public responses to *Fourtin* is what seems at first blush to be dispositive: Fourtin sexually assaulted L.K. However, legal professionals’ criticism-of-the-criticisms begins to clarify that what is so distressing about *Fourtin* may not be the ruling itself, which neither denied nor questioned the occurrence of the assault. Rather, the ruling reveals the tragic bind of Connecticut sexual assault law for significantly disabled victims: they are disabled enough that assailants need not use requisite force for their conduct to qualify as criminal, but abled enough to class out of physical helplessness. L.K., then, is not victimized under the general sexual assault statute because her disability makes force moot, but she is not victimized under the status subsections either because she can resist just enough not to be helpless. Caught between force requirements and blanket exclusions from sexual contact, there is nowhere for L.K. to turn to seek redress.<sup>311</sup>

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308 See *Fourtin*, 52 A.3d at 688.

309 See Gideon, *Supreme Court*, *supra* note 307.

310 *Id.*; White, *supra* note 307.

311 This bind (too disabled for force to be necessary, too abled to be helpless) is nowhere more egregiously exemplified than in *State v. Hufford*. See *supra* notes 291–293 and accompanying text. The Connecticut Supreme Court overturned the conviction of an emergency medical technician for sexually assaulting a woman taped to a stretcher. Hufford “had no need to exert force to effect the sexual contact. The complainant had been rendered immobile for transport to the hospital and the defendant had only to open her blouse and pants to commit the sexual assault. We are unpersuaded by the state’s argument that these actions constituted force.” *State v. Hufford*, 533 A.2d 866, 871 (Conn. 1987). On the other hand, “[w]hile [the defendant’s] testimony tends to show lack of consent, it contradicts the state’s assertion that the complainant was unable to communicate her ‘unwillingness to an act.’ The record contains no evidence tending to show that the complainant was physically helpless.” *Id.* at 873. While the Connecticut Supreme Court remanded the case “for a new trial limited to the issue of lack of consent,” such a charge—violation of Connecticut General Statute § 53a-73a(a) (2)—is a misdemeanor, applicable only to sexual contact (not intercourse) and is hardly ever prosecuted but for

Or almost nowhere. Various stakeholders rebuked the state attorneys for prosecuting Fourtin under two statutes that, by precedent, require total inability to communicate as proof of helplessness. Both the Connecticut Supreme Court and commentators posited that the state attorney should have charged Fourtin under Connecticut General Statutes §§ 53a-71(a)(2)<sup>312</sup> and -73a(a)(1)(B), which referenced the sexual assault of victims determined “mentally defective.”<sup>313</sup> As Justice Palmer wrote for the *Fourtin* majority: “this appears to be a case in which the state ultimately proceeded against the defendant under the wrong statute . . . [B]y electing to prove that the victim was physically helpless rather than mentally defective, the state removed from the case all issues pertaining to the victim’s mental capacity to consent to sex.”<sup>314</sup> Justice Norcott, dissenting, agreed on the point: “the state would have been far better advised” to charge Fourtin with violation of the sexual assault statutes “which require a victim that is ‘mentally defective.’”<sup>315</sup>

On the other hand, post hoc recriminations—locating someone to blame—may satisfy emotional frustration more than fact of law. As Susann Gill, the lead prosecutor in *Fourtin* told us, case law delineating the parameters of the “mentally defective” subsection is even sparser than the pursued alternative, “physically helpless.”<sup>316</sup> L.K.’s demonstrated resistance classed her out of “helplessness”; it may just as well have classed her out of “defectiveness.”

In any event, *Fourtin*’s failure to protect disabled and vulnerable subjects propelled the pursuit for future remedy. In the months and years following the 2009 appellate

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unwanted gropes. See *infra* notes 360–361 and accompanying text.

312 Until 2013, Connecticut General Statute § 53a-71(a)(2) read: “A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . such other person is mentally defective to the extent that such other person is unable to consent to such sexual intercourse.” For the post-*Fourtin* revised statutes, see *infra* notes 326–328.

313 See, e.g., White, *supra* note 307. Connecticut General Statute § 53a-65(4) defines a subject as “mentally defective” if that person “suffers from a mental disease or defect which renders such person incapable of appraising the nature of such person’s conduct.” CONN. GEN. STAT. ANN. § 53a-65(4) (West 2015).

314 *State v. Fourtin*, 52 A.3d 674, 689 n.20 (Conn. 2012).

315 *Id.* at 701 n.22 (Norcott, J., dissenting).

316 Interview with Susann E. Gill, Supervisory Assistant State’s Att’y, Conn. State’s Att’y’s Office, Judicial Dist. of Fairfield, in Milford, Conn. (Oct. 16, 2014). However, Deborah Denno documents several cases in which “mental defect” or similar statutory language has been interpreted expansively—too expansively for Denno (and for us)—to render persons legally unable to consent to sexual relations. Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 347–49; see also *infra* Part III.C.

ruling, Connecticut State Representative Gerald Fox III, the *Fourtin* prosecutors, and the Connecticut General Assembly's Permanent Commission on the Status of Women (PCSW) led a team of policymakers and advocates to amend state sexual assault law in order to extend protections over disabled persons like L.K.<sup>317</sup> In 2010, 2011, and 2012, three consecutive Senate bills were brought to the Connecticut Judiciary Committee that would have made alterations to Connecticut General Statute § 53a-71(a)(2), concerning victims who are “mentally defective,” and/or Connecticut General Statute § 53-73a(a)(3), concerning victims who are “physically helpless.”<sup>318</sup> A wide range of state agencies and organizations concerned with the welfare of women, victims of violence, disabled persons, and others whom these statutes might impact testified in support of all three bills.<sup>319</sup>

The proposed legislative changes in 2010 and 2011 would have altered both statutes, eliminating the phrases “physically helpless” and “mentally defective” from the sexual assault laws altogether.<sup>320</sup> Instead, perpetrators would be found guilty of sexual assault in the second degree if “the victim’s ability to communicate lack of consent was *substantially impaired because of a mental or physical condition*.”<sup>321</sup> The language revisions suggest a significantly lowered threshold of impairment to reach a successful conviction and a departure from the limited (limiting) capture of “physical helplessness” as set in Connecticut General Statute § 53a-65(6). Neither bill passed the State House of Representatives, and legislators revised their amendments in 2012.<sup>322</sup> The proposed changes in 2012, more

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317 PERMANENT COMM’N ON THE STATUS OF WOMEN, 2012 CONN. GEN. ASSEMB., OFFICIAL STATEMENT RE: STATE V. RICHARD FOURTIN CONVICTION [hereinafter OFFICIAL STATEMENT].

318 *Id.*

319 Supporters of the 2012 bill, S.B. 247, 2012 Leg., Reg. Sess. (Conn. 2013), which successfully passed in 2013, included: HARC, Inc.; the Susan B. Anthony Project; Connecticut Sexual Assault Crisis Services (CSACS); The Arc of Connecticut; Mary Ann Langton; Mary Louise Reardon; and Robert James Payne. For a full list of supporters of earlier drafts of the bill, see *id.*

320 *See id.*

321 *Id.* (emphasis added).

322 *Id.* Although neither S.B. 315, 2010 Leg., Reg. Sess. (Conn. 2010), nor S.B. 918, 2011 Leg., Reg. Sess. (Conn. 2011), passed the Connecticut House of Representatives, the bills were not met with substantial resistance when proposed. The official statement released by the Permanent Commission on the Status of Women on the legislative history of proposed changes to Connecticut General Statute § 53a-71 (regarding sexual assault in the second degree) notes, OFFICIAL STATEMENT, *supra* note 317, that both S.B. 315 and S.B. 918 were voted through by the Joint Committee on Judiciary and then passed in the Connecticut State Senate. Based on the limited details provided by the PCSW, S.B. 315 failed to pass because the House did not act on it after it passed the Senate, and S.B. 918 failed to pass because it died on the House calendar. Whether these failures to act on the proposed bills were the result of legislative inertia or silent resistance remains unclear;

limited than in previous years, altered only Connecticut General Statute § 53a-71(a)(2). Perpetrators would be found guilty of sexual assault if “the ability of [the victim] to consent or to communicate lack of consent to such sexual intercourse is substantially impaired because of *mental disability*.”<sup>323</sup> The final bill passed in the 2013 Connecticut General Assembly legislative session, signaling a win for the sexual assault and disability advocates who had supported the change.<sup>324</sup>

This victory, though, seems limited at best and superficial at worst. Although catalyzed by Richard Fourtin’s acquittal, the statutory revisions approved in 2012 would likely not have changed the *Fourtin* ruling. Since S.B. 247 (2013) did not include any changes to Connecticut General Statute § 53–73a(a)(3), the same phraseology and standard of “physical helplessness” remain in Connecticut sexual assault law.<sup>325</sup> Legislators only changed the language of Connecticut General Statute § 53a–71(a)(2), by replacing “mentally defective” with “mental incapacitation.” They also implemented a scienter requirement.<sup>326</sup>

We worry that the facial change to the statute reflects a discomfort among policymakers with the ableist and archaic language of “mentally defective,” rather than a more substantial investment in the flourishing (sexual and otherwise) of mentally and physically disabled people. If the amended statute assuages policymakers’ distress over unseemly language better than it protects victims of sexual assault, then the statute has not meaningfully changed at all.

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however, that the bill was then substantially pared down in 2012, *see infra* notes 286–287 and accompanying text, is somewhat surprising.

323 S.B. 247, 2012 Leg. Reg. Sess. (Conn. 2013) (emphasis added).

324 *See* CONN. GEN. STAT. § 53a–71(a)(4) (2013); CONN. GEN. STAT. § 53a-73a(a)(1)(C).

325 *See* CONN. GEN. STAT. § 53a–73a.

326 S.B. 247 proposed the following revision to Connecticut General Statute § 53a-71(a)(2):

[A] person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . the ability of such other person to consent or to communicate lack of consent to such sexual intercourse is substantially impaired because of mental disability and the actor knows or has reasonable cause to know that the ability of such other person to consent or to communicate lack of consent to such intercourse is so impaired.

Conn. S.B. 247. For the original text of Connecticut General Statute § 53a-71(a)(2), *see supra* note 312.

### C. Metacritique: Helpless to “Helplessness”

In interviews about the proposed statutory revisions, Connecticut State Representative Gerald Fox III noted that drafters had worked diligently to tailor the language so as not to be “overly broad,” and thus “ban[] handicapped people from consenting to sexual activity.”<sup>327</sup> We share this concern. Like feminist, anti-violence, and disability activists, we are troubled by the verdict issued in *State v. Fournin* and troubled too that the threshold requirements for “physically helpless” and “mentally incapacitated” do not protect persons with disabilities from sexual assault. But like other theorists of disability, sexuality, and the law,<sup>328</sup> and like some persons with disabilities and their service providers,<sup>329</sup> we are troubled that the expansion of blanket protections for disabled victims of sexual assault may render mentally and/or physically disabled adults legally unable to consent to any *wanted* sexual contact.

It seems, perversely, that the reduction of sexual autonomy to sexual consent may render larger classes of persons unfit and ineligible for either. While many *Fournin* commentators were disturbed that L.K. did not qualify as “physically helpless,” only a few such critics registered concern with the potential consequences of expanding the coverage of “physically helpless” to include all adults whose mental and/or physical disabilities

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327 Michelle Golladay, *Legislation Would Close ‘Gap’ in Sex Assault Law Involving Disabled*, CONN. LAW TRIBUNE (Mar. 29, 2013), <http://www.ctlawtribune.com/PubArticleCT.jsp?id=1202594133927> [<http://perma.cc/S9YY-HQWJ>].

328 For a meticulously crafted, measured argument against overbroad statutory proscriptions on the sexual conduct of persons with intellectual disabilities, see generally Denno, *supra* note 316; *see also* Jacob M. Appel, *Sex Rights for the Disabled?*, 36 J. MED. ETHICS 152 (2010); *infra* notes 337–341 and accompanying text. From one historical vantage point, extending the capture of the “physically helpless” and “mentally incapacitated” statutory subclauses reflects and reignites the socio-legal “asexual objectification of disabled individuals.” Harlan Hahn, *Feminist Perspectives, Disability, Sexuality, and Law*, 4 S. CAL. REV. L. & WOMEN’S STUD. 97, 100 (1994).

329 On more generalized concern regarding the juridical will-to-protection over disabled persons’ sexuality, see, for instance, Anne Finger, *Forbidden Fruit*, 233 NEW INTERNATIONALIST (July 1992), <http://newint.org/features/1992/07/05/fruit> [<http://perma.cc/D4PK-5MMJ>]; Siebers, *supra* note 27; Mark O’Brien, *On Seeing a Sex Surrogate*, SUN, May 1990, [http://thesunmagazine.org/issues/174/on\\_seeing\\_a\\_sex\\_surrogate](http://thesunmagazine.org/issues/174/on_seeing_a_sex_surrogate) [<http://perma.cc/2Q6C-QQH4>]; *see also* sources cited in Denno, *supra* note 316, at 380–93; *infra* note 446 and accompanying text.

The distinction between “disability theorists” and “people with disabilities” is analytic, the referent populations overlapping. From herein, as the Article becomes prescriptive, we amplify the voices and forefront the experiences of persons with significant disabilities.

present similarly to L.K.'s.<sup>330</sup> That “no one would dispute that the victim is physically helpless in the ordinary sense of that term” suggests a perpetual, widespread, and “ordinary” conflation of disability, helplessness, and (thus) asexuality.<sup>331</sup>

If, for example, we stretch the parameters of “physically helpless” so that any disabled adult with similar restrictions to L.K. automatically qualifies as “physically helpless,” despite a documented ability to communicate nonverbally, we may delegitimize or derealize hir sexual (and non-sexual) agency, and the possibility of hir sexual flourishing, whatever form that might take.<sup>332</sup> Many scholars have cautioned against the (often forcible) desexualization of disabled individuals.<sup>333</sup> In a variety of vernaculars and (inter)disciplines, these authors have advocated for the sexual autonomy of disabled persons—for the right to co-determine sexual relations and for that codetermination-capability to be fostered.<sup>334</sup> This position contravenes the one held by progressive activists and legislators in the wake of *Fourtin*, but from a crip theoretic perspective, the expansion of “physically helpless” to include all adults with severe mental and/or physical disabilities risks codifying the stifling norms of ableism.<sup>335</sup>

330 See, e.g., Golladay, *supra* note 327 (“State Representative Gerald Fox III . . . said, ‘we’ve had to be extremely careful with the language that we use,’ in part so that the measure doesn’t end up banning handicapped people from consenting to sexual activity.”).

331 *State v. Fourtin*, 52 A.3d 674, 682 (Conn. 2012).

332 On “derealization” as an idiom and upshot of unjust sociolegal formations, see JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 34 (2006). For a critique of Butler’s framing of gendered and sexual violence as rendering subjects unthinkable, but not also subordinated, see *supra* note 250. The gender-neutral pronoun “hir” may be jarring, but its usage aligns with the normative aspiration of this Article. We carry a brief for a reconstructed sexual autonomy right, a right that privileges the codetermination, rather than the sovereign ascription, of social and sexual identification. See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 *BERKELEY WOMEN’S L.J.* 15, 17 n.7 (2003).

333 See, e.g., CLARE, *supra* note 304, at 108–09; Hahn, *supra* note 328, at 121–24; Shakespeare, *supra* note 14, at 161 (“The barriers to the sexual expression of disabled people are primarily to do with the society in which we live, not the bodies with which we are endowed.”); Siebers, *supra* note 27; Holly Ann Wade, *Discrimination, Sexuality and People with Significant Disabilities: Issues of Access and the Right to Sexual Expression in the United States*, 22 *DISABILITY STUD. Q.* 9 (2002); *infra* notes 394–401 and accompanying text. Resonantly, Rosemarie Garland-Thompson flags the connection between the coercive sterilization of disabled persons and elective prenatal testing for genetic disabilities. Rosemarie Garland-Thompson, *Integrating Disability, Transforming Feminist Theory*, 14 *NAT’L WOMEN’S STUD. ASS’N J.* 1, 16 (2002) (“The practices of genetic and prenatal testing as well as physician-administered euthanasia then become potentially eugenic practices within the context of a culture deeply intolerant of disability.”).

334 See *infra* note 332.

335 We understand the reclaimed pejorative “crip” to signal practices and theories that put pressure on, while



Our metacritique echoes the argument law professor Deborah Denno put forth roughly two decades ago, which protests that “mentally retarded individuals” are preemptively disqualified from sex by the statutory codifications and judicial determinations of “mentally defective.”<sup>336</sup> Denno describes how expansive interpretations of and determinative factors for “mentally defective” and “mental incapacity” have hastily rendered persons with intellectual disabilities unable to consent to sex, by raising the consent standard unreachably high.<sup>337</sup> She claims that consent inquiries excessively emphasize the IQ and “mental age” of persons with intellectual disabilities, thereby wrongly assuming intellectual (dis)ability is static, permanent, and unaltered by context.<sup>338</sup> Moreover, such consent inquiries have

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also countenancing the power effects of, the norms, determinants, and identity formations that orbit ability and disability. See ROBERT McRUER, *CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY* 33–76 (2006) [hereinafter McRUER, *CRIP*]; see also *supra* notes 13–14 and accompanying text.

