“Equal protection, Equal freedom for Women with Mental Disabilities: Rethinking Capacities to Consent in Sexual Assault Cases”

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When women with intellectual, developmental or cognitive disabilities make complaints of rape or sexual assault, they face challenges that often magnify the criminal justice system’s historic pattern of stereotyping and discrimination against women who make allegations of rape. These women are even less likely to believed and are at greater risk of discriminatory cross-examination on the basis of their sexual history. At the same time, it is clear that they are even more likely than most women to be sexually assaulted. The standard definition of rape or sexual assault, even when informed by feminist theory and the reform efforts of front-line feminists, has not been adequate to address some cases of the sexual exploitation of women with mental disabilities. Feminist theorizing around sexual assault often posits a tension between protection from violence and sexual autonomy, but in many cases women with mental disabilities have little of either.

Our paper compares approaches to capacity and consent in the U.S., Canada and the U.K. in cases involving women with mental disabilities, and explores the concept of “situational capacity” and its application in the criminal law context. We consider which approach best vindicates the equality rights of this group of women and whether sexual assault law is adequate to protect all women.