Date of Hearing: July 15, 2025
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Nick Schultz, Chair

SB 258 (Wahab) – As Amended May 1, 2025

SUMMARY: Eliminates the spousal exception from the definition of rape based on the victim's inability to legally consent, as specified, because of a mental disorder or developmental or physical disability.

EXISTING LAW:

1) States rape is an act of sexual intercourse accomplished under any of the following circumstances:

    a) If a person who is not the spouse of the person committing the act is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship, as specified, the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

    b) If it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

    c) If a person is prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused.

    d) If a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:

        i. Was unconscious or asleep.

        ii. Was not aware, knowing, perceiving, or cognizant that the act occurred.

        iii. Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

        iv. Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

v. If a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

vi. If the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

e) If the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

2) States in a prosecution for rape, sodomy, forcible oral copulation, or sexual penetration, in which consent is at issue, "consent" means positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (Pen. Code, § 261.6, subd. (a).)

3) Punishes rape of a person, including a person who is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act, by imprisonment in the state prison for 3, 6 or 8 years. (Pen. Code, § 264, subd. (a).)

4) Punishes rape of a minor under the age of 14 if it is accomplished against the person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another by imprisonment in the state prison for 9, 11 or 13 years. (Pen. Code, § 264, subd. (c)(1).)

5) Punishes rape of a minor who is 14 years of age or older if it is accomplished against the person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another by imprisonment in the state prison for 7, 9 or 11 years. (Pen. Code, § 264, subd. (c)(1).)

6) Defines "duress" for purposes of rape to mean "a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one would not have submitted. The total circumstances, including the age of the victim, and the victim's relationship to the defendant, are factors to consider in appraising the existence of duress." (Pen. Code, § 261, subd. (b)(1).)

7) Punishes a person who engages in sodomy, oral copulation, or sexual penetration with a minor, except as punishable as a lewd and lascivious act with a minor under 14, by imprisonment in the state prison or in a county jail for not more than one year. (Pen. Code, §§ 286, subd. (b)(1), 287, subd. (b)(1), and 289, subd. (h).)

8) Punishes a person over the age of 21 who participates in an act of sodomy, oral copulation, or sexual penetration with a minor who is under the age of 16 with a felony. (Pen. Code, §§ 286, subd. (b)(2), 287, subd. (b)(2), and 289, subd. (i).)

9) Punishes a person who participates in an act of sodomy, oral copulation, or sexual penetration with a minor who is under 14 years of age and the minor is more than 10 years younger than the person by imprisonment in the state prison for 3, 6 or 8 years. (Pen. Code, §§ 286, subd. (c)(1), 287, subd. (c)(1), and 289, subd. (j).)

FISCAL EFFECT: Unknown.

COMMENTS:

1) **Author's Statement**: According to the author, "Marriage should never be a shield for rape. Senate Bill (SB) 258 ends the unequal treatment of spousal rape in California by closing a legal loophole that allows the rape of a spouse who is unable to consent due to a disability. This outdated exception denies justice to disabled survivors of sexual assault, simply because they are married to the perpetrators. All survivors of sexual assault deserve equal access to protections and legal recourse.

   "Spousal rape is already underreported, and even more so among people with disabilities, who face significantly higher risks of sexual violence—particularly those with intellectual disabilities, who are over seven times more likely to be assaulted than people without disabilities. Abolishing this two-tiered system of justice is long overdue. More than 40 states have already eliminated similar provisions, affirming that rape is rape, regardless of marital status. SB 258 is essential to correct this harmful and outdated exception, bringing California in line with nearly every other state.

2) **History of Spousal Rape**: For decades, California did not recognize the crime of rape between a husband and wife. AB 546 (Mori), Statutes of 1979, enacted the first spousal rape law in California by adding former Penal Code section 262, which was separately codified from the general (non-marital) rape section in Penal Code section 261.

   The initial reasoning for criminalizing the rape of a spouse were arguments centered upon the fact that marriage did not grant irrevocable consent to engage in intercourse with a spouse, and women should not be viewed as property. Specifically, "a woman does not give up her right to consent to sexual intercourse by virtue of marriage, and that the existing definition of rape treats married women in an unequal and unfair fashion." [1]

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[1] Ross, *Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage* (Dec. 2015) Digital Commons @ University of Nebraska – Lincoln; https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&context=historydiss at p. 136, citing Senate Committee on Judiciary summary of A.B. 546 at fn. 384 [as of May 26, 2021].