336 Denno, *supra* note 316, at 341–55; see also GILL, *supra* note 13, at 192–93. In this Article, we use the now more acceptable language of “intellectual disability” in reference to the same or similar populations as Denno, aware that all such ascriptive and identitarian terms, including our own, are subject to changing and competing cultural norms. Of course, sensitive terminology has no necessary correspondence to just policy. See KULICK & RYDSTRÖM, *supra* note 27, at 37.

What we will present in this book . . . is the example of a country [Denmark] where wildly politically incorrect language about disability coexists with policies and practices that are both politically radical (for what they mean for the rights of people with disabilities as citizens) and ethically progressive (for what they imply about how disabled and nondisabled people might imagine and engage with one another). This contrasts starkly with Denmark’s neighbor, Sweden. There, *language* about disability is constantly monitored and uncompromisingly judged. But policies and practices relating to the sexual lives of people with disabilities are politically retrogressive and ethically arrested.

*Id.*

337 Denno, *supra* note 316, at 349 (“Most striking is that all [court] tests appear to judge mentally retarded victims under a higher consent standard than nonretarded victims.”) (internal citation omitted).

338 *Id.* at 342, 355–56.

Courts nearly always refer to a victim’s IQ when the crime charged is rape or an assault against a mentally retarded person. Although IQ is a convenient clinical and administrative tool, alone it has limited predictive value and may mischaracterize an individual’s adaptive abilities, particularly when it used by inexperienced evaluators. Although courts also typically refer to a victim’s “mental age,” it too is considered misleading and controversial.

*Id.* at 366 (internal citations omitted). For another trenchant criticism of “mental age,” see GILL, *supra* note 13, at 38 (“Mental age is an ableist notion that can actively discredit individual choice and perpetuate assumptions about incompetence, childhood, and necessity for protection by prioritizing professional medical authority at

historically provided cover for the moralistic containment of women's sexuality (say, to prevent disabled women from reproducing or to punish adultery or fornication).<sup>339</sup>

Denno counteroffers a "contextual approach" to consent determinations,<sup>340</sup> one which would relieve persons with intellectual disabilities from "statutory isolation."<sup>341</sup> Denno's approach, dissolving categorical exceptions like "physically helpless" or "mentally incapacitated,"<sup>342</sup> would instruct judges and juries to examine the many situational and circumstantial factors around a sexual encounter in order to determine consent. In Denno's scheme, mental ability, more accurately assessed,<sup>343</sup> might be one such factor, but neither primary nor summary.<sup>344</sup> For example, in the case of a gang rape of an intellectually disabled girl by a group of teenage boys, Denno soundly suggests that the boys' deception, manipulation, coercion, and threats of retaliation take judicial priority over locating (impossibly) an exact measurement or age equivalency of the girl's intellectual ability.<sup>345</sup>

Like Denno then, we argue that feminist, anti-violence, and disability advocates and policymakers must consider more fully what consequences extended-capture reforms (broadening the reach of "physically helpless" or "mentally incapacitated") would have on the sexual autonomy of persons with intellectual disabilities. In the next Part, and building off of Denno's earlier proposals,<sup>346</sup> we suggest reforms to sexual assault law that might

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the expense of individual desire and epistemology.").

339 Denno, *supra* note 316, at 349–52. Of course, medical authorities have not always required the pretense of consent to intervene on the reproductive and sexual lives of women with disabilities. Sexual unruliness and "improvement" of the human population have long justified sterilization and other eugenic policies. *See, e.g.*, Block, *supra* note 304, at 245; *see also infra* notes 441–446 and accompanying text.

340 Denno, *supra* note 316, at 355–59.

341 *Id.* at 343.

342 *Id.* at 394–95 ("By excluding from statutory specification the term mental retardation or any other pejorative label currently encompassing it, state legislatures would appropriately foster the presumption that most mentally retarded individuals are able to consent to sexual relations under most circumstances.").

343 *Id.* at 342–43 (arguing that legal terms for and jury instructions regarding intellectual disability are outdated and do not reflect current medical consensus and research findings).

344 *Id.* at 394.

345 Denno, *supra* note 316, at 360–76 (criticizing the prosecution and defense strategies in the "Glen Ridge Rape Case," both of which emphasized victim's IQ and "mental age"); *see In re B.G.*, 589 A.2d 637 (N.J. Super. Ct. App. Div. 1991).

346 Denno, *supra* note 316, at 394–95.

better protect vulnerable and disabled persons while still promoting sexual autonomy across the spectrum of ability. Our reforms, like Denno's, excise disability as a special category of sexual assault law, stressing instead relational conditions and constraints.<sup>347</sup> Yet—and perhaps because our reforms are principled not on the notion of universal human dignity but rather on relational autonomy<sup>348</sup>—we also canvass ways the state might facilitate the sexuality and intimacy opportunities for persons with significant disabilities in particular.<sup>349</sup>

#### IV. Disabling Consent: Notes for a New Statutory Scheme of Sexual Regulation

*Why do rehabilitation hospitals teach disabled people how to sew wallets and cook from a wheelchair but not deal with a person's damaged self-image? Why don't these hospitals teach disabled people how to love and be loved through sex or how to love our unusual bodies? I fantasized running a hospital that allowed patients the chance to see a surrogate, and that offered hope for a future richer than daytime tv, chess, and wheelchair basketball.<sup>350</sup>*

##### A. Are “Sexual Autonomy” and “Disability” Incompatible?

Political philosophers of the social contract tradition explicitly exclude persons with severe disabilities from autonomy's domain. They are subjects of charity, not justice.<sup>351</sup> Presumptively unable to sufficiently reason or cooperate, persons with severe disabilities, especially intellectual disabilities, are largely excluded from political conceptions of the person. (In)famously, the heteronomy and dependence of persons with severe disabilities has been leveraged to advocate for the better treatment of nonhuman animals, since such

347 See *infra* Parts IV.C, IV.D.

348 Denno, *supra* note 316, at 359. Denno references Wolf Wolfensberger's “dignity of risk,” which posits “a certain ‘dignity’ in allowing mentally retarded individuals to assume the same risks as nonretarded individuals.” *Id.* at 359 n.277. Dignity, framed as such, lends itself to a presumption of noninterference and thus dedifferentiation regarding the legal treatment of persons with disabilities. Sexual autonomy, as a human capability, demands positive provisions for flourishing, and thus differentiation compensating extant social inequalities, asymmetric opportunities, and accidents of birth. See NUSSBAUM, *FRONTIERS*, *supra* note 25, at 186–95.

349 See *infra* Part IV.E.

350 O'Brien, *supra* note 329.

351 See CARLSON, *supra* note 158, at 131–37 (documenting philosophers' analogizing of persons with intellectual disabilities to nonhuman animals); see also *supra* notes 161–163 and accompanying text; *supra* notes 255–258 and accompanying text.

animals may have greater cognitive function (thus more autonomous-like) than persons with severe intellectual disabilities.<sup>352</sup>

From the other direction, several disability scholars and feminist theorists have posited that autonomy is a mistaken aspiration, devaluing or disavowing our dependence on others and the relational constitution of our selves and identities.<sup>353</sup>

However, as we have shown, a concept of autonomy that thins the character requirements and thickens the choice and choice structure requirements invites some persons with disabilities back into autonomy's domain. Sexual autonomy as an aspiration—the capability to codetermine sexual relations—is normatively and descriptively discrete from autonomy postulated as a presocial trait of the human. This sexual autonomy is inclusive of people across a wider spectrum of ability.

## **B. Reforming Sexual Assault Law (for Persons with Disabilities): Three Possibilities**

Below we offer three statutory reforms to protect and promote the sexual autonomy of persons (with disabilities): the interjection of affirmative consent into Connecticut sexual assault law; the expansion of proscribed sex across certain status relations; and sociopolitical accommodations—access, education, and assistance—to facilitate sex.

### **1. Furbishing Consent**

The controversy surrounding *Fourtin* and the defanged legislative reform that followed revealed that the “physical helplessness” and “mentally defective” subsections of the

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352 For a critique of the comparison between animality and disability, see CARLSON, *supra* note 158, at 137–61; *see also* PETER SINGER, *ANIMAL LIBERATION* (2009).

353 *See, e.g.*, FINEMAN, *supra* note 169; KULICK & RYDSTRÖM, *supra* note 27, at 281; Garland-Thompson, *supra* note 333, at 21 (“An equality model of feminist theory sometimes prizes *individualistic autonomy* as the key to women’s liberation. A feminist disability theory, however, suggests that we are better off learning to individually and collectively accommodate bodily limits and evolutions than trying to eliminate or deny them.”); Russell Shuttleworth, *Critical Research and Policy Debates in Disability and Sexuality Studies*, 4 *SEXUALITY RES. & SOC. POL’Y* 1, 5 (2007); Siebers, *supra* note 27, at 38 (“[D]isabled people experience sexual repression, possess little or no sexual autonomy, and tolerate institutional and legal restrictions on their intimate conduct.”); Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN’S L.J.* 149, 159–61 (2000); *see also* NEDELSKY, *supra* note 25, at 118–27 (rehearsing and critiquing feminist interventions against autonomy).

sexual assault statutes leave persons with disabilities virtually unprotected<sup>354</sup> by law. Left unexamined, however, were the *general* sexual assault statutes historically reserved for able-bodied, able-minded, adult victims. These statutes retain a force (or threat of force) requirement. If the touchstone of sexual assault (in Connecticut and other states) were consent, not force, might Fourtin have been successfully convicted under the general statute? What if the law treated L.K. like a woman, not an (almost-but-not-quite) invalid? What if the law recognized unwanted sex, not just forced sex, as sexual assault?

Pressured by feminist and liberal legal advocates since the 1970s, states have eliminated the most affrontingly sexist elements of conventional rape law (e.g., the “utmost resistance” requirement, the marital rape exemption, the corroboration requirement, and so forth).<sup>355</sup> And since the 1980s, feminist legal activism and scholarship have helped shift the national conversation around sexual assault away from determinations of force and toward expressions of consent.<sup>356</sup> In some jurisdictions, resistance and force requirements have been relaxed or excised, replaced by nonconsent requirements.<sup>357</sup> However, as with the replacement of “mentally defective” with “mentally incapacitated” in Connecticut General Statute § 53a-71(a)(2),<sup>358</sup> the statutory substitution of force with nonconsent may be a codified distinction without a material difference: juries and judges rely on evidence of resistance as proof of nonconsent.<sup>359</sup>

Consent is all but nonexistent in the Connecticut Penal Code of sexual offenses. The only subsection that criminalizes sexual conduct solely on the basis of nonconsent is

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354 Or overprotected. *See generally* Denno, *supra* note 316.

355 *See supra* notes 33–35 and accompanying text; *see also* Jennifer A. Bennice & Patricia A. Resick, *Marital Rape: History, Research, and Practice*, 4 *TRAUMA VIOLENCE & ABUSE* 228 (2003); Chamallas, *supra* note 34; Falk, *supra* note 300; Anna Scheyett, *Marriage is the Best Defense: Policy on Marital Rape*, 3 *AFFILIA: J. WOMEN & SOC. WORK* 8 (1988); Schwartz, *supra* note 300.

356 *See* CARINGELLA, *supra* note 38, at 14–15. *But see* SCHULHOFER, *supra* note 24, at 29–32 (observing that some feminist legal activists focused on expanding the meaning of “force” in sexual assault offenses while others focused on eliminating or diminishing the force requirement).

357 CARINGELLA, *supra* note 38, at 76.

358 *See supra* notes 323–326 and accompanying text.

359 *See* CARINGELLA, *supra* note 38, at 106–07; *see also* Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Abuse of Power*, 18 *MICH. J. GENDER & L.* 147, 156–60 (2011). In Connecticut, while “lack of consent” has been read into the force element of sexual assault, *see, e.g.*, *State v. Smith*, 554 A.2d 713 (Conn. 1989), the state court also made clear that, absent force, passiveness, *id.* at 718, and silence, *id.* at 717, register as consent. *See infra* note 362.

Connecticut General Statute § 53a-73a(a)(2): “a person is guilty of sexual assault in the fourth degree when: (2) such person subjects another person to sexual contact without such other person’s consent.” This subsection is hardly exercised by the state; when it is, it is used to reach comparatively less serious assaults like an unsolicited grope at a bar.<sup>360</sup> Of the 175 sexual assault cases that reached the Connecticut Appellate Court from 2010–2015, only six involved sexual assault in the fourth degree for unconsented-to sexual contact.<sup>361</sup>

The statutes that “count”—first, second, and third degree sexual assault—criminalize sexual conduct that involves: the use and/or threat of force<sup>362</sup> (including force involving weapons<sup>363</sup>), the infliction of bodily injury,<sup>364</sup> and victims deemed unable to consent<sup>365</sup> (including due to status restrictions).<sup>366</sup> Inability to consent and nonconsent are non-equivalent; the former focuses on a categorical distinction, the latter on relational conduct.

Over the past couple of decades, liberal and feminist legal scholars and advocates have proposed an “affirmative consent” standard for sexual assault law (and for university sexual misconduct codes).<sup>367</sup> An affirmative consent standard rejects force, resistance, and

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360 Interview with Susann E. Gill, *supra* note 316; *see also supra* note 314.

361 *Shefelbine v. Comm’r of Corr.*, 90 A.3d 987 (Conn. App. Ct. 2014); *State v. Jesse H.*, 78 A.3d 228 (Conn. App. Ct. 2013); *State v. White*, 55 A.3d 818 (Conn. App. Ct. 2012); *State v. McLaren*, 15 A.3d 183 (Conn. App. Ct. 2011); *State v. McGee*, 4 A.3d 837 (Conn. App. Ct. 2010); *State v. Calvin N.*, 998 A.2d 810 (Conn. App. Ct. 2010). For our analysis of these 175 cases, *see infra* notes 405–413.

362 CONN. GEN. STAT. ANN. §§ 53a-70(a)(1) (West 2012), -70b(b) (West 2015), -72a(a)(1)(A)(B) (West 2012). In *State v. Smith*, 554 A.2d 713, the Connecticut Supreme Court held “lack of consent” to be an element of the crime of sexual assault in the first degree. However, while a “finding that a complainant had consented would implicitly negate a claim that the actor had compelled the complainant by force or threat to engage in sexual intercourse,” *id.* at 717, “it is clear that a defendant must either use force or threaten its use by words or conduct that would reasonably generate fear of physical injury,” *id.* at 718. Thus, in *Smith*, the gravamen is not the fact that the complainant “expressly declined [Smith’s] advances,” but that Smith made a “statement she could reasonably have regarded as a threat of physical injury.” *Id.* For clarification on the requisite mens rea regarding lack of consent for sexual assault offenses, *see Efstathiadis v. Holder*, 119 A.3d 522 (Conn. 2015).

363 CONN. GEN. STAT. ANN. §§ 53a-70a(a)(1) (West 2012), -72b(a) (West 2012).

364 CONN. GEN. STAT. ANN. § 53a-70a(a)(2)(3) (West 2015).

365 *See supra* Parts III.A, III.B.

366 *See infra* notes 398–402 and accompanying text.

367 *See* SCHULHOFER, *supra* note 24, at 283; *see also* CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 246–47 (2005) (“Requiring affirmative consent . . . is an improvement over existing law, but can be polluted by inequality . . . . If force were defined to include inequalities of power, meaning social hierarchies, and consent

nonconsent thresholds, and instead requires evidence—a verbal or nonverbal, non-coerced indication of agreement—in order for sexual activity to be rendered non-criminal (or not in violation of university policy).<sup>368</sup> A nonconsent requirement, although preferable to proof of resistance or force, may render permissible sex which is unagreed to, acquiesced to, or pursued with persons that are silent and/or frozen in fear. Saying “no” is not as easy as one might think,<sup>369</sup> and many victims believe that expressed refusal will further endanger them.<sup>370</sup> By requiring minimal evidence of positive agreement one degree above acquiescence, an affirmative consent standard may better track a subject’s participation in codetermining his sexual relations.

How might the introduction of an affirmative consent standard impact the outcome of cases like *Fourtin*? When Fourtin was charged under statute subsections that required a finding of “physical helplessness” to demonstrate an inability to communicate nonconsent, the question of law became not whether L.K. consented to (let alone desired)<sup>371</sup> sexual contact, but rather whether L.K.’s disabilities rendered her incompetent. If the gravamen of sexual assault were the absence of affirmative consent rather than the victim’s incapacity

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were replaced with a welcomeness standard, the law of rape would begin to approximate the reality of forced and unwanted sex.”); Joan McGregor, *Why When She Says No She Doesn’t Mean Maybe and Doesn’t Mean Yes: A Critical Reconstruction on Consent, Sex, and the Law*, 2 LEGAL THEORY 175 (1996); Schwartz, *supra* note 300, at 592–95; *see generally* YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE (Jaclyn Friedman & Jessica Valenti eds., 2008).

368 SCHULHOFER, *supra* note 24, at 283; *see, e.g.*, WIS. STAT. ANN. § 940.225(4) (West 2013) (“‘Consent,’ as used in [the sexual assault offenses] means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”); *see also* Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL’Y & L. 287, 329 (1997) (advocating an affirmative consent standard for sex with minors). On the insertion of affirmative consent in university sexual misconduct codes, *see, e.g.*, Melanie Boyd & Joseph Fischel, *The Case for Affirmative Consent (Or, Why You Can Stop Worrying That Your Son Will Go To Prison For Having Sex When He Gets To College)*, HUFFINGTON POST (Dec. 17, 2014, 9:48 AM), [http://www.huffingtonpost.com/melanie-boyd/the-case-for-affirmative-consent\\_b\\_6312476.html](http://www.huffingtonpost.com/melanie-boyd/the-case-for-affirmative-consent_b_6312476.html) [<http://perma.cc/BH5Z-2STD>].

369 *See, e.g.*, Celia Kitzinger & Hannah Frith, *Just Say No? The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal*, 10 DISCOURSE & SOC’Y 293, 295–99 (1999).

370 *See, e.g.*, Schwartz, *supra* note 300, at 566–82. *But see* Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in FEMINISTS THEORIZE THE POLITICAL 385, 385 (Judith Butler & Joan W. Scott eds., 1992) (arguing that feminist rehearsals of rape trauma may re-inscribe the injuries they are deployed to offset).

371 Some feminist law scholars reject consent as a legal metric for adjudicating sexual harm. For an eloquent if ultimately authoritarian defense of “pleasure” as the organizing principle for feminist legal advocacy, *see* West, *supra* note 353.

to communicate nonconsent, Fourtin's misconduct might have been more readily recognizable. No party, at any proceeding, ever claimed the sex was consensual, or that L.K. expressed interest in the sex (although at trial Fourtin initially claimed never to have had sexual contact with L.K.).<sup>372</sup>

Many debate<sup>373</sup>—and some lampoon<sup>374</sup>—the legal criteria for affirmative consent. We will not rehearse that debate here, but note that in sexual scenarios involving persons with intellectual disabilities, affirmative consent may register more precisely under law than in (garden-variety) sexual scenarios involving persons without disabilities. L.K. after all, has a message board with the words “Yes” and “No” imprinted on it.<sup>375</sup> In their monograph on disability and sexual assistance, Don Kulick and Jens Rydstrom document “plan of action” contracts caretakers draft to help their disabled clients masturbate (the placing of sex aids, the positioning of pillows, duration of time to leave client alone, and other variables to be determined *in medias res*).<sup>376</sup> These contracts specify in advance the sexual activities disabled clients wish to pursue and set parameters for caretaker assistance.<sup>377</sup> Designated to facilitate masturbation, such plans of actions are adaptable to sexual contact between

372 Interview with Susann E. Gill, *supra* note 316.

373 See, e.g., CARINGELLA, *supra* note 38, at 75–95; David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 400–11 (2000); Judith Shulevitz, *Regulating Sex*, N.Y. TIMES, Jun. 27, 2015, [http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?\\_r=0](http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?_r=0) [<http://perma.cc/P2F6-NHBE>].

374 See, e.g., Chappelle's Show, *Love Contract*, COMEDY CENTRAL (Feb. 11, 2004), <http://www.cc.com/video-clips/jwmxvd/chappelle-s-show-love-contract> [<http://perma.cc/5PAS-HWX8>]; see also Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES, Nov. 15, 2014, <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<http://perma.cc/B4ZY-PM8K>] (“Under this definition [of sexual consent at Yale University], a person who voluntarily gets undressed, gets into bed and has sex with someone, without clearly communicating either yes or no, can later say—correctly—that he or she was raped. This is not a law school hypothetical. The unambiguous consent standard requires this conclusion.”). Rubenfeld's assertions here are plainly wrong, not least because a violation of a university's sexual misconduct code and a violation of state criminal code (rape) are nonequivalent. Moreover, Rubenfeld's adverbial “voluntarily” seems to token the affirmative consent he decries. See Boyd & Fischel, *supra* note 368.

375 *State v. Fourtin*, 52 A.3d 674, 691 n.7 (Conn. 2012) (Norcott, J., dissenting) (“The communication board utilized by the victim contains numerous words, such as emotions, persons' names, ‘yes’ and ‘no,’ and icons to which she can point in order to express her needs and desires, such as hunger, thirst and the need to use the toilet.”). An affirmative consent standard sounds with the first prong of Boni-Saenz' three-pronged test to determine the sexual decision-making ability of persons with cognitive impairments: “the capacity to express volition.” Boni-Saenz, *supra* note 15, at 1234.

376 KULICK & RYDSTRÖM, *supra* note 27, at 105–08. For a more detailed discussion of Kulick and Rydstrom's brief for sexual assistance for persons with disabilities, see *infra* Part IV.E.3.

377 KULICK & RYDSTRÖM, *supra* note 27, at 107.



disabled persons or between disabled and nondisabled persons, and could be criterial for, if not dispositive of, affirmative consent.

An affirmative consent standard for sexual assault also resonates with Denno's "contextual approach" for determining consent, as well as with her suggestion to dedifferentiate sexual assault law for persons with disabilities.<sup>378</sup> The contextual approach accounts for various situational and circumstantial criteria of the sexual encounter,<sup>379</sup> so too, what will count as "affirmative consent" will depend on particularities. A "yes" procured through threats is not affirmative consent.<sup>380</sup> If a person with intellectual disabilities smiles in response to all social interactions, however injurious, surely affirmative consent will require more than a smile.<sup>381</sup> Because the "affirmative" component of affirmative consent can and should be tailored, the standard reaches persons with intellectual disabilities who thus no longer need be outcast into "statutory isolation."<sup>382</sup> Dedifferentiating disability in sexual assault law minimizes the potential for under-protection (not helpless enough) and over-protection (always already incapable of consent), while remedying the codified entrenchment of social stigma and marginality.<sup>383</sup>

However, an affirmative consent standard—in combination with greater restrictions on sex in relations of dependence and trust, delineated below—may better hedge against the moralistic, gendered policing Denno admonishes than Denno's own contextual approach.<sup>384</sup> Her "situational factors," for example, include "the number of men" involved in the sexual encounter.<sup>385</sup> But if "number of men" is a legitimate factor in judges' and juries' considerations of consent, then perhaps roughness or kink might be legitimate factors too,

378 Denno, *supra* note 316, at 355–58; *see supra* notes 336–349 and accompanying text.

379 Denno, *supra* note 316, at 355–59.

380 *See* Fischel, *supra* note 267, at 324; SCHULHOFER, *supra* note 24, at 114–36.

381 *See* Denno, *supra* note 316, at 387–89; *see also* Appel, *supra* note 328, at 153 ("All smiles, of course, do not betoken consent. Yet rather than enforcing a restriction that is over-inclusive . . . caregivers of institutionalised individuals should evaluate smiles and other forms of non-verbal and indirect assent in the context of the patient's life.").

382 Denno, *supra* note 316, at 343.

383 *Id.* at 376; *see also* NANCY MAIRS, *WAIST-HIGH IN THE WORLD: A LIFE AMONG THE NONDISABLED* 59 (1997) (discussing ways persons with disabilities are literally, not just figuratively, marginalized from society).

384 Denno, *supra* note 316, at 355–60.

385 *Id.* at 374 (enumerating an appellate court's criteria to determine the victim's capacity in the "Glen Ridge Rape Case").

and juries could well end up terming non-normative sex nonconsensual, repeating the very one-over Denno exposes as too often governing inquiries of “mental defectiveness.”<sup>386</sup> “Situational factors” may too easily slip into ableist/erotophobic societal mores, while affirmative consent may just as effectively regulate coercive or unwanted sex.<sup>387</sup>

A last note on the irony of “furbishing consent” in an Article titled “Disabling Consent”: By speculating on the injection of an affirmative consent standard into the general sexual assault statutes of the Connecticut Sex Offenses, we do not equate sexual autonomy with sexual consent.<sup>388</sup> As discussed above, sexual autonomy, relationally reconceived, is attentive to broader social and material opportunities for the realization of intimate and sexual choices, and thus irreducible to first person present active consent, no matter how freely given, affirmative, or enthusiastic. Furbishing consent in sexual assault law is but one possible reform for better protecting and encouraging the sexual autonomy of persons across the spectrum of ability. Below are two more.

## 2. Capturing Status

No matter how (re)furbished, consent is not synonymous with nor solely constitutive of sexual autonomy, now relationally defined and inclusive of persons historically ejected from autonomy’s ambit.

Another compensatory reform, then, to the gap in sexual assault protections for severely disabled persons is the expansion of laws to regulate or criminalize sexual conduct within certain relationships of dependence unaddressed by extant status restrictions. Status restrictions are, for the most part, strict liability offenses unconcerned with intent, scienter, consent, etc. Sex otherwise consensual may nonetheless be impermissible under per se proscriptions.

Status restrictions on sexual relations are neither unprecedented nor uncommon: assault laws frequently contain provisions restricting or prohibiting sexual contact within

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386 *Id.* at 350 (“[C]ourts’ pretense of a societal moral consensus [recognition of which may serve as the metric for an intellectually disabled person’s mental capacity] encourages judges and juries to determine consent not on the basis of facts and law but rather on the basis of their moral view of the world.”).

387 For a similar criticism of Denno’s remedy, see Boni-Saenz, *supra* note 15, at 1221, 1244. However, under our reconstructed principle of sexual autonomy, not all consensual kinky or rough sex may be legally permissible. See *supra* notes 266–268 and accompanying text; *infra* note 417 and accompanying text.

388 See *supra* Part I.C.

particular relationships.<sup>389</sup> These status restrictions include provisions restricting sexual conduct between parents and their children, teachers and their students, employers and their employees, and/or doctors and their patients.<sup>390</sup> Laws regulating sex within family relationships (often codified as “incest”) commonly target consanguinity or biological relation over power inequality.<sup>391</sup> Laws regulating sex between teachers and students are premised on both the alleged immaturity of minors<sup>392</sup> and the likelihood of coercion or manipulation.<sup>393</sup> Age of consent statutes, perhaps the most widespread example of status restriction codifications, are generally understood to concern both the uneven social power dynamics between adults and minors as well as the presumptively limited developmental capacity of young people.<sup>394</sup> At their best, status restrictions track manipulations of relational dependence. Status restrictions reflect that there are certain professional, familial, and other social relationships in which one subject is disqualified from processes of sexual

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389 *Id.*

390 *Id.*

391 *See, e.g.*, D.C. CODE § 22-1901 (2013) (“If any person in the District related to another person within and not including the fourth degree of consanguinity . . . shall marry or cohabit with or have sexual intercourse with such other so-related person, knowing him or her to be within said degree of relationship, the person so offending shall be deemed guilty of incest.”); IND. CODE § 35-46-1-3 (2013) (“A person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when the person knows that the other person is related to the person biologically . . . commits incest.”). Some states, like Connecticut, also criminalize sexual contact between certain family members unrelated by blood, like stepparents and stepchildren. CONN. GEN. STAT. ANN. §§ 53a-71(a)(4) (West 2012), -73a(a)(1)(A)(B) (West 2012). *See infra* notes 396–404 and accompanying text.

392 In Connecticut, status restrictions on employer-employee sex release when the employee is eighteen or older. CONN. GEN. STAT. ANN. § 53a-71(a)(10) (West 2012). Some (but not all) restrictions on teacher-student and coach-student relations release when the student reaches the age of majority. CONN. GEN. STAT. ANN. § 53a-71(a)(9) (West 2012) (“A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . the actor is a coach in an athletic activity or a person who provides intensive, ongoing instruction and such other person is a recipient of coaching or instructions from the actor and . . . is a secondary school students and receives such coaching or instruction in a secondary school setting, or . . . is under eighteen years of age.”).

393 *See, e.g.*, SCHULHOFER, *supra* note 24, at 195–201; *see also infra* note 395.

394 *See, e.g.*, Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703 (2000). Oberman also argues that age of consent laws are necessary to check *peer* coercive or unwanted sex. *Id.* at 717–28, 775–78. For less paternalistic proposals to reach *peer* coercive or unwanted sex, *see*, for instance, Fischel, *supra* note 267, at 300–31; Phipps, *supra* note 75, at 438–40.

negotiation due to acute dependence and/or inequality (e.g., psychotherapists, high school coaches, aunts, and uncles).<sup>395</sup>

Like other states, Connecticut criminalizes sex not only between adults and minors<sup>396</sup> (and between older adolescents and younger adolescents/children),<sup>397</sup> but also within specified relations of dependence. Connecticut currently imposes restrictions of differing degrees of severity on relationships between parents/guardians and their children,<sup>398</sup> custodial supervisors (in the justice system, hospitals, and other institutions) and their charges,<sup>399</sup> psychotherapists and their patients,<sup>400</sup> school employees and students,<sup>401</sup> coaches and players at the secondary school level,<sup>402</sup> and employers and employees—if the employer is twenty-years-old or older, and the employee is under eighteen.<sup>403</sup> Sexual contact is also limited among familial relatives, along kinship lines stipulated in Connecticut General Statute § 46b-21.<sup>404</sup>

But are these restrictions sufficient? Or to put this differently: how often do perpetrators of sexual assault “look” like Richard Fourtin—the mother’s boyfriend, an informal caretaker, a person of trust? Might prevalence of sexual abuse within heretofore unregulated relations of dependence be grounds for proscription?

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395 On what sorts of relations of dependence might be reasonably subject to heightened regulations on sex, and why, see SCHULHOFER, *supra* note 24, at 168–253; see also Fischel, *supra* note 267, at 318.

396 CONN. GEN. STAT. ANN. § 53a-70(a)(2) (West 2015).

397 CONN. GEN. STAT. ANN. §§ 53a-71(a)(1), -73a(a)(1)(E) (West 2012).

398 CONN. GEN. STAT. ANN. §§ 53a-71(a)(4), -73a(a)(1)(A)(B) (West 2012).

399 CONN. GEN. STAT. ANN. §§ 53a-71(a)(5), -73a(a)(1)(F) (West 2012).

400 CONN. GEN. STAT. ANN. §§ 53a-71(a)(6), -73a(a)(4) (West 2012).

401 CONN. GEN. STAT. ANN. §§ 53a-71(a)(8), -73a(a)(6) (West 2012).

402 CONN. GEN. STAT. ANN. §§ 53a-71(a)(9), -73a(a)(7) (West 2012).

403 CONN. GEN. STAT. ANN. §§ 53a-71(a)(10), -73a(a)(8) (West 2012).

404 Connecticut General Statute § 53a-72a(a)(2) prohibits sexual intercourse between persons who know that they are related within any of the following degrees: parent, grandparent, child, grandchild, sibling, parent’s sibling, sibling’s child, stepparent, or stepchild. CONN. GEN. STAT. ANN. § 53a-72a(a)(2) (West 2012).

### a. Capturing Status by the Numbers

To track patterns of sexual violence within relations of dependence, we reviewed, coded, and analyzed all sexual assault cases heard by the Connecticut Appellate Court between January 1, 2010, and March 1, 2015: a dataset of 175 cases and 205 unique victims.<sup>405</sup> The results confirm research on sexual assault incidence more generally, which suggests that about 80% of sexual assaults are committed by someone known to the victim<sup>406</sup>—a number that rises to over 90% for victims who are minors when assaulted.<sup>407</sup> Of all victims whose connection to the perpetrator is described in the respective case (n = 161), 87.0% had a prior, established relationship with the perpetrator, and 72.0% had a relationship that could be classified as involving significant dependence and/or power imbalance.<sup>408</sup> Sex within some of these relationships is already prohibited in Connecticut—for example, sex between fathers and their children, or sex between a teacher or coach and their students.<sup>409</sup> In other relationships, though, manipulations of power and dependence may go unchecked.

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405 Cases were extracted from a LexisNexis search on March 1, 2015. An initial search yielded 214 unique cases heard by the Connecticut Appellate Court between January 1, 2010 and March 1, 2015, all of which contained the phrase “sexual assault.” Of these, 39 appeals were excluded from analysis: they were duplicate cases or appeals of jury trials that referenced “sexual assault” but sexual assault was immaterial to the issue of law. The remaining 175 cases were coded and analyzed. 9.1% of cases involved multiple victims, resulting in a total victim count of 207. For a more extensive overview of case data, see *infra* Appendix.