Former Penal Code section 262 was the spousal rape statute and mostly mirrored the rape statute:

> Rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished under any of the following circumstances:
>
> (a) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.
>
> (b) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused.
>
> (c) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.
>
> (d) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.
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> (e) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official.

Former Penal Code section 262 did not require a person to register as a sex offender and a defendant convicted of former Penal Code section 262 was eligible for probation.

In 2021, the Legislature passed AB 1171 (C. Garcia, Chapter 626, Statutes of 2021), which repealed the stand-alone spousal rape statute (Pen. Code, § 262) and expanded the definition of rape (Pen. Code, § 261) to include the rape of a spouse in all but one circumstance. The expanded version of the rape statute maintained a limited exemption for the act of sexual intercourse with a spouse who is incapable of giving “legal consent” or having the capacity to consent because of a mental disorder or developmental or physical disability. (Pen. Code, § 261, subd. (a)(1).)

The reasoning for this narrow exception at the time the Legislature eliminated spousal rape were concerns about over-criminalization of developmentally disabled people who are legally allowed to marry, but may be prohibited from having sex.

Disability advocates at the time argued, "We believe there should be continued dialog about the impacts of Penal Code 261(a)(1) to preserve the sexual agency of people with disabilities and provide equitable protections for disabled victims of spousal rape…"[2]

This bill now proposes to eliminate the spousal language from rape of a person not able to provide legal consent due to a mental disorder or physical or developmental disability.

Penal Code section 261 criminalizes rape, without reference to the relationship between the perpetrator and victim as a sexual act: (a) against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another; (b) when the victim is prevented from resisting by an intoxicating or anesthetic substance, or controlled substance, and this condition was known, or should have been known, to the accused; (c) where the victim was unconscious of the nature of the act, because they were unconscious or asleep, not aware, knowing, perceiving, or cognizant that the act occurred, not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact (the perpetrator tricked, lied to, or concealed information); or not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact (the perpetrator tricked, lied to, or concealed information); (d) against the victim's will by threat of retaliation, as defined; or, (e) against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. (Pen. Code, § 261, subd. (a)(1-7).)

3) **Legal Consent and Capacity to Consent:** Penal Code section 261.6 defines legal consent for offenses involving developmental or intellectual disabilities as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (Pen. Code, § 261.6, subd. (a).) The concept of legal consent in statute dates back to 1980 when the court expressly rejected the idea that "the person who does not resist, consents."

> In *People v. Barnes* (1986) 42 Cal. 3d 284, our Supreme Court explained that the traditional requirement that a woman resist her attacker was 'grounded in the basic distrust with which courts and commentators traditionally viewed a woman's testimony regarding sexual assault.' (Internal citation omitted.) 'Such wariness of the complainant's credibility created 'an exaggerated insistence on evidence of resistance.' [Citation.] As an objective indicator of non-consent, the requirement of resistance insured against wrongful conviction based solely on testimony the law considered to be inherently suspect. In our state, it supplied a type of intrinsic corroboration of the prosecuting witness's testimony, a collateral demanded even when extrinsic corroboration was not required. Elimination of the resistance requirement in our criminal law represents what the people of this state believe is reasonable to expect of a

[2] Disability Rights California, *"RE: AB 1171 (Garcia) – Updated Position Letter – NEUTRAL"* July 10, 2021 to the Sen. Comm. on Public Safety.

> victim of a sexual assault. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 262.)

However, *capacity to consent* is slightly different than *legal consent*. Capacity to consent includes instances where the victim is incapable of consent due to intoxication or unable to consent due to a mental disorder or physical or developmental disability.

The existence of capacity to consent is a question of fact. (*People v. Griffin* (1897) 117 Cal. 583, 585, overruled on other grounds in *People v. Hernandez* (1964) 61 Cal.2d 529, 536.) A juror is able to assess the extent of a victim's mental disability.

> "The question whether a person possesses sufficient resources—intellectual, emotional, social, psychological—to determine whether to participate in sexual contact with another is an assessment within the [experience] of the average juror, who likely has made the same determination at some point.'"(*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1413.)