406 MICHAEL PLANTY ET AL., U.S. DEP’T OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010 4 (2013).

407 HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS, NAT’L CTR. FOR JUVENILE JUSTICE 10 (2000).

408 The following relationships were classified as “involving significant dependence and/or power imbalance” for this analysis: intimate relationships (spouse, former spouse, partner, former partner), familial and semi-familial relationships (father, uncle, grandfather, other family member, other legal guardian, stepfather, mother’s boyfriend/intimate partner), caretaking relationships (babysitter, teacher or coach, other caretaker), coworker/employer, and client (for sex workers).

409 See, e.g., CONN. GEN. STAT. ANN. § 53a-73a (West 2012).

**Table 1: Most Common Perpetrator/Victim Relationships,  
Connecticut Appellate Court Sexual Assault Cases, 2010–2015<sup>410</sup>**

	#	% of total (n = 205)	% of total, excl. “relationship not specified” (n = 161)
Father	28	13.7%	17.4%
Mother’s boyfriend/partner	24	11.7%	14.9%
Stranger	15	7.3%	9.3%
Uncle	11	5.4%	6.8%
Stepfather	9	4.4%	5.6%
Family friend	8	3.9%	5.0%
Other personal acquaintance	8	3.9%	5.0%
Grandfather	7	3.4%	4.3%
Spouse	6	2.9%	3.7%
Other family member	5	2.4%	3.1%
Other known adult	5	2.4%	3.1%

Although fathers—the most common perpetrators in this set—are prohibited by status restriction from engaging in sexual contact with their children, mothers’ boyfriends, and unmarried partners of parents generally, are not (our dataset contained only one female perpetrator).<sup>411</sup> The statutory focus on fathers rather than unmarried parents’ partners as potential perpetrators (even when the partner cohabits with the mother and maintains a parental household role)<sup>412</sup> seems, superficially, commonsensical: the relationship involves

410 See *infra* Appendix, Tbl.A.3 for a complete review of all relationships between perpetrators and victims.

411 See *State v. Lanasa*, 62 A.3d 572 (Conn. App. Ct. 2013) (involving the assault of a fifteen-year-old boy by his high school classmate’s mother); *supra* note 404. There are limited data on the prevalence of female perpetration of sexual assault. Research indicates that female perpetration of sexual assault is underreported, in part due to gendered stereotypes that construe perpetration as male and victimhood as female, and in part due to the legacy of rape laws that required penetrative, heterosexual intercourse as an element of the crime. See, e.g., CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, FEMALE SEX OFFENDERS (2007). Despite our highlighting the frequent offending of fathers and mothers’ boyfriends, the expanded status restrictions that we propose would apply to perpetrators and victims of all genders.

412 Cohabitation with an unmarried intimate partner is increasingly common in the United States, where the rates of unmarried parenthood (24% in 2013, compared to less than 10% in 1960) have increased as rates of marriage have fallen (close to 70% in 1960, compared to 50.5% in 2012). See Andrew L. Yarrow, *Falling Marriage Rates Reveal Economic Fault Lines*, N.Y. TIMES, Feb. 6, 2015, <http://www.nytimes.com/2015/02/08/fashion/weddings/falling-marriage-rates-reveal-economic-fault-lines.html> [http://perma.cc/KL75-Z8J7]; Emily Badger, *The Unbelievable Rise of Single Motherhood in America over the Last 50 Years*, WASH. POST, Dec. 18, 2014, <https://www.washingtonpost.com/news/wonk/wp/2014/12/18/the-unbelievable-rise-of-single-motherhood-in-america-over-the-last-50-years/> [http://perma.cc/36RU-4ARV]. Given this trend—whereby mothers’ boyfriends may inhabit transient or permanent paternal roles, cohabiting in ways that involve financial and emotional resource-sharing similar to marital cohabitation—the incongruity in status restrictions between mothers’ boyfriends (unmarried parents’ partners) and spouses/parents is anachronistic.

neither consanguinity nor a formal, legal relationship of dependence. As shown in Table 1, though, mothers' boyfriends may perpetrate sexual assault at close to the same rate as fathers: they are the second most common perpetrators in our case review (accounting for 14.9% of assaults across appellate cases in which the relationship between victim and perpetrator is specified, compared to 17.4% for fathers). Uncles, also common perpetrators (6.8%), are prohibited from sexual contact with their nephews and nieces, but only by consanguinity.<sup>413</sup> An uncle by blood faces status restrictions on sexual contact with his niece or nephew, but an uncle by marriage (or an aunt's live-in boyfriend) does not.<sup>414</sup> These legal discrepancies—or what we might crudely call “the green light” for mother's boyfriends and uncles—demonstrate the failure of existing status restrictions to capture common manipulations of relational dependence.

If, in the interest of protecting and promoting sexual autonomy, we shift from a model of status restrictions based on age and consanguinity (or legal affinity, e.g. relatives “by marriage” rather than “by blood”) to a model based on significant dependence and inequality, other relationships may be regulable. Sexual autonomy might provide normative grounds to restrict, for example, sexual contact between a young woman and her mother's boyfriend, as the young woman may be unduly impeded from codetermining (in the *Fourtin* scenario, exiting) the relation despite the absence of a formal (legal or consanguine) relationship.

Recall Rubinfeld's second seventeen-year-old (pressured into sex with the high school principal)<sup>415</sup> and Spindelman's cannibalistic sex.<sup>416</sup> We are inclined to think of sex in heretofore legally unregulated relations of dependence (namely, the child of a parent and the parent's intimate partner) like sex between a teenage student and a high school teacher, or, strange-sounding as it first seems, sex that entails killing, eating, or causing severe and irreversible injury to one's partner. Under a relationally reconstructed sexual autonomy sensor, sex with your mother's boyfriend, sex with your high school principal, and sex that involves irreversible injury may be impermissible because of the permanent constraints they level on an individual's (sexual) future, and therefore her ongoing ability to codetermine sexual relations.<sup>417</sup> Relational sexual autonomy protects not just the sexual

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413 See *supra* note 404.

414 *Id.*

415 See *supra* notes 81–83 and accompanying text.

416 See *supra* notes 103–106 and accompanying text.

417 See *supra* notes 264–269 and accompanying text. *But see* Downing, *supra* note 268. In a similar vein, Sarah Conly argues that the state ought to prevent persons from engaging in forms of conduct that contravene

present but the possibility of a sexual future. And capturing status relations, as opposed to extending the reach of “physical helplessness” or “mental incapacity,” renders sex between Richard Fourtin and L.K. impermissible, without the risk of criminalizing all sex with persons with disabilities.

Viewed alongside our appellate case review, *Fourtin* appears both exceptional and typical. Exceptional, because the statutes under which Fourtin was charged—those that reference physical helplessness—are so infrequently exercised by the state<sup>418</sup> and because reported assault cases rarely involve victims with identified disabilities.<sup>419</sup> Typical, though, because the relationship between Richard Fourtin and L.K. was one of significant dependence and power imbalance due to Fourtin’s dual roles as L.K.’s mother’s boyfriend and one of L.K.’s informal caretakers.<sup>420</sup> A recurring theme across witness and expert testimonies in and preceding *Fourtin* is L.K.’s significant dependence on others in her day-to-day life, including on Fourtin himself.<sup>421</sup> As disabled persons living in a

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their own best interests. However, she claims her advocacy for (selective, consequentially justified) coercive paternalism counters the normative and cultural primacy of autonomy. But insofar as “a coercive action might protect an individual’s freedom in the long run,” her critique against the conventional understanding of autonomy might buttress our reconstruction. SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* 151 (2013).

418 Only one of the 175 appellate cases we surveyed involves a charge under Connecticut General Statute § 53a-71(a)(3), the “physically helpless” standard. *See State v. Joseph*, 93 A.3d 1174 (Conn. App. Ct. 2014). Another involves Connecticut General Statute § 53a-71(a)(2), the former “mentally defective” standard, now the “impaired because of mental disability or disease” standard. *See State v. Dickerson*, 97 A.3d 15 (Conn. App. Ct. 2014).

419 Only three of the 175 appellate cases we surveyed involve a victim whose disability is referenced in court documents. In all three cases, the perpetrator was aware of the victim’s disability. *See State v. Carolina*, 69 A.3d 341 (Conn. App. Ct. 2013) (involving the assault of a teenage girl with unidentified “cognitive disabilities” by her non-biological uncle); *State v. Dearing*, 34 A.3d 1031 (Conn. App. 2012) (involving the assault of a nine-year-old girl with “pervasive developmental disorder not otherwise specified” by an adult family friend); *Di Teresi v. Stamford Health Sys., Inc.*, 63 A.3d 1011 (Conn. App. 2013) (involving the assault of a ninety-two-year-old woman with “dementia, advanced Alzheimer’s disease, Parkinson’s disease, and other ailments” by a nurse’s assistant while the victim was hospitalized at Stamford Hospital).

420 *See State v. Fourtin*, 982 A.2d 261, 263 (Conn. App. Ct. 2009) (“The defendant, who was the boyfriend of the complainant’s mother, lived nearby. He frequently assisted the mother in caring for the complainant. The complainant got along with him.”).

421 *Id.* at 264 (“She cannot walk and needs assistance in performing the daily activities of living.”). *See also Fourtin*, 52 A.3d at 679 (“[T]he prosecutor argued that the jurors could find that she was [physically helpless] because, like an infant, [s]he is totally dependent on others.”); *id.* at 678 (noting that S. L.K.’s mother, “took her to the shower”). The Court cites similar testimony from the caregivers and supervisors at L.K.’s adult day care program, on whom she is dependent when not at home with her mother. *Id.* at 695–96 (Norcott, J.,



world compulsorily captivated by and structurally designed for the able-bodied,<sup>422</sup> L.K. and similarly-situated adults are often “radically dependent” on the assistance of those around them in order to complete tasks necessary for both survival and flourishing.<sup>423</sup> This dependence places severely disabled persons at substantially higher risk of victimization, sexual and otherwise. Research suggests that women with disabilities are approximately four times more likely than women without disabilities to experience sexual assault.<sup>424</sup> For persons with intellectual disabilities (ranging from mild to severe), risk of victimization may be even greater, approximately ten times higher than for persons without intellectual disabilities.<sup>425</sup> Comparative rates of *lifetime* risk of sexual assault do not capture the heightened risk of *repeated* victimization: in one study of persons with diverse disabilities who had experienced sexual assault, nearly half (49.6%) had experienced ten or more sexually abusive incidents in their lifetimes.<sup>426</sup>

Especially instructive are the rates at which disabled people are sexually assaulted within the context of relationships of intimacy and dependence. Dick Sobsey and Tanis Doe found that 37.5% of perpetrators held supervisory positions over their victims, contracted on the basis of the victims’ disability.<sup>427</sup> Another 28.8% of perpetrators had other

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dissenting).

422 See Robert McRuer, *Compulsory Able-Bodiedness and Queer/Disabled Existence*, in *DISABILITY STUDIES: ENABLING THE HUMANITIES* 88, 88 (Sharon L. Snyder, Brenda Jo Brueggemann & Rosemarie Garland-Thompson eds., 2002) [hereinafter McRuer, *Compulsory*]; European Disability Forum, “A world made for disabilities,” YouTube (Jan. 30, 2008), [https://www.youtube.com/watch?v=RsuKxY\\_9f\\_8](https://www.youtube.com/watch?v=RsuKxY_9f_8) [<http://perma.cc/2WZ7-AMK5>].

423 CHRISTIAN SMITH, *TO FLOURISH OR DESTRICT: A PERSONALIST THEORY OF HUMAN GOODS, MOTIVATIONS, FAILURE, AND EVIL* 248 (2015).

424 Sandra L. Martin et al., *Physical and Sexual Assault of Women with Disabilities*, 12 *VIOLENCE AGAINST WOMEN* 823, 834 (2006); see also Carri Casteel et al., *National Study of Physical and Sexual Assault among Women with Disabilities*, 14 *INJURY PREVENTION* 87, 90 (2008). For a meta-analysis of studies comparing rates of abuse among disabled and nondisabled women, see Sara-Beth Plummer & Patricia A. Findley, *Women with Disabilities’ Experience with Physical and Sexual Abuse: A Review of the Literature and Implications for the Field*, 13 *TRAUMA VIOLENCE & ABUSE* 15 (2012).

425 Carlene Wilson & Neil Brewer, *The Incidence of Criminal Victimization of Individuals with an Intellectual Disability*, 27 *AUSTRALIAN PSYCHOLOGIST* 114, 115 (1992).

426 Dick Sobsey & Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 *SEXUALITY & DISABILITY* 243, 247 (1991).

427 *Id.* at 248. For example, disability service providers (e.g., personal care attendants, psychiatrists, residential care staff) comprised 27.7% of perpetrators, specialized transportation providers 5.4%, and specialized foster parents 4.3%.

supervisory positions over the victims.<sup>428</sup> Evidence also suggests that factors associated with increased dependence, including decreased mobility and increased social isolation, are strongly predictive of experiencing sexual violence as a disabled person.<sup>429</sup> Like Anne Finger, we recognize that the trope of sexual victimization itself can be oppressive, if that trope is leveraged to categorically ban sex with, or withhold sexual information from, persons with disabilities.<sup>430</sup> Far from pointing toward a general prohibition, however, these data support expanding status restrictions to restrict or prohibit sexual conduct across relationships of dependence.

We find a host of compelling reasons, then, for expanding status restrictions in Connecticut (and beyond) to capture certain relationships of dependence for both disabled and nondisabled persons alike. However, we concede that categorical restrictions on sex between disabled persons and their caretakers could, like overextending the “physically helpless” or “mentally defective” subsections of Connecticut sexual assault law, impede the sexual autonomy of persons like L.K.<sup>431</sup> Caretakers may be the ones best equipped to act as sexual assistants for their severely disabled clients. The conundrum is this: those best able to sexually gratify persons with severe disabilities are those best positioned to abuse them (hence our proposal for expanded status restrictions).<sup>432</sup> One possible way to circumvent this conundrum is to render affirmative consent an affirmative defense within certain status relations.<sup>433</sup>

A last note on capturing status: expanding the universe of status relations in which sex is legally impermissible, like injecting an affirmative consent standard into sexual

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428 *Id.* For example, family members comprised 16.8%, paid service providers (e.g., babysitters) comprised 9.8%, and step-family members comprised 2.2%.

429 Margaret A. Nosek et al., *Disability, Psychosocial, and Demographic Characteristics of Abused Women with Physical Disabilities*, 12 VIOLENCE AGAINST WOMEN 838, 846 (2006); see also GILL, *supra* note 13, at 33–34.

430 Finger, *supra* note 329.

431 See *infra* Part III.C.

432 See *supra* note 427.

433 For a similar argument regarding sex between minors (for which affirmative consent would provide an affirmative defense), see Heidi Kitrosser, *supra* note 368, at 330–31. Of course, this solution would not solve the problem if the caretaker accused of sexual assault is the person facilitating the alleged victim’s affirmative consent. See Daniel Engber, *The Strange Case of Anna Stubblefield*, N.Y. TIMES MAG., Oct. 20, 2015, [http://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html?\\_r=0](http://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html?_r=0) [<http://perma.cc/RM2J-K4RG>]; see also Boni-Saenz, *supra* note 15, at 1239, 1245.

assault law, also sounds with Denno's "contextual approach" to determinations of sexual consent.<sup>434</sup> A critical factor under her contextual approach is "defendant's knowledge in relation to the victim's ability to consent."<sup>435</sup> Defendant's knowledge is better grounds for determining consent than, say, the "[intellectually disabled] victim's actual physical appearance while testifying," which invites prejudicial, decontextualized interpretations.<sup>436</sup> "More appropriate," advises Denno, "is a court's consideration of the *victim's relationship to the defendant*. Although the factor is important in all rape cases, it becomes a major issue in cases involving a mentally retarded victim because it bears on *whether the defendant knew or should have known that the victim was capable of consent in a particular situation*."<sup>437</sup> Our Appellate case analysis suggests that Denno is right to be concerned: in the few cases we reviewed that involved a disabled victim, the perpetrator was unambiguously aware of his victim's communicative limitations.<sup>438</sup> Richard Fourtin, like many a mother's boyfriend, knew about his girlfriend's child. At the very least, he knew L.K. was intellectually disabled, nonverbal, in a wheelchair, and isolated.<sup>439</sup> That this sort of information is more readily

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434 Denno, *supra* note 316, at 355–59; *see also supra* notes 340–345 and accompanying text; *supra* notes 378–387 and accompanying text.

435 Denno, *supra* note 316, at 371 (internal citation omitted).

436 *Id.* at 372.

437 *Id.* (emphases added) (internal citation omitted). In *State v. Dearing*, 34 A.3d 1031 (Conn. App. 2012), the defendant argued that the trial court abused its discretion by allowing the nine-year-old victim to testify, on the grounds that she was incompetent (due to her "pervasive developmental disorder not otherwise specified"). The trial court judgment was affirmed, and Dearing's claims rejected. The very "incompetence" Dearing exploited sexually, he then attempted to exploit legally.

438 *See supra* note 419. Expanding status restrictions (to reach parents' partners, or disabled persons' professional caretakers) and rendering affirmative consent an affirmative defense to sexual activity between a caretaker and a disabled client both become rather complicated—or perhaps rather uncomplicated—when the caretaker is already a long-term intimate partner (such as a spouse) of the disabled client. In these scenarios, a "contextual approach" would be presumptively favorable toward, say, the husband of the alleged victim and presumptively unfavorable toward, say, the alleged victim's mother's boyfriend. In the spring of 2015, an Iowa jury found a man not guilty of sexually assaulting his wife, an Alzheimer's patient. The jury rejected both of the prosecutor's claims: that the couple had sexual contact on the date in question and that the defendant's wife was mentally incapable of consenting to sexual activity. *See 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> [<http://perma.cc/8FSS-SJ3S>]; Tony Leys & Grant Rogers, *Rayhons: 'Truth finally came out' with not guilty verdict*, DES MOINES REG., Apr. 22, 2015, <http://www.desmoinesregister.com/story/news/crime-and-courts/2015/04/22/henry-rayhons-acquitted-sexual-abuse/26105699> [<http://perma.cc/Y7S6-UB6U>].

439 *State v. Fourtin*, 982 A.2d 261, 263 (Conn. App. Ct. 2009) ("The defendant, who was the boyfriend of the complainant's mother, lived nearby. He frequently assisted the mother in caring for the complainant. The

ascertainable in relations of dependence and trust provides further normative ammunition for proscribing sex in those relations.

### 3. Accommodating Sex

Sexual autonomy as a universal human capability portends the following policy recommendations,<sup>440</sup> but so does ableism, and the ugly history of the wide-scale denigration or outright denial of the sexuality of persons with disabilities, particularly intellectual disabilities.<sup>441</sup> Persons with disabilities have been figured—by medical experts, scientists, journalists, and cultural workers—as sexually predatory or, more often, as childlike and innocent.<sup>442</sup> Both constructs, predator and child, have authorized the refusal of sexual information to, and impeded the sexual opportunities for, persons with disabilities.<sup>443</sup> Women with disabilities have and continue to suffer disproportionate suppression of their

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complainant got along with him.”). However, perspicacity to the spectrum of ability troubles any certitude of the *Fourtin* facts: “Although the defendant was arrested in 2006, his trial was postponed because he was found incompetent to stand trial at that time. The trial commenced two years later, when he was found to have been restored to competency after a period of commitment to Connecticut Valley Hospital.” *Id.* at 263.

440 A non-policy recommendation that we do not consider but strenuously support is a shift in cultural representation. Too often, persons with disabilities are represented as either asexual or as a fetishistic subgenre. See Mollow, *supra* note 27, at 286. *But see* THE SESSIONS (Fox Searchlight 2012). The available representational trope for persons with disabilities is almost always what the late disability rights activist Stella Young termed “inspiration porn”: motivation for the rest of us (*if she can do it, I have no excuse. . .*). Stella Young, *I’m not your inspiration, thank you very much*, TEDxSYDNEY (Apr. 2014), [http://www.ted.com/talks/stella\\_young\\_i\\_m\\_not\\_your\\_inspiration\\_thank\\_you\\_very\\_much?language=en#t-7303](http://www.ted.com/talks/stella_young_i_m_not_your_inspiration_thank_you_very_much?language=en#t-7303) [<http://perma.cc/ETJ6-PGX3>]. Were sexual activity and intimacies across the ability spectrum represented benignly, or were the sexual skills of quadriplegics or persons with tracheotomies celebrated in mass media, we imagine sexual culture would be far more hospitable, creative, and pleasurable. See Siebers, *supra* note 27, at 48–50. Certainly too, transformations in material relations and institutional practices (base) would expand repertoires of representation (superstructure). See CHARLTON, *supra* note 218, at 27.

441 See, e.g., Appel, *supra* note 328; Block, *supra* note 304; Denno, *supra* note 316, at 332–59. *But see* Michel Desjardins, *The Sexualized Body of the Child: Parents and the Politics of ‘Voluntary’ Sterilization of People Labeled Intellectually Disabled*, in SEX AND DISABILITY, *supra* note 27, at 69, 73 (observing that the parents of persons with disabilities whom the author interviewed did not “asexualize” their children but were instead concerned with their children producing offspring).

442 See Mollow, *supra* note 27, at 286.

443 *Id.*; see also Denno, *supra* note 316, at 33–34; Finger, *supra* note 329. In one study, forty percent of intellectually disabled women surveyed had never received any education regarding gynecologic and/or reproductive health. C.A. Kopac, J. Fritz & R.A. Holt, *Gynecologic and Reproductive Services for Women with Developmental Disabilities*, 2 CLIN. EXCELL. NURSE PRACT. 88 (1998).

sexuality.<sup>444</sup> In the past, medical and political authorities sterilized women or otherwise curbed their sexuality, motivated by eugenic fears of social degradation.<sup>445</sup> In the present, medical and political authorities restrict the sexual lives of women with disabilities out of concern for the caretaking responsibilities and financial burdens of their potential offspring.<sup>446</sup>

Meanwhile, the modern disability rights movement, which has justifiably centralized discrimination and accommodation in notionally public vectors of housing, employment, and education, has paid scant attention to ostensibly private vectors of sex and intimacy (which are hardly private in so many scenarios involving severe disability).<sup>447</sup> And while the silence around sexuality and disability has broken in recent years, journalistic, documentarian, pornographic, scholarly, and autobiographic accounts of sex and disability generally feature persons with physical disabilities, sidestepping what might be thornier

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444 See CARLSON, *supra* note 158, at 53–83; Denno, *supra* note 316, at 334; see also KULICK & RYDSTRÖM, *supra* note 27, at 164–73; Finger, *supra* note 329.

445 See Denno, *supra* note 316, at 333–34.

446 See KULICK & RYDSTRÖM, *supra* note 27, at 164–71. This concern also manifests in “menstrual manipulation”—the use of clinical methods, like contraceptives, to alter the symptoms and experiences associated with menstruation or suppress menstruation altogether in young people with disabilities. In some cases, the young person may desire relief from menstrual inconveniences, general (such as dysmenorrhea, painful cramps, or muscle pains) and/or associated with one’s disability (such as heavy or irregular bleeding associated with certain developmental disabilities or difficulty utilizing conventional sanitary products with physical mobility limitations). However, clinical guidelines released by the American College of Obstetricians and Gynecologists and the Society of Obstetricians and Gynaecologists of Canada suggest that caretakers’ and parents’ anxieties about the complications of menstruation and disability more commonly motivate menstrual manipulation. See Y.A. Kirkham et al., *SOGC Clinical Practice Guideline: Menstrual Suppression in Special Circumstances*, 36 J. OBSTETRIC GYNAECOLOGY CAN. 915 (2014); Am. Coll. of Obstetricians & Gynecologists, *Menstrual Manipulation for Adolescents with Disabilities*, 448 ACOG COMMITTEE OPINION 1 (2009); I. Savasi et al., *Menstrual Suppression for Adolescents with Developmental Disabilities*, 22 J. PEDIATRIC ADOLESCENT GYNECOLOGY 143 (2009).

In a study conducted in Quebec, Michel Desjardins finds that parents of teenagers and young adults with intellectual disabilities persuade their children, through a host of strategies, to “elect” sterilization as the trade-off for sexual activity. Parents are foremost concerned that their children are not “capable of carrying out the role of parent.” Desjardins, *supra* note 441, at 77. In these scenarios, it is the semblance of consent, rather than incapacity to consent, that is morally (and legally) transformative. *Id.* at 80–81.

447 See KULICK & RYDSTRÖM, *supra* note 27, at 120–34; Finger, *supra* note 329; Siebers, *supra* note 27, at 43–46.

moral and philosophical questions regarding sexual flourishing for L.K. and others with intellectual disabilities.<sup>448</sup>

Reconstructing sexual autonomy as a universal human capability, avowing the nearly ubiquitous historical suppression of the sexual autonomy of persons with disabilities, and integrating recent contributions of feminist and queer disability scholarship and activism, our suggested institutional reforms constellate around three components: greater *access* for sexual information and opportunities, far more comprehensive, variably tailored *sexuality education*, and substantive provisions for sexual *assistance*.

Such reforms, it should be noted, are some steps removed from the moral urgency of L.K.'s sexual assault and the legal lacuna made manifest in *Fourtin*. Rather, these policy proposals point toward broader structural and social change that foster sexual autonomy across the spectrum of ability, while at once better equipping disabled persons in particular with sexual self-confidence and sexual decision-making capabilities.

#### a. Sexual Access

In “A Sexual Culture for Disabled People,” Toby Siebers convincingly argues that our dominant understandings of the sexual good life are shot through with ableist assumptions.<sup>449</sup> From “great sex” to beauty standards to personal and social determinants of intimacy to the propriety of “the private” for sexual conduct, our macro social norms and everyday expectations regarding sex prefigure able-bodied, rational, and reasonable persons inhabiting the amatory couple form.<sup>450</sup> It is because this concept of a “sex life”—individualized, domesticated, privatized, and oriented around a presumptively proper physicality, ability, and genital-directedness—is so tightly wound to normative ability standards that Siebers opts instead to carry a brief for “sexual culture.”<sup>451</sup> “Sexual culture”

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448 See, e.g., MAIRS, *supra* note 383; O’Brien, *supra* note 329; MURDERBALL (ThinkFilm 2005); Tim Dean, *Stumped*, in THE PORN ARCHIVES 420 (Tim Dean, Steven Ruszczycky & David Squires eds., 2014). As Kulick and Rydström put it bluntly, persons with severe disabilities, often but not always intellectual, “write no poems” (primarily referencing Mark O’Brien) and “throw no balls” (primarily referencing the rugby players of MURDERBALL, *id.*). KULICK & RYDSTRÖM, *supra* note 27, at 16. “These kinds of significantly disabled adults,” they insist, “are the ones who need the most help in exploring their sexuality.” *Id.* at 3.

449 Siebers, *supra* note 27, at 38–43.

450 See generally *id.*

451 *Id.* at 39.

is not simply a synonym for sex in public.<sup>452</sup> As Siebers explains, “the distinction between sex life and sexual culture relies not on privacy but access as defined in a disability context: sexual culture increases access for disabled people not only by breaking down the barriers restricting them from sexual locations but also by bringing sexual rights to where they live.”<sup>453</sup> For Siebers, a critical element of expanding sexual culture for persons with disabilities is broadening access, which means, in part, remapping zones of sexual permissibility and impermissibility so that the erotic worlds of persons with disabilities are not so “obnoxiously cramped.”<sup>454</sup> Access entails: affording more privacy rights to disabled persons in group homes; eliminating the “‘no sex’ policies that exist in American nursing facilities, mental hospitals, and group homes”;<sup>455</sup> providing more (or as is often the case, any) opportunities to meet sexual partners, to masturbate, and to read erotic and pornographic literature or view erotic or pornographic films;<sup>456</sup> delivering “information about sexuality[; and] . . . addressing sexual needs and desires as part of health care.”<sup>457</sup> Finally, access to sexual culture entails a right to choose what one does not want, to refuse sexual advances from caretakers.<sup>458</sup>

Making sexual culture more realizable for persons with disabilities entails approaching disability from a social welfare perspective and not simply from an antidiscrimination perspective.<sup>459</sup> If we are to guarantee a right to sexual culture, that guarantee cannot be secured through a “reasonable accommodation” particularized to one sector of social life.<sup>460</sup> Rather, greater accessibility of sexual culture will depend upon cross-sector reforms and much more significant state investment in, inter alia, transportation, healthcare, assistance

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452 However, Siebers’ essay shares intellectual and political affinity with Lauren Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547 (1998).

453 Siebers, *supra* note 27, at 39–40.

454 Berlant & Warner, *supra* note 452, at 557.

455 Appel, *supra* note 328, at 153; GILL, *supra* note 13, at 39.

456 Siebers, *supra* note 27, at 45.

457 *Id.* at 47; see also KULICK & RYDSTRÖM, *supra* note 27, at 293 (approving group home policies and practices that make sex a “legitimate and welcome topic of discussion and concern”).

458 Siebers, *supra* note 27, at 45–46; see also SCHULHOFER, *supra* note 24, at 99.

459 See Satz, *supra* note 27, at 554–68.

460 On the importance of cross-sectorial accommodation reforms for persons with (and without) disabilities, see Satz, *supra* note 27, at 541–50.

with contraception, abortion, and family planning, and in providing information about varieties of sexual conduct and intimacy arrangements.

So too, transforming sexual access entails more than minimizing physical barriers or amending group home policies. In his 1990 study of fourteen men with cerebral palsy, Russell Shuttleworth found that “the two issues that most often emerged in [his] discussions . . . were the difficulty [men] experienced in meeting social expectations of normative functioning and control and male gender role expectations.”<sup>461</sup> Shuttleworth’s informants were perceived by themselves and others as undesirable on account of their restricted mobility, speech impairments, and limited bodily control.<sup>462</sup> And his informants’ inability to fulfill “hegemonic expectations of masculinity” like “competitiveness, strength, control, endurance, and independence” rendered them unattractive and inadequate.<sup>463</sup> These observations paired with Shuttleworth’s own normative priors lead him to call for a more capacious understanding of “barriers” to access, one that includes “parents’ negative or protective attitudes, a lack of sexual negotiation models for disabled people, unattainable ideals of desirability . . . poor body image . . . among other concerns.”<sup>464</sup> Certainly, these barriers cannot be lowered or eradicated by policy changes and institutional reforms alone, but they should nonetheless be on our sexual justice radar as we seek to improve access.<sup>465</sup>

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461 Shuttleworth, *supra* note 158, at 185.

462 *Id.* at 185–88.

463 *Id.* at 189–92. “Those men, however, who did not view hegemonic masculinity as a total index of their desirability . . . could better stand rejection and . . . were able to cultivate significantly more successful sexual relationships than those who could not.” *Id.* at 190–91.

464 *Id.* at 178. Amy Swango-Wilson suggests that liberalizing parents’ and caretakers’ attitudes regarding sexuality and disability may improve the sexual lives and opportunities of their dependents. Amy Swango-Wilson, *Caregiver Perceptions and Implications for Sex Education for Individuals with Intellectual and Developmental Disabilities*, 26 *SEX & DISABILITY* 167, 172–74 (2008) [hereinafter Swango-Wilson, *Caregiver Perceptions*].

465 See Young, *supra* note 440. Kulick and Rydström criticize Shuttleworth and others for banking too much of their sexual rights agenda on access. Physical access to various sexualized spaces (e.g., dance clubs) is inadequate if not outright irrelevant for persons whose mobility and/or cognition is severely limited. And pressures of gender expectations and desirability norms endured by disabled persons may be different in degree, but not kind, from pressures endured by nondisabled persons. KULICK & RYDSTRÖM, *supra* note 27, at 19–22. While access, institutional or representational, is variably important across the spectrum of ability, surely lowering barriers should be exponential of, even if not comprehensive for, fostering the sexual autonomy of persons with disabilities. Expanding access is necessary but not sufficient.



In addition to spatial and representational transformations, meaningful access to sexual culture also demands more comprehensive sexuality education for all persons, with or without physical or intellectual disabilities.

### **b. Sexuality Education<sup>466</sup>**

A commitment to sexual autonomy—as a capability that needs to be cultivated—requires a minimal level of publicly funded comprehensive sexuality education (CSE). Below, we sketch out briefly United States CSE in its fraught political context, describe what CSE could be, and then synthesize and speculate upon ways CSE might interface with disability.

Comprehensive sexual education programs were all but rubbed out in the United States between 1981 and 2009.<sup>467</sup> Until quite recently, Abstinence Only Until Marriage (AOUM) programs dominated public schools, especially those in poorer communities.<sup>468</sup> AOUM programs were first federally funded under the Reagan Administration, and “funding for these unproven programs grew exponentially from 1996 until 2009, particularly during the years of the George W. Bush Administration, and to date Congress has funneled over one-and-a-half billion tax-payer dollars into abstinence-only-until-marriage programs.”<sup>469</sup> AOUM programs are both scientifically inaccurate and ineffective against their own success measures.<sup>470</sup> They elide or demean queer sexualities, and reproduce presumptions of male

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466 Some of this subsection has been adapted from Joseph J. Fischel, *A More Promiscuous Politics: LGBT Rights without the LGBT Rights*, in *AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT POLITICS* (Carlos Ball ed., 2016) (forthcoming).