However, in instances where a victim may have an intellectual or developmental disorder (I/DD), capacity to consent likely requires expert testimony to avoid discriminatory commentary from family members or law enforcement about a person being too "simple" or "child-like" to consent. According to Disability Rights California:

> California law generally presumes all persons have legal capacity to make decisions and be responsible for their acts, including people with I/DD.[3] For example, the legal threshold for marrying is the lowest capacity standard in California, and even people under conservatorships can retain this right unless a court specifically finds they lack it based on medical testimony and affidavits.[4] The probate code uses a case-by-case approach and relies on expert opinions to assess a person's capacity. Unfortunately, the criminal legal system lags behind the probate code and still applies outdated, discriminatory, and paternalistic biases about disability. California courts have never recognized that a person with I/DD has the legal capacity to consent to sexual intercourse. … In some cases, individuals were found legally incapable of consent even after prior sexual experience,

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[3] See *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 639; see generally Rabbi Norman Cohen, The Story of Robert and Julie (2010) Impact 23(2) available at https://publications.ici.umn.edu/impact/23-2/the-story-of-robert-and-julie.

[4] Prob. Code, §§ 1900-1901, 2351.5, subd. (b)(6); In re Marriage of Greenway, supra, at 639-640; *Conservatorship of Navarrete* (2020) 58 Cal.App.5th 1018, 1031, as modified (Dec. 21, 2020); see also generally Dinnerstein, Sexual Expression for Adults with Disabilities: The Role of Guardianship (2010) Impact 23(2) available at https://publications.ici.umn.edu/impact/23-2/sexual-expression-for-adults-with-disabilities-the-role-of-guardianship.

> childbirth, or explicit verbal objections to the charged sexual acts."

DRC points to cases like *People v. Mobley* (1999) 72 Cal.App.4th 761, 781, overruled on other grounds, *People v. Trujillo* (2006) 40 Cal. 4th 165, wherein the lack of testimony about capacity to consent and familial explanations about what a person understands or does not understand, may lead to profoundly unjust and discriminatory findings by the court.

Legal consent and capacity to consent is not the same. If an adult with no history of I/DD or physical disability is so intoxicated that they cannot affirmatively consent, they lack legal consent.

> "A person is prevented from resisting if he or she is so incapacitated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character and probable consequences. Legal consent is consent that's given freely and voluntarily by someone who knows the nature of the act involved." ((*People v. White* (July 14, 2015, No. D060969) ___Cal.App.5th___, citing 1 CALCRIM 1002.))

Capacity to consent means a person, due to an I/DD or physical disability, intoxication, or unconsciousness cannot understand the nature and consequences of the act of sexual intercourse.

> Rape occurs when the victim lacks capacity to consent because of a mental disorder or disability (§ 261, subd. (a)(1)), unconsciousness (§ 261, subd. (a)(4)), or a level of intoxication that prevents resistance (§ 261, subd. (a)(3)). In each of these latter three circumstances, the accused either must have known or reasonably should have known of the victim's particular condition that precluded consent.(*People v. Linwood* (2003) 105 Cal.App.4th 59, 71 [129 Cal.Rptr.2d 73].)

A review of case law on Penal Code section 261, subdivision (a) prosecutions arguably demonstrates a discrimination of a different kind. In many cases, the conduct at issue is actually rape based on duress (Pen. Code, § 261, subd. (a)(2)) or threat of use of authority (Pen. Code, § 261, subd. (a)(7)), but are prosecuted as lack of capacity to consent. As noted in a report issued by the Stanford Law School Intellectual & Developmental Disabilities Law and Policy Project:

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

> Though each state has attempted to set forth its standards for capacity to consent in the statute and accompanying case law, it should be noted that the law is a blunt and imperfect instrument for assessing this question—one that has ethical, contextual, and social dimensions. The law is best adept to deal with concrete standards and facts. However, the majority of standards relating to capacity to consent to sexual activity are highly abstract and mutable."[5]

In *People v. Mobley, supra*, specifically, the perpetrator was convicted of sodomy against two young men who, as it appeared from the facts, may have been manipulated and led to believe they could not refuse the perpetrator's request for sex. The perpetrator befriended one of the victims at a train museum in San Diego and the other victim was the best friend of the first victim. (*Mobley, supra,* 72 Cal.App. at 769) According to the facts:

> When he told Mobley it hurt him and that he did not want to do it, Mobley told him "just do it." One time he threatened [victim] that if he did not do it, he would not be able to leave the room. Other times, he would lie on top of [victim] and just 'rammed it in.' Steve said the [act] was only painful a short time and then it would be done. He just got used to it and 'cooperated.'" (*People v. Mobley*, 72 Cal.App.4th, at 775.)