467 See Sexuality Information and Education Council of the United States (SIECUS), *A Brief History of Federal Funding for Sex Education and Related Program*, SIECUS (2011), <http://www.siecus.org/index.cfm?fuseaction=page.viewPage&pageID=1341&nodeID=1> [<http://perma.cc/C8S9-4NPG>].

468 *Id.*; see also Michelle Fine & Sara I. McClelland, *Sexuality Education and Desire: Still Missing After All These Years*, 76 *HARV. ED. REV.* 297, 307 (2006).

469 See SIECUS, *supra* note 467.

470 *Id.*; see also Fine & McClelland, *supra* note 468, at 309–13; Patrick Malone & Monica Rodriguez, *Comprehensive Sex Education v. Abstinence-Only-Until-Marriage Programs*, 38 *A.B.A. HUM. RTS. MAG.* (2011), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_spring2011/comprehensive\\_sex\\_education\\_vs\\_abstinence\\_only\\_until\\_marriage\\_programs.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/comprehensive_sex_education_vs_abstinence_only_until_marriage_programs.html) [<http://perma.cc/SY7B-492V>].

aggression and female vulnerability.<sup>471</sup> Such programs promote not sexual autonomy but sexual incompetence and ignorance.

While the Obama Administration has relaxed the funding stranglehold of AOUM,<sup>472</sup> most publicly funded sexuality education programs remain abstinence-only or “abstinence-plus,”<sup>473</sup> and the great majority of United States teenagers either do not learn anything at all (in school) about sex or learn only that sex should be deferred.<sup>474</sup> Comprehensive sexuality education, while certainly a major improvement from AOUM, does not extend broadly or deeply enough to foster the capability to codetermine sexual relations. Some CSE programs avow and respect minority sexual orientations and provide accurate information about contraceptives, sex, reproduction, and disease.<sup>475</sup> Yet CSE programs too generally run on the

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471 See NANCY KENDALL, *THE SEX EDUCATION DEBATES* 151–223 (2013); Fine & McClelland, *supra* note 467, at 309–11; Rose Grace Grose, Shelly Grabe & Danielle Kohfeldt, *Sexual Education, Gender Ideology, and Youth Sexual Empowerment*, 51 J. SEX RES. 742, 749 (2014) (finding that “hegemonic masculinity ideology,” linked to “traditional attitudes toward women,” was significantly negatively associated with “safer contraceptive beliefs” among youth participating in a sex education program); *infra* note 430. *But see also* Sharon Lamb, Kelly Graling & Kara Lustig, *Stereotypes in Four Current Sexuality Education Curricula: Good Girls, Good Boys, and the New Gender Equality*, 6 AM. J. SEXUALITY EDU. 360, 373–74 (2011) (finding that stereotypes of male aggression and female passivity have remained but subsided in AOUM sexuality education curricula while stereotypes of girls as manipulators and temptresses have surfaced.).

472 See SIECUS, *supra* note 467.

473 Abstinence-plus education programs “aim to prevent, stop, or decrease sexual activity; however, programs also promote condom use and other safer-sex strategies as alternatives for sexually active participants. Abstinence-plus programs differ from abstinence-only interventions, which promote abstinence as the exclusive means of HIV prevention without encouraging safer sex.” K. Underhill, P. Montgomery & D. Operario, *Abstinence-plus Programs for HIV Infection Prevention in High-Income Countries*, 4 EVID.-BASED CHILD HEALTH 400, 409 (2009). *See also* KENDALL, *supra* note 471, at 7–8; Alexandra Sifferlin, *Why Schools Can't Teach Sex Ed*, TIME (2014), <http://time.com/why-schools-cant-teach-sex-ed> [<http://perma.cc/U2R8-F2AF>].

474 Sifferlin, *supra* note 473.

475 See KENDALL, *supra* note 471, at 6–7, 225–31; Sharon Lamb, *The Place of Mutuality and Care in Democratic Sexuality Education: Incorporating the Other Person*, in *SEXUALITY & YOUTH CULTURE* 29, 31–33 (Dennis Carlson & Donyell L. Roseboro eds., 2011). However, “[s]ex education that meaningfully incorporates a discussion of homosexuality, asexuality, and bisexuality is rare, especially in special education classrooms.” GILL, *supra* note 13, at 49.

“disaster prevention model”<sup>476</sup> of sexuality education, emphasizing how to delay sex and avoid pregnancy and STIs.<sup>477</sup>

Virtually nonexistent are sexuality education programs in which sexual desire is celebrated as a “force for good.”<sup>478</sup> Rarely are sex acts—what they include, why they (should) feel good, how to refuse or initiate them, how to perform them well and safely—discussed plainly and positively.<sup>479</sup> Infrequently too are the “plumbing” lessons of sexuality education taught alongside either critical interrogations of gender normativity, heteronormativity, and cultural valorizations of able-bodiedness and able-mindedness.<sup>480</sup> Nor does comprehensive sexuality education typically entail less lofty but no less important lessons regarding how to start and end relationships, how to respectfully argue with intimate partners, and how to determine and revise one’s sexual and relational values.<sup>481</sup>

CSE programs that extolled sexual pleasure and sexual safety, emphasized sexual and intimate decision-making, and assessed the force and ethicality of cultural norms would better foster sexual autonomy as a capability for all people.

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476 AL VERNACCHIO, FOR GOODNESS SEX: CHANGING THE WAY WE TALK TO TEENS ABOUT SEXUALITY, VALUES, AND HEALTH X (2014).

477 See KENDALL, *supra* note 471, at 228–33; see generally JESSICA FIELDS, RISKY LESSONS: SEX EDUCATION AND SOCIAL INEQUALITY (2008).

478 VERNACCHIO, *supra* note 476, at 10; see also GILL, *supra* note 13, at 81.

479 See, e.g., Dannielle Owens-Reid & Kristin Russo, *How to Talk to Your Gay Teen About Sex*, TIME, <http://time.com/why-schools-cant-teach-sex-ed/#how-to-talk-to-your-gay-teen-about-sex> [<http://perma.cc/2WTH-YFJF>]; Fine & McClelland, *supra* note 468, at 325–28.

480 See generally VERNACCHIO, *supra* note 476; see also Fine & McClelland, *supra* note 468, at 326; Sharon Lamb & Zoë D. Peterson, *Adolescent Girls’ Sexual Empowerment: Two Feminists Explore the Concept*, 66 SEX ROLES 703, 710 (2012); McRuer, *Disabling Sex*, *supra* note 14. Recent research suggests that sex education programs which interrogate the impact (and intersection) of gender and power on sexuality and sexual experience are five times more likely than other programs to reduce rates of STIs (including HIV) and unintended pregnancy. See Nicole A. Haberland, *The Case for Addressing Gender and Power in Sexuality and HIV Education: A Comprehensive Review of Evaluation Studies*, 41 INT’L PERSP. ON SEXUAL & REPROD. HEALTH 31 (2015); see also Editorial, *To Prevent Sexual Assault, Start Early*, N.Y. TIMES, Jul. 14, 2015, <http://www.nytimes.com/2015/07/14/opinion/to-prevent-sexual-assault-start-early.html> [<http://perma.cc/UB8G-UZ2L>] (“Researchers are also studying whether teaching students about sexual health reduces the risk of assault. Some educators believe that it does and that students should learn not just about preventing pregnancy and diseases but also about how to decide when they want to have sex and how to respect other people’s decisions.”).

481 VERNACCHIO, *supra* note 476, at 71–102; see also Lamb, *supra* note 475.

Evidently, there is nothing about such programs that are “disability-specific.” But we might think of comprehensive sexuality education (what it could be, not just what it is) as a policy reform with universal objectives (e.g., sexual literacy; cognizance of physiological development; familiarity with contraceptives, their use, and effectiveness; critical apprehension of cultural and media stereotypes around gender and sexuality; etc.) that should be differentially, sometimes individually tailored to persons across the spectrum of intellectual and physical abilities.<sup>482</sup> While we may expect all students to reach some specified threshold of sexual literacy—a threshold that should no doubt be co-determined by persons with disabilities<sup>483</sup>—reaching such objectives may require customized teaching lessons and many more resources for persons with disabilities.<sup>484</sup>

Although over the past two decades sexuality education programs have been created for and targeted to disabled audiences, they tend, as with sexuality education programs for nondisabled adolescents, to emphasize ways to minimize risk of abuse, STIs and pregnancy, rather than ways to enhance decision-making skills, to interrogate gender and ableist norms, or to experience pleasure.<sup>485</sup> And sex education, particularly for persons with intellectual disabilities, cannot be administered solely through decontextualized knowledge-banking. Because a person’s intellectual disabilities wax and wane across different social settings (depending on comfort, anxiety, newness, etc.), those with such disabilities need

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482 See E. Dukes & B.E. McGuire, *Enhancing Capacity to Make Sexuality-Related Decisions in People with an Intellectual Disability*, 53 J. INTELLECTUAL DISABILITY RES. 727 (2009); Amy Swango-Wilson, *Meaningful Sex Education Programs for Individuals with Intellectual/Developmental Disabilities*, 29 SEX & DISABILITY 113 (2011) [hereinafter Swango-Wilson, *Meaningful Sex*]; see also NUSSBAUM, FRONTIERS, *supra* note 25, at 190–91.

483 Swango-Wilson, *Caregiver Perceptions*, *supra* note 464, at 168–69 (“Current sex education courses do not utilize information identified by individuals with [intellectual disabilities] as helpful in the development of sex education programs.”); Swango-Wilson, *Meaningful Sex*, *supra* note 482, at 117–18 (finding that her intellectually disabled informants wished to learn about friendships, relationships and marriage, and “safe intimacy” from sexuality education programs. Her informants also proposed methods of knowledge acquisition, such as instructional videos and guest lecturers and insisted that caretakers receive tailored sexual education as well); Michelle A. Whitehouse & Marita P. McCabe, *Sex Education Programs for People with Intellectual Disability: How Effective Are They?*, 32 EDUC. & TRAINING MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 229, 230 (1997).

484 See NUSSBAUM, FRONTIERS, *supra* note 25, at 188, 190–91, 202.

485 See GILL, *supra* note 13, at 69–78; Poul Rohleder & Leslie Swartz, *Providing Sex Education to Persons with Learning Disabilities in the Era of HIV/AIDS: Tensions between Discourses of Human Rights and Restriction*, 14 J. HEALTH PSYCH. 601, 608 (2009) (arguing that because of educators’ preconceptions about persons’ with disabilities sexual unruliness and/or sexual vulnerability, “sexuality education . . . can be used as a means to prevent sexual expression in disabled people”); Whitehouse & McCabe, *supra* note 483, at 234–37 (1997) (“Few programs have been concerned with the enhancements of positive attitudes toward sexuality.”).

practice and experience communicating about sex and intimacy in different contexts.<sup>486</sup> For example, a study in Japan that administered specially tailored, social-situational sexual education to persons with intellectual disabilities found that the intervention improved the subject population's skills in "communication," "management," and "problem-solving."<sup>487</sup> And a small study in Ireland found that one-on-one sexual education interventions for persons with moderate intellectual disabilities not only improved the subjects' knowledge of sex, sexuality, and sexual safety, but also "improve[d] capacity to make sexuality-related decisions" for persons with moderate intellectual disabilities.<sup>488</sup> Both the Ireland and Japan studies demonstrate how sexuality education can better not simply sex, but sexual autonomy as a decision-making capability.

Many researchers have argued too that the disproportionate dearth of sexual information and education among the disabled likely makes the population more susceptible to sexual exploitation and abuse.<sup>489</sup> Some persons with disabilities neither know they can say "no" nor recognize themselves as decision-makers in matters of intimacy and sex.<sup>490</sup> Sexuality education can de-stigmatize conversations about sex, sexual health, and sexual abuse.

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486 See, e.g., Mayumi Hayashi, Mikako Arakida & Kazutomo Ohashi, *The Effectiveness of a Sex Education Program Facilitating Social Skills for People with Intellectual Disability in Japan*, 36 J. INTELL. & DEVELOPMENTAL DISABILITY 11, 17–18 (2011).

487 *Id.* at 14–15.

488 Dukes & McGuire, *supra* note 482, at 727–32 (finding that three of four intellectually disabled participants maintained their knowledge of sexual safety practices six months after the researchers' intervention; all four participants' knowledge of physical/sexual functioning and of "choices and consequences in sexual matters"—remained greater than when measured pre-intervention).

489 See, e.g., Monica Cuskelly & Rachel Bryde, *Attitudes towards the Sexuality of Adults with an Intellectual Disability: Parents, Support Staff, and a Community Sample*, 29 J. INTELL. & DEVELOPMENTAL DISABILITY 255, 256 (2004); Swango-Wilson, *Meaningful Sex*, *supra* note 482, at 114. *But see* Whitehouse & McCabe, *supra* note 483, at 232, 235–36 ("[T]here is no evidence that sex education does in fact decrease the vulnerability to people [sic] with intellectual disabilities to sexual assault.").

490 See, e.g., Swango-Wilson, *Meaningful Sex*, *supra* note 482, at 114 ("Education has the potential to encourage positive sexuality, promote the decision-making *capabilities* about that sexuality and empower the individual with [intellectual/developmental disabilities] to act on their decisions.") (emphasis added).

L.K. had no sex education whatsoever.<sup>491</sup> When undergoing gynecological examinations, L.K. was noncommunicative.<sup>492</sup> We have no direct knowledge of L.K.'s cognitive abilities, and expert testimony is too conflicting to be determinative<sup>493</sup>: perhaps she simply can neither receive nor remember information regarding sexual health, pleasure, and violence. But we wonder if perhaps she had no sex education because nobody ever thought to offer it and that nobody ever thought to offer it because of the presumptive asexuality/sexual disorderliness of disabled people.<sup>494</sup> Richard Fourtin, a jury found, violated L.K. in the most affronting, brutal way. But might we, a culture of systemic “compulsory able-bodiedness”<sup>495</sup> and selective erotophobia,<sup>496</sup> less perceptibly undermine her sexual autonomy by categorically withholding robust, comprehensive sexual educational opportunities?<sup>497</sup>

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491 *State v. Fourtin*, 52 A.3d 674, 695 (Conn. 2012) (Norcott, J., dissenting) (“[T]he victim had never received any kind of sex education—either from [her mother] or from any of her schools or care programs.”).

492 *Id.* at 678–79, 679 n.11.

493 *Id.* at 691 n.8, 695 (Norcott, J., dissenting).

494 *See* Cuskelly & Bryde, *supra* note 489, at 256; Swango-Wilson, *Caregiver Perceptions*, *supra* note 464, at 167–68.

495 McRuer, *Compulsory*, *supra* note 422.

496 *See, e.g.*, Fine & McClelland, *supra* note 468, at 300.

[Adolescent desire] has been splashed all over MTV, thoroughly commodified by the market, and repetitively performed in popular culture. A caricature of desire itself is now displayed loudly, as it remains simultaneously silent . . . . Today we can “google” for information about the average young woman’s age of “sexual debut,” if she used a condom, got pregnant, the number of partners she had, if she aborted or gave birth, and what the baby weighed. However, we don’t know if she enjoyed it, wanted it, or if she was violently coerced. Little has actually been heard from young women who desire pleasure, an education, freedom from violence, a future, intimacy, an abortion, safe and affordable child care for their babies, or health care for their mothers.

*Id.* (internal citations omitted).

497 Our suggestion for more robust, feminist sexuality education for persons with or without disabilities is not naïve to the power relations and asymmetric identity formations produced through practices of schooling. For a Foucauldian historical analysis of the ways medical experts and institutions have arrogated power through variable constructions of the educable “idiot,” see CARLSON, *supra* note 158, at 36–45. If no social practice is purified of power, some practices are better than others; sexual autonomy is our ethical barometer.