In this case, it is not at all clear the victims' actually consented without reference to the capacity to consent. The two victims may have had capacity to consent, they just did not consent.

In *People v. Thompson* (2006) 142 Cal.App.4th 1426, the perpetrator was an employee of a group home for people with I/DD. The perpetrator entered the victims' rooms at night while they slept and committed sex acts against them. The victim explained she did not consent and told her mother she had been raped. (Thompson, supra, 142 Cal.App. at 1430-31.) Despite the victim's statements that she had been raped – defendant was prosecuted solely on a theory of her capacity to consent.

> [Victim], who is trusting and docile, did not resist; instead, she dissociated—at trial, she was able to describe everything defendant did to her, yet she insisted that she had been 'in a deep sleep.' Thus, while the record leaves no doubt that she did not consent, there was some question as to whether defendant knew that she did not consent, and also as to whether he used force. (*People v. Thompson*, 142 Cal.App.4th at 1429.)

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[5] Linder, *"Capacity to Consent to Sexual Activity among those with Developmental Disabilities,"* Stanford Law School, Stanford Intellectual % Developmental Disabilities Law & Policy Project, p. 3.)

Both *Mobley* and *Thompson* may be somewhat demonstrative of a lack of respect for the victim's experience.

If the victim is able to clearly explain they consented to sex, that must be respected; yet, if a victim states they either did not express affirmative consent or said they did not want to have to sex, that must be taken just as seriously and prosecuted in accordance with a lack of consent rather than lack of capacity to consent. The feelings, thoughts, and expressions of the victims should be the foundation of any decision to prosecute, and if so, what charge should be lodged. However, given the latent discrimination in rape prosecutions generally, it is unclear to what extend the removal of the spousal exception will impact people with I/DD. Perhaps it makes more sense to develop a more specific basis to determine capacity to consent similar to what was proposed by the opposition. The most important voice should be those with I/DD.

4) **Sex Offender Registration and Probation:** One of the primary differences between spousal rape and rape, before 2021, was spousal rape was eligible for probation and sex offender registration was not mandatory.[6]

Penal Code section 1203.065 states offenses that are defined as rape, with the exception of Penal Code section 261, subdivision (a) may not be granted probation. (Pen. Code, § 1203.065, subd. (a).) This bill does not eliminate the possibility that a charge of rape based on a lack of capacity to consent may be sentenced to probation.

As for sex offender registration, rape generally requires mandatory sex offender registration. (Pen. Code, § 290, subd. (c) [Penal Code section 261 convictions are required to register as a sex offender].) That will remain the case without reference to the removal of the spouse exception in Penal Code section 261, subdivision (a) because of the elimination of the spousal rape statute in 2021. As explained in the Committee analysis of AB 1171 (C. Garcia), Chapter 626, Statutes of 2021:

> "By repealing the spousal rape statute and including it in the non-spousal rape statute, this bill would require mandatory sex offender registration in all instances of spousal rape. The period of registration could be from 20 years to life depending on the circumstances. (Pen. Code, § 290.) Further, a person required to register as a sex offender for spousal rape could also be included on the Megan's law website. (Pen. Code, § 290.46, subds. (c)(1) & (d)(1)(A).)"

[6] Rape carries significant penalties. The offense is punishable by a state prison sentence up to eight years. (Pen. Code, § 264.) Probation is prohibited if the perpetrator uses a firearm in the commission of the offense or inflicts great bodily injury upon the victim. (Pen. Code, §§ 1203.06, subd. (a)(1)(F) & 1203.075, subd. (a)(6).)

Therefore, removal of the spousal exception in Penal Code section 261, subdivision (a) will have no impact on either probation or registration. Probation is still an option and, since the changes in AB 1171, registration is still mandatory.

5) **Argument in Support**: According to the *Coalition of Gender Equality*: SB 258 is a follow-up bill to AB 1171 (Garcia) which passed in 2021. AB 1171 repealed the spousal rape exception, but left one loophole that allows the spousal rape when the victim cannot consent due to a severe disability. This was not an omission that the author or sponsors wanted, but we ran out of time and committed that we would come back in order to remove that last exception. Former Assemblymember Garcia generally supports SB 258's goal of closing this loophole, as a continuation of her work on AB 1171.
SB 258 protects disabled individuals from being raped by their spouses when they cannot consent to sex due to the impact of a disability. Today, rape of a spouse who is too disabled to consent is not a crime in California. That same rape, if committed by a non-spouse, is a crime. SB 258 simply removes the discriminatory law that allows this rape of disabled married spouses. The bill is strongly supported by numerous disability rights and service organizations, most notably the ARC of California, United Cerebral Palsy, The Association of Regional Center Agencies which coordinate services for, and advocate on behalf of, over 450,000 Californians with intellectual and developmental disabilities. It also has the support of national and state women's rights organizations and numerous domestic violence service providers.

California is currently one of a tiny, shrinking handful of states that provide any form of spousal rape exception. These laws are an archaic holdover from 17th century common law that have no place in a modern penal code. In the last 4 years since the passage of AB 1171 more than 10 states have repealed their spousal rape exceptions. Now California stands nearly alone with this retrograde statute and is clearly an outlier. SB 258 is necessary to bring California law into alignment with that of other states.

The Public Defenders and their allies oppose the bill in a series of near-identical form letters. The Public Defenders have opposed virtually every effort to repeal California's spousal rape exception for the last 50 years. In 1993, for example, with reference to then-Assembly Member Hilda Solis's AB 187, they wrote that they opposed any effort to eliminate the spousal rape exception because "spousal rape should not be generalized in the same category as rape by a stranger, or date rape. These were outdated views in 1993, and are even more so now.

The opponents, including DRC, claim that SB 258 criminalizes all sex between disabled people. This is simply untrue. This bill respects the ability of all people, including disabled married people to have choice about their bodily autonomy -- to have sex when they choose and not have it thrust on them without their consent. Furthermore the bill provides appropriate protection for accused spouses by requiring that the accused spouse either knew or should have known that the victim was too disabled to consent.

Current law contains an ironclad presumption that a disabled spouse can never be too impaired by their disability to consent to sex. This is unconscionable. According to the opposition, It doesn't matter if the victim is paralyzed from a stroke. It doesn't matter if the victim is unable to understand their surroundings, move, or speak after being hit by a drunk

driver. It doesn't matter if they have dementia and no longer recognize their spouse. It doesn't matter if they are unable to scream, fight back, or flee.

It also doesn't matter if the defendant knew for a fact that the victim was too disabled to consent but sexually violated them anyway. According to the opponents, if a victim was competent to get married on her wedding day, then the marriage is itself proof of ongoing ability to consent to sex, regardless of how distant in time the marriage may have been, what has happened with her health since then, or what the specific facts and circumstances were at the time of the rape. Common sense alone tells you that is wrong. Current law discriminates on the basis of both marital status and disability. SB 258 will finally end that discrimination.

6) **Argument in Opposition**: According to *Disability Rights Education and Defense Fund:* DREDF served as a co-sponsor of AB 1663 (Maienschein), the Probate Conservatorship Reform and Supported Decision-Making Act enacted in 2022. Since then, DREDF has trained hundreds of lawyers and community members on supported decision-making as a tool to support and preserve the capacity of people with disabilities, including people with intellectual and developmental disabilities. DREDF advocates for the right of people with disabilities to make their own decisions in life with any needed supports, including decisions about friends, dating, consensual sex, reproductive health care, marriage, and parenting. …

"Autonomy Issues Raised by SB 258

The history of law is riddled with misogyny and ableism, among other forms of oppression. Prior to the 1970s, marital rape – sex by one spouse (typically a man) with the other spouse (typically a woman) without the second spouse's consent – was legal in every US state. The original structure of Penal Code section 261, first enacted in the late 1880s, is a relic from this shameful history. California criminalized marital rape in 1979 and reformed the marital language of Penal Code 261 in 2021 (except for the provision at issue in SB 258). 2021 Cal. Stats. ch. 626 (AB 1171).