### c. Sexual Assistance

Finally, another way to promote the sexual autonomy of persons with disabilities is to provide publicly funded sexual assistance. Compensated sexual assistants for persons with disabilities operate legally in countries like Germany, Switzerland and Denmark (all countries where prostitution is legal and regulated), and operate illegally in countries like Sweden and the United States (where purchasing sex is criminalized).<sup>498</sup> While there has been some recent public debate and advocacy regarding the provision of commercial sexual services for persons with physical disabilities, commercial sexual services for persons with intellectual disabilities is hardly ever mentioned.<sup>499</sup> Surely, we are aware that intellectual disabilities more seriously complicate questions of consent, wantedness, recognizable pleasure and pain, and cognizance, than do physical disabilities. But such difference is not a warrant for erasure. Rather, sexual assistance may facilitate the sexual autonomy of persons with intellectual disabilities, but such assistance must be carefully (and indeed, sometimes expensively) monitored and individually tailored. Nonetheless, we can make the generalizable assumption that in scenarios involving (publicly or privately) paid sexual assistants/assistance, affirmative consent should actualize as it might in noncommercial encounters: through a message board,<sup>500</sup> smiles,<sup>501</sup> and/or written, detailed plans of action.<sup>502</sup>

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498 See Maña de la Baume, *Disabled People Say They, Too, Want a Sex Life and Seek Help in Attaining It*, N.Y. TIMES, Jul. 4, 2014, [http://www.nytimes.com/2013/07/05/world/europe/disabled-people-say-they-too-want-a-sex-life-and-seek-help-in-attaining-it.html?\\_r=0](http://www.nytimes.com/2013/07/05/world/europe/disabled-people-say-they-too-want-a-sex-life-and-seek-help-in-attaining-it.html?_r=0) [<http://perma.cc/ZC5M-8F6E>].

Prostitution is illegal across the United States., save several counties in Nevada. Barbara G. Brents, *Nevada's Legal Brothels Make Workers Feel Safer*, N.Y. TIMES, Jan. 23, 2014, <http://www.nytimes.com/roomfordebate/2012/04/19/is-legalized-prostitution-safer/nevadas-legal-brothels-make-workers-feel-safer> [<http://perma.cc/74QU-GU9A>]. However, sexual assistants hired under the auspices of therapy or surrogacy makes the legality of such practices uncertain: “The legal status of surrogate partners is undefined in most of the United States and most countries around the world. This means that there are generally no laws regulating the profession.” International Professional Surrogates Association, *Legal Status*, IPSA, <http://www.surrogatetherapy.org/legal-status> [<http://perma.cc/V32V-7CR7>].

Committed to a relationally reconstructed concept of sexual autonomy, and cognizant of the perils of black and grey market commercial sex, we support the decriminalization (and/or legalization) of sex work generally, not only the legalization of sexual assistance for individuals with disabilities. See *infra* notes 531–32 and accompanying text.

499 See Appel, *supra* note 328, at 152.

500 See *supra* note 375 and accompanying text.

501 See Denno, *supra* note 316, at 387. But see Appel, *supra* note 328, at 153.

502 See *infra* notes 512–516, 519–526, and accompanying text.

To dimensionalize sexual assistance, we turn to Don Kulick and Jens Rydström's *Loneliness and its Opposite: Sex, Disability and the Ethics of Engagement*.<sup>503</sup> The authors offer a stunning description of—and ethical defense for—publicly funded assistance for the erotic lives and sexual flourishing of persons with significant disabilities. Kulick and Rydström compare policies, practices, and public opinion regarding the sexuality of persons with disabilities in Sweden and Denmark. Utilizing ethnographic interviews, participant observation, archival research, and discourse analysis, they demonstrate that Sweden is resolutely hostile towards the sexuality of persons with disabilities while Denmark is consistently if not always facilitative.<sup>504</sup> Swedish state and group home policies, as well as personal assistants themselves, generally contain, “discipline,” or “ignore” the sexuality of persons with disabilities,<sup>505</sup> in large part because the specter of sexual abuse and victimization poisons progressive initiatives.<sup>506</sup> Danish policies, as well as Danish personal assistants themselves, although highly attentive to risks of sexual abuse,<sup>507</sup> creatively foster sexual possibilities for persons with disabilities. Explanations for the differences between these two countries are multiple, but particularly important is the fact that Danish social workers and caretakers may train to become “sexual advisers” who “assist people with disabilities perform activities like masturbate, have sex with a partner, or purchase sexual services from a sex worker.”<sup>508</sup> These advisers undergo specialized training to assist not only persons with disabilities, but also caretakers and group home administrators.<sup>509</sup> We rehearse some of the ways Danish sexual advisers help persons with disabilities masturbate, have sex, and seek out commercial sexual services. These modes of assistance, carefully chronicled by Kulick and Rydström, undoubtedly enhance sexual autonomy of persons with severe disabilities (if sexual autonomy is redefined as the capability to codetermine sexual relations). And while Kulick and Rydström's field site is not the United States, some of the practices they observe could and should be integrated into United States state and group home policies regarding the sexuality of persons with disabilities.<sup>510</sup>

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503 KULICK & RYDSTRÖM, *supra* note 27.

504 *Id.* at 4, 17–18.

505 *Id.* at 79–80.

506 *Id.* at 90, 232–40.

507 *Id.* at 15–19.

508 KULICK & RYDSTRÖM, *supra* note 27, at 18.

509 *Id.* at 101–05.

510 On the insufficiencies (or more precisely, nonexistence) of United States public and institutional policies regarding the sexuality of persons with disabilities, see Shuttleworth, *supra* note 353, at 4–6; *see also* Siebers,



### i. Facilitating Masturbation

We cite the following anecdote from Kulick and Rydström in full, as it so aptly captures how assistance with masturbation may facilitate sexual autonomy for persons with significant intellectual disabilities:

One particularly inventive solution to a seemingly unmanageable problem involved a young man with intellectual impairments in Denmark who insisted on masturbating at the edge of a highway. Every day this young man managed to elude staff members at his group home, turning up by the side of the highway and prompting near accidents and outraged calls to the local police. Desperate, the staff called in a sexual advisor for advice. The woman who came to help managed to figure out that what the young man found exciting was the sound of traffic. At her suggestion, the staff recorded a video of the highway at the site where the young man liked to stand, and they gave that video to him, telling him that whenever he felt like looking at cars and touching himself, he could do so—in his room, with the sound up and the door closed. Problem solved.<sup>511</sup>

What is ethically noteworthy about this incident is not that this young man can now masturbate free from the danger of oncoming traffic. Rather, it is noteworthy that the solution to this problem was promotional, not punitive, of the man's sexual autonomy. By recording the sounds of traffic instead of, say, unilaterally attempting to re-circuit the man's desires toward more hetero-palatable materials, the group home staff permitted and encouraged the man to codetermine the contours of his sexuality.

Kulick and Rydström also recount the case of Helle, a young woman in a group home who is nonverbal, suffers cerebral palsy, and uses a mechanism akin to a message board to communicate (thus Helle shares some classificatory similarities with L.K., but it is unclear if or to what extent she is intellectually impaired).<sup>512</sup> A sexual advisor drafted a plan of

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*supra* note 27, at 45 (“Group homes and long-term care facilities purposefully destroy opportunities for disabled people to find sexual partners or to express their sexuality.”); *infra* note 525.

511 KULICK & RYDSTRÖM, *supra* note 27, at 126–27. However, Michael Gill cautions that prescribing masturbation for persons with disabilities may function to diminish or discredit possibilities for sex. If severed from an integrative, sex-positive approach, “[m]asturbation training becomes a disciplinary tool” exercised by caretakers to contain rather than promote intimacy and sexuality. GILL, *supra* note 13, at 95.

512 KULICK & RYDSTRÖM, *supra* note 27, at 106, 116.

action for Helle's assistants in order to help Helle masturbate.<sup>513</sup> The plan of action details how Helle should be laid on the bed and where mirrors and pillows should be placed.<sup>514</sup> The document directs assistants (although assistants are not mandated to facilitate sex for clients<sup>515</sup>) to "place the sex aid on [Helle's] privates," and to ask Helle for how long she would like to "lie alone." When Helle finishes masturbating, the assistant is to wash the sex aid and make sure Helle is content.<sup>516</sup>

In Helle's case, as in the case with the young man masturbating to traffic, sexual advisers and clients' assistants collaborated with each other and with their patients to enable sexuality and sexual autonomy. The plan of action for Helle was codetermined by Helle, and practices of sexual codetermination themselves recursively strengthen the capability of (sexual) codetermination:<sup>517</sup> the sexual advisor "had long conversations with Helle to determine what kind of sex aid she wanted, and she helped Helle try out several before they settled on the one Helle liked best."<sup>518</sup>

Figuring out how to facilitate the autoerotic lives of such persons with intellectual and/or physical disabilities evidently takes time, collaboration, and creativity, but it does not require seismic change. By approaching persons with disabilities as presumptively sexual, and presumptively capable of sexual autonomy, advisers and assistants make possible and then encourage their erotic flourishing.

## ii. Facilitating Sex

Facilitating sex for persons with disabilities is not altogether different from facilitating masturbation, excepting of course the significant but generally surmountable problem of gauging wantedness or unwantedness of all sexual partners.<sup>519</sup>

513 *Id.* at 106.

514 *Id.* at 106.

515 *Id.* at 104–05.

516 *Id.* at 106.

517 See Dukes & McGuire, *supra* note 482, at 732. Perhaps sexual autonomy, relationally reconstructed, might be conceived as a "fertile functioning" that promotes other capabilities, like affiliation and imagination. On "fertile functioning," see JONATHAN WOLF & AVNER DE-SHALIT, *DISADVANTAGE* 133–54 (2007).

518 KULICK & RYDSTRÖM, *supra* note 27, at 116.

519 See Denno, *supra* note 316, at 384–93 (chronicling several cases in which assistants and social workers intervened to help persons with significant intellectual disabilities have sex. Caretakers continually gauge—and

Kulick and Rydström tell the story of Marianne and Steen.<sup>520</sup> Residing in separate group homes, they became a romantic couple after meeting in an activity center.<sup>521</sup> Steen is nonverbal, “spastic,” autistic, and paralyzed from the neck down.<sup>522</sup> Like Helle and L.K., Steen uses a message board to communicate to his assistants and group home staff. Marianne is intellectually disabled, deaf, and “nearly blind.”<sup>523</sup>

For Marianne and Steen to share intimacy and sex required great effort on the part of their assistants and group home social workers. Social workers collaborate with each other, rearranging schedules, coordinating transportation, and delegating supervisory responsibilities.<sup>524</sup> They also prepare rooms, beds, pillows—as well as Steen’s body—in such a way that the couple may have and enjoy sex.<sup>525</sup> Assistants constantly consult Marianne and Steen to make sure everything is alright.<sup>526</sup>

Evidently, facilitating sex for persons with significant disabilities requires more than assisting the sex act itself. Preparations must be made beforehand, and evaluations of wantedness recurring. In Danish group homes visited by Kulick, staff organized role-playing activities and discussion groups for persons with disabilities in order to familiarize them with modes of intimate communication and negotiation, to explain boundaries of permissible social/sexual behavior, to help them cope with the rejection of a love interest, and so forth.<sup>527</sup>

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sometimes instruct patients how to legibly express—wantedness and unwantedness.).

520 KULICK & RYDSTRÖM, *supra* note 27, at 97–112.

521 *Id.* at 97.

522 *Id.*

523 *Id.*

524 *Id.* at 98–101, 111.

525 KULICK & RYDSTRÖM, *supra* note 27, at 111.

526 *Id.* at 100.

527 *Id.* at 108–09. For a closer-to-home example of facilitating sex for the elderly (with or without diagnosed disabilities), see ROBIN DESSEL & MILDRED RAMIREZ, HEBREW HOME AT RIVERDALE, POLICIES AND PROCEDURES CONCERNING SEXUAL EXPRESSION AT THE HEBREW HOME AT RIVERDALE (1995), <http://www.riverspringhealth.org/files/sexualexpressionpolicy.pdf> [<http://perma.cc/R4SU-KVSK>] (stipulating the sexual rights of Hebrew Home residents and the responsibilities of Hebrew Home staff to facilitate residents’ sexual expression); *see also* Pam Belluck, *Sex, Dementia, and a Husband on Trial at Age 70*, N.Y. TIMES, Apr. 13, 2015, <http://www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html> [<http://perma.cc/3J7J-AJ2M>] (“Yet many nursing homes have no sexual intimacy policy . . . . An exception is the Hebrew Home, where staff members are asked to assess consent with nonverbal cues, to note a resident’s mood after sex, and

These sessions are exemplary in their promotion of sexual autonomy, designed to enhance disabled persons' capability to codetermine their sexual relations.

### iii. Facilitating the Purchase of Sexual Services

The sexual facilitation we described in the above two subsections is publicly funded.<sup>528</sup> But sexual services can be and are purchased privately as well, directly by persons with disabilities.<sup>529</sup>

Kulick and Rydström repeatedly emphasize in their monograph that the population of persons with disabilities who directly purchase sexual services makes up a “tiny fragment” of all disabled people.<sup>530</sup> The authors suggest that such services receive disproportionate media and academic attention, reflecting a prejudiced presumption that the only way persons with significant disabilities could have sex is if they paid for it. This is untrue—and beneath the surface of such *doxa* are the untenable presumptions that commercial sex is definitionally devoid of intimacy and exploitative.<sup>531</sup>

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to pose questions like: ‘Do you enjoy sexual contact?’, ‘Do you know what it means to have sex?’, and ‘What would you do if you wanted it to stop?’”).

528 KULICK & RYDSTRÖM, *supra* note 27, at 4, 101–02, 202.

529 *Id.* at 174–216.

530 *Id.* at 24, 179.

531 *Id.* at 185. On the ways intimacy is mediated and brokered in contemporary commercial sex markets, see generally ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX* (2007); see also JOHNS, MARKS, TRICKS AND CHICKENHAWKS: PROFESSIONALS & THEIR CLIENTS WRITING ABOUT EACH OTHER (David Henry Sterry & R.J. Martin, Jr. eds., 2013). Frequently, clients (mostly men) who purchase sexual services desire romantic and/or emotional connection in addition to (or instead of) sex. See, e.g., Christine Milrod & Ronald Weitzer, *The Intimacy Prism: Emotion Management among the Clients of Escorts*, 15 MEN & MASCULINITIES 447 (2012); Teela Sanders, *Male Sexual Scripts: Intimacy, Sexuality, and Pleasure in the Purchase of Commercial Sex*, 42 SOCIOLOGY 400 (2008).

Debates about commercial sex polarize around the question of whether sex work is (a) exploitative, patriarchal, and “bad” or (b) radical, world-making, and “good.” From the infamous Sex Wars of the 1980s to current global campaigns to end human trafficking, these debates obscure the diversity of experience in the sex industry and are generally irrelevant to the development of laws and policies ensuring the safety and economic stability of sex workers. This dominant discourse “is disconcerting to those . . . who find themselves in sympathy with elements of both ‘sides’ of the debate, and yet also feel that it is the wrong debate to be having about prostitution.” Julia O’Connell Davidson, *The Rights and Wrongs of Prostitution*, 17 HYPATIA 84 (2002); see also Julia O’Connell Davidson, *Will the Real Sex Slave Please Stand Up?*, 83 FEMINIST REV. 4 (2006).

Nonetheless, the private purchasing of sexual services occurs, and when done right, fosters the sexual autonomy of persons with disabilities while also protecting the rights and bodily integrity of sex workers, sexual assistants, and disabled persons themselves.<sup>532</sup>

“The private purchase of sexual services” is not simply euphemistic for hiring a sex worker; it encompasses a wide variety of activities. The sorts of sexual services available for private purchase in Denmark are identical to those sometimes available in group homes: for example, hiring assistants to help with masturbation or to help arrange sex between partners.<sup>533</sup> Handisex is a Danish organization “which puts adults with disabilities into contact with helpers who will assist them with sex without actually having sex with them.”<sup>534</sup> Nor is it just men who purchase sexual services from women, despite popular assumptions to the contrary. Women with disabilities also purchase services to facilitate their masturbation and sexual activity, and they sometimes hire sex workers.<sup>535</sup>

If they wish to pay for sex directly, persons with disabilities may also need help finding sex workers willing to meet persons with disabilities;<sup>536</sup> combing through websites and newspaper advertisements for such escorts; locating brothels that are accessible;<sup>537</sup> and

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532 KULICK & RYDSTRÖM, *supra* note 27, at 196–200. Existing criminal penalties for offenses related to sex work—e.g., prostitution, solicitation, “commercial vice”—tend to depress sex workers’ autonomy, sexual and otherwise. Criminalization impedes sex workers’ ability to control the conditions under which their work takes place, and, accordingly, their capability to codetermine the conditions of their relations with clients. Criminal penalties and state surveillance often prevent sex workers from mitigating their exposure to harm (e.g., carrying condoms, reporting abusive client behavior to authorities, and working with other sex workers rather than in isolation). See, e.g., Acacia Shields, *Criminalizing Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe*, OPEN SOCIETY FOUND. (2012), <http://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf> [<http://perma.cc/3LBQ-KMR2>]; Nicolé Fick, *Enforcing Fear: Police Abuse of Sex Workers when Making Arrests*, 16 S. AFR. CRIME Q. 27 (2006); Jillian Keenan, *Sex Workers Don’t Deserve to be Raped*, DAILY BEAST, Sep. 27, 2014, <http://www.thedailybeast.com/articles/2014/09/27/sex-workers-deserve-protection-from-rape-too.html> [<http://perma.cc/3756-N64P>]; Michele R. Decker et al., *Human Rights Violations Against Sex Workers: Burden and Effect on HIV*, 385 LANCET 186 (2015); see also *supra* note 498 and accompanying text.

533 KULICK & RYDSTRÖM, *supra* note 27, at 182–83.

534 *Id.* at 287.

535 *Id.* at 180–84.

536 *Id.* at 207.

537 *Id.* at 195.

navigating what can often be complicated and detailed menus of services and prices.<sup>538</sup> Particularly for persons who are nonverbal and/or intellectually disabled, caretakers are often needed as “translators” for hired sex workers, since caretakers are more familiar with their patients’ communication patterns and better suited to interpret the meanings of patients’ gestures, sounds, and so forth.<sup>539</sup> In addition, persons with significant intellectual disabilities and/or mobility limitations may need to be bathed in advance of a sexual encounter, and their rooms properly prepared.<sup>540</sup>

The private purchasing of sexual services, including the purchase of sex, provides some persons with disabilities opportunities for sexual pleasure that might otherwise be nonexistent or unduly difficult to obtain.<sup>541</sup> Just as importantly, though, from the perspective of sexual autonomy, these sorts of paid-for sexual experiences can help boost the confidence of persons with disabilities; they can help persons with disabilities recognize themselves not only as sexual beings but also as capable of successfully “having sex,” whether or not such sex is penetrative.<sup>542</sup> The purchase of sexual services allows one paraplegic man, as Kulick and Rydström put it, “the opportunity to engage with others in ways that extend his capacities.”<sup>543</sup> Mark O’Brien, famed poet and journalist paralyzed from polio, writes of seeing a sex surrogate: “I knew I could change my perception of myself as a bumbling, indecisive clod, not just by having sex with someone, but by taking charge of my life and trusting myself enough to make decisions.”<sup>544</sup> These kinds of experiences expand disabled persons’ erotic repertoire and, more generally, invite them to participate in navigating their life trajectories.

Some critics express concern that permitting/facilitating the purchase of sexual services may further segregate disabled persons from society by removing them from the noncommercial marketplace of dating, intimacy, and love.<sup>545</sup> Yet there is no necessary

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538 KULICK & RYDSTRÖM, *supra* note 27, at 203.

539 *Id.* at 203.

540 *Id.* at 198–99.

541 *But see supra* notes 530–531 and accompanying text.

542 KULICK & RYDSTRÖM, *supra* note 27, at 209.

543 *Id.* at 211.

544 O’Brien, *supra* note 329.

545 *See, e.g.,* Stefania Rousselle, *Seeking Sexual Surrogates*, N.Y. TIMES, Jul. 4, 2013, <http://www.nytimes.com/2013/07/05/world/europe/disabled-people-say-they-too-want-a-sex-life-and-see-help-in-attaining-it>.

reason commercial sex (or intimacy) and noncommercial intimacy (and sex) must be mutually exclusive.

Others express concern that commercial sex degrades sex workers (oftentimes but not always women) and their clients (oftentimes but not always men), and subordinates women.<sup>546</sup> Yet there is no logical reason sexual services are any more or less degrading than the host of “bodily services”—often exhausting, often involving fluids and excretions—provided by compensated caretakers for disabled persons.<sup>547</sup> We suspect that the concern over degradation and subordination masks a moralistic opprobrium to sex for money.<sup>548</sup>

We offer a last note on sexual assistance, sex work, and relationally reconceived sexual autonomy. Sex workers hired by disabled persons, as well as disabled persons themselves, attest that their “sex” often looks much different than able-bodied persons might assume.<sup>549</sup> This sex is not always penetrative, genitally directed, or orgasm-centered.<sup>550</sup> “Sex” might be about touching bodies, extended physical contact, eroticizing and stimulating non-genital body parts, or even eroticizing wheelchairs<sup>551</sup> and amputated limbs.<sup>552</sup> One sex worker reports that for her paraplegic, impotent male clients, “the sexual sessions these men pay for consist mostly of conversation and the man licking her genitals.”<sup>553</sup> Much disabled sex

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html [<http://perma.cc/RK5A-FWEJ>]. *But see* O’Brien, *supra* note 329 (“What if I ever *did* meet someone who wanted to make love with me? Wouldn’t I feel more secure if I had already had some sexual experience?”); *supra* note 531.

546 *See, e.g.*, Sheila Jeffreys, *Disability and the Male Sex Right*, 31 *WOMEN’S STUD. INT’L FORUM* 327, 331–44 (2008). *But see* KULICK & RYDSTRÖM, *supra* note 27, at 176–77; *supra* note 531.

547 *See generally* Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 *J. LEGAL STUD.* 693 (1997).

548 *Id.* at 705–06; *see supra* notes 448, 478–479, and accompanying text; *see also* Mary Anne Case, *Pets or Meat*, 80 *CHI.-KENT L. REV.* 1129, 1146 (2005).

549 KULICK & RYDSTRÖM, *supra* note 27, at 205–07.

550 *Id.* at 2; *see also* MAIRS, *supra* note 383, at 47–54; Siebers, *supra* note 27, at 39.

551 *See, e.g.*, de la Baume, *supra* note 498 (“‘If someone is in a wheelchair, I start in the wheelchair,’ [a sexual surrogate] said. ‘I start playing the game of getting undressed on the wheelchair. It becomes a little like a game.’”).

552 *See, e.g.*, Dean, *supra* note 448.

553 KULICK & RYDSTRÖM, *supra* note 27, at 206.

manifests what queer theory has sought from its inception—a radical reorganizing of what sex and sexuality (and therefore sexual autonomy) are and might be.<sup>554</sup>

Kulick and Rydström conceive of these modes of erotic facilitation—for masturbation, sex, and sexual services—as “ethical practices of awareness, engagement, and justice.”<sup>555</sup> This language sounds highfalutin for, say, fellating someone for a fee. But clearly sexual assistance for persons with disabilities entails more than simply enabling transactional, commercial sex. Our brief for sexual autonomy presupposes neither that humans are innately sexual nor that sex is necessarily special. For many people, though, disabled and not, sex, sexual pleasure, and intimacy make for a more complete, flourishing life. Because sex is or can be “interactional activity that develops and enriches social relationships,”<sup>556</sup> there is a recursive quality to sexual autonomy—opportunities for co-determined sex and intimacy are themselves manifestations of sexual autonomy, but such opportunities also cultivate persons’ capabilities for sexually autonomous actions.

From the perspective of the Capabilities Approach, and from the normative presumption of sexual autonomy as a central capability, accommodating sex for persons with disabilities—by broadening access, improving sexuality education, and facilitating sex practices—is “ethically superior” to inaction (and thus to extant social/sexual arrangements).<sup>557</sup>

We advocate for the public funding of such forms of sexual assistance, at least to a minimum threshold, so that sexual autonomy is a right for many and not a privilege for the few.<sup>558</sup>

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554 See generally Mollow, *supra* note 27; EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 29 (1990).

But to the extent that, as Freud argued and Foucault assumed, the distinctively sexual nature of human sexuality has to do precisely with its excess over or potential difference from the bare choreographies of procreation, “sexuality” might be the very opposite of what we originally referred to as (chromosomal-based) sex: it could occupy, instead, even more than “gender” the polar position of the relational, the social/symbolic, the constructed, the variable, the representational.

*Id.*

555 KULICK & RYDSTRÖM, *supra* note 27, at 38.

556 *Id.* at 263.

557 *Id.* at 264.

558 See NUSSBAUM, *FRONTIERS*, *supra* note 25, at 193–95.



### CONCLUSION: THE ORDINARINESS OF SEXUAL AUTONOMY

A feminist, relationally reconstructed sexual autonomy defined as the capability to codetermine sexual relations rejects sexual autonomy as merely a synonym for sexual consent. As a human capability, and not simply human choice, sexual autonomy so conceived encourages us to examine not only first person present active (or passive) consent—the preoccupations of Rubinfeld’s and Spindelman’s otherwise opposed critiques<sup>559</sup>—but also institutions, policies, and norms that foster or impede erotic creativity, co-participation, and flourishing. A panoramic perspective allows us to see that extant sexual regulations (like, say, some age of consent statutes,<sup>560</sup> or some statutory determinations of mental incapacity or physical helplessness),<sup>561</sup> and not just predatory persons, depress sexual autonomy. L.K. and those similarly situated need no longer anchor sexual autonomy as its constitutive outside (à la Stephen Schulhofer<sup>562</sup> and Gerald Dworkin),<sup>563</sup> but might instead be afforded a shot at erotic possibility. Our version of sexual autonomy—as dynamic, aspirational, achieved, and relational rather than binary and keyed to a rationality threshold—readmits certain subjects (like, say, some teenagers and persons with disabilities) historically ejected from its ambit.<sup>564</sup>

Once the reduction of sexual autonomy to sexual consent is refused, we can dispense with (or at least deprioritize) that equation’s characterological corollary: either/or classificatory determinations of capacity. In the case of disability (and disability as a case for sexual autonomy reconstructed writ large), sexual autonomy cautions against widening the statutory net to render larger disabled populations ineligible for sex. Instead, we have suggested a more ecological approach keyed to fostering sexual capability: the replacement of force and nonconsent requirements of sexual assault law with an affirmative consent standard; proscriptions against sex in heretofore unregulated relations of dependence (like a spouse’s intimate partner, e.g., Richard Fourtin); sexual accommodations in the form of

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559 *See infra* Part I.

560 *See supra* notes 74–80 and accompanying text.

561 *See supra* Part III.C.

562 *See supra* Part II.B.1 and accompanying text.

563 *See supra* notes 161–163 and accompanying text.

564 *See supra* notes 158–163 and accompanying text.

expanded access (material and discursive) and comprehensive, feminist-inflected sexuality education; and facilitation of masturbation, sex, and the purchase of sexual services.<sup>565</sup>

We conclude on a final note that our defense of sexual autonomy is, for the most part, a claim for the ordinariness, not the extraordinariness, of sex.<sup>566</sup> “It is important not to dramatize sex too much.”<sup>567</sup> Persons with disabilities receive publicly funded attendant care. Why should they not receive publicly funded sexual assistance?<sup>568</sup> The fictive difference between washing genitals and rubbing genitals is the presence and absence of patients’ sexual desire.<sup>569</sup> Our national proscription against the latter and permission of the former singles out sexual desire as especially unworthy, because undignified, of state assistance. We accommodate—on paper if not in practice<sup>570</sup>—disabled persons’ health, employment, housing and transportation. Why not accommodate sex? Why not cultivate sexual autonomy, the capability to codetermine sexual relations, more broadly and more deeply? Why not make sex a little more ordinary?

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565 See *supra* Part IV.

566 For an early admonition against the queer theoretic spectacularizing of sex, see generally Bidy Martin, *Extraordinary Homosexuals and the Fear of Being Ordinary*, 6 DIFFERENCES 100 (1994). *But see* Berlant & Warner, *supra* note 452, at 556–77. For a recent casing of the (sociological) ordinariness of homosexuality, see generally Heather Love, *Doing Being Deviant: Deviance Studies, Description, and the Queer Ordinary*, 26 DIFFERENCES 74 (2015).

567 KULICK & RYDSTRÖM, *supra* note 27, at 216.

568 *Id.* at 295; *see also* Appel, *supra* note 328, at 153–54.

569 KULICK & RYDSTRÖM, *supra* note 27, at 118, 120, 122; *see also* Case, *supra* note 548, at 1146; NUSSBAUM, *SEX*, *supra* note 142, at 706–07.

570 For a critique of United States federal legislation regarding disability accommodations, see generally Satz, *supra* note 27.

## APPENDIX: CONNECTICUT APPELLATE COURT SEXUAL ASSAULT CASES, 2010–2015

The following tables overview data collected from a review of 2010–2015 Connecticut Appellate Court sexual assault cases. Cases were extracted from a LexisNexis search on March 1, 2015. An initial search yielded 214 unique cases heard between January 1, 2010 and March 1, 2015, all of which contained the phrase “sexual assault.” Of these, 37 appeals referenced sexual assault but sexual assault was immaterial to the issue of law—these cases have been excluded from analysis. The remaining cases (175) were coded and analyzed.

**Table A.1: Case Description**

	#	%	Variable Notes	
Sexual assault	175	N/A	<i>Includes all cases involving one or more charges of sexual assault.</i>	
Unique victims	205	N/A	<i>9.1% of cases involved multiple victims.</i>	
Case Type	#	%	Variable Notes	
State of CT v. Defendant	132	75.4%	<i>“Appellant v. Commissioner of Correction” refers to cases involving an appellate plea for a writ of habeas corpus.</i>	
Appellant v. Commissioner of Correction	39	22.3%		
Other	4	2.3%		
# of Charges	#	%	Variable Notes	
Single	14	8.0%	<i>Not all charges under “Multiple” are sexual assault</i>	
Multiple	161	92.0%		
Specific Charges Involved	#	%	Variable Notes	
Sexual assault in the 1 <sup>st</sup> degree	123	70.3%	<i>Includes aggravated or attempt to commit. The category “Other charges” includes all non-sexual assault charges, e.g., burglary, kidnapping, possession of child pornography, etc.</i>	
Sexual assault in the 2 <sup>nd</sup> degree	42	24.0%		
Sexual assault in the 3 <sup>rd</sup> degree	23	13.1%		
Sexual assault in the 4 <sup>th</sup> degree	31	17.7%		
Sexual assault in a spousal/cohabiting relationship	6	3.4%		
Risk of injury to a child	109	62.3%		
Sexual assault, degree not specified	7	0.04%		
Other charges	81	46.3%		
# Victims	#	%		Variable Notes
Single	159	90.9%		
Multiple	16	9.1%		
	2	11		6.3%
	3	3		1.7%
	>3	2		1.1%

**Table A.2: Ages of Perpetrators and Victims**

Age of Perpetrator	#	%	Variable Notes
Adult (18+)	35	20.0%	<i>Perpetrators whose age is “not specified” in the appeal are likely over 18, given the other facts of these cases.</i>
Minor (<18)	2	1.1%	
Not specified	138	78.9%	
TOTAL	175	100.0%	
Age of Victim			
Adult (18+)	4	2.0%	<i>Victims whose age is “not specified” in the appeal are likely over 18, given the other facts of these cases.</i>
Minor (<18)	138	67.3%	
Not specified	60	29.3%	
Police officer posing as minor	3	1.5%	
TOTAL	205	100.0%	

**Table A.3: Relationship between Perpetrators and Victims<sup>571</sup>**

Relationship Classification	#	%	Variable Notes
Intimate Relationship	15	7.3%	<i>“Spouse” includes common-law spouse. “Former spouse” includes spouses that are separated, regardless of formal divorce.</i>
Spouse	6	2.9%	
Former Spouse	4	2.0%	
Partner (excl. spouse)	2	1.0%	
Former Partner (excl. spouse)	3	1.5%	
Familial or Semi-Familial Relationship	86	42.0%	<i>“Father” includes biological and adoptive fathers. “Uncle” includes uncles by marriage and aunts’ live-in boyfriends. “Grandfather” includes step-grandfathers and grandmothers’ live-in boyfriends.</i>
Father (***)	28	13.7%	
Uncle (*)	11	5.4%	
Grandfather (***)	7	3.4%	
Other family member (*)	5	2.4%	
Other legal guardian (***)	1	0.5%	
Stepfather (***)	9	4.4%	
Mother’s boyfriend/intimate partner	24	11.7%	

571 Relationship classifications marked with (\*\*\*) are always restricted by existing Connecticut law. Relationship classifications marked with (\*) may be restricted by existing law, depending on additional details (e.g., whether the relationship involves consanguinity, whether the victim is under the age of eighteen, whether the relationship involves a legal contract, etc.). See *supra* notes 405–439 and accompanying text.

Relationship Classification	#	%	Variable Notes
Caretaking Relationship	8	3.9%	
Babysitter (*)	2	1.0%	<i>“Other caretaker” includes: a child development caretaker in a junior residential treatment center where the victim was a resident; a nurse’s assistant at a hospital where the victim was a patient; and a dentist of whom the victim was a patient.</i>
Teacher or Coach (*)	3	1.5%	
Other Caretaker (*)	3	1.5%	
Other Relationship	32	15.6%	
Coworker or Employer (*)	4	2.0%	<i>“Other known adult” includes any adult with whom a child is familiar, but who is not a family friend (e.g., a neighbor).</i>
Family friend	8	3.9%	
Parent of a friend	3	1.5%	
Friend of a friend	4	2.0%	
Other personal acquaintance	8	3.9%	
Other known adult	5	2.4%	
No Prior Relationship	21	10.2%	
Client (for sex workers)	3	1.5%	
Stranger	15	7.3%	
Police Officer (posing as teen girl online)	3	1.5%	
Relationship Not Specified	44	21.5%	
TOTAL	205	100.0%	