"Alongside the history of sexism which included marital rape is the history of state-sponsored eugenics and state regulation of the bodies and intimate choices of people with disabilities, particularly people with intellectual and developmental disabilities. California sought to regulate and prevent sex, marriage, and reproduction by disabled people, consistent with the eugenical mandate to prevent the "breeding" of biologically inferior persons. For decades, California law allowed the commitment of "an imbecile, or feeble-minded person, or any idiot, or epileptic" upon petition of their guardian, and permitted the sterilization of "such idiot or fool" upon the written request of their guardian. Cal. Code § 2192 (1916);[7] *see also Buck v. Bell*, 274 U.S. 200, 206 (1927) (affirming constitutionality of law permitting sterilization of "any patient afflicted with hereditary forms of insanity [or] imbecility").

"State law prohibited the issuance of a marriage license when either party was "an imbecile, or insane." 1907 Cal. ch. 241, page 053, amending Cal. Civ. Code § 69 (1907).[8] And under

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[7] One third, or 20,000, of all documented compulsory sterilizations conducted under state eugenics laws occurred in California.

[8] *Accord* Cal. Civ. Code § 4201 (1988) ("No [marriage] license shall be granted when either of the parties, applicants therefor, is an imbecile, is insane."). Such regulation of marriage was a common component of laws implementing eugenical thinking. Robyn M. Powell, "Achieving Justice for Disabled Parents and Their Children:

Section 261 as enacted in 1872, sex between two unmarried people in which one person was found "incapable, through lunacy or any other unsoundness of mind" of giving legal consent, was deemed rape. *See People v. Griffin*, 117 Cal. 583, 587 (1897) (finding that adult with intellectual disability could not consent to sex under Penal Code 261 where "medical superintendent for the state home for feeble-minded testified that she was (at the time of the trial) an inmate of his institution and was feeble-minded"). Over the many decades between the height of the eugenics movement and today, disabled people and their advocates have slowly built the modern disability rights and disability protection systems. In 1992, following the 1990 enactment of the federal Americans with Disabilities Act, California amended its marriage laws to eliminate the provision that barred the issuance of a marriage license "when either of the parties, applicants therefor, is an imbecile, is insane," replacing this language with "if either of the applicants lacks the capacity to enter into a valid marriage." 1992 Cal Stats. ch. 162 (AB 2650) (amending Fam. Code § 352); *compare* 1988 Cal Stats. ch. 228 (AB 2749).

"Californians with intellectual and developmental disabilities can now freely marry. The level of capacity required to marry is extremely low. *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 641 (2013) ("There is a large body of case authority reflecting an extremely low level of mental capacity needed before making the decision to marry or execute a will. … Family Code section 300, subdivision (a) simply states marriage requires 'the consent of the parties capable of making that contract.'"); *see also* 1895 Stats. ch. 29 (amending Civ. Code § 55 to contain language virtually identical to present-day Family Code § 300).[9]

"In 1995, California amended the Penal Code to protect people with disabilities from sexual contact by staff and caretakers. 1995 Cal Stats. ch. 890 (SB 1161) (adding sections to Penal Code § 288 to prohibit lewd and lascivious acts by caretakers on dependent disabled people in many settings); *see also* Penal Code §§ 237, 243.4(b), 243.25, 368 *et seq.*, 422.56(b) & (d), 422.75. This category of crime does not turn on capacity to consent to sex and is often applicable to the fact patterns charged under Section 261(a)(1).

"In 2021, the Legislature declined to eliminate the marital language in section (a)(1) – retaining an imperfect form of "safe harbor" for married people with intellectual and developmental disabilities – but emphasized that "[t]his paragraph [regarding capacity to consent to sex] does not preclude the prosecution of a spouse committing the act from being prosecuted under any other paragraph of this subdivision or any other law." In other words, while the safe harbor meant that consensual sex within a marriage cannot be rape based on lack of capacity, other types of rape can be prosecuted, including sex against a person's will

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An Abolitionist Approach," 33 Yale J.L. & Feminism 37, 71 (2022) ("Another aspect of eugenics that restricted people with disabilities from creating and maintaining families was the enactment of state laws that barred disabled people from marrying or alternatively permitted marriages only after the age of forty-five. For example, a Connecticut law prohibited 'epileptics, imbeciles, and feebleminded persons' from marrying or having extramarital sexual relations before the age of forty-five."); *see also* Robyn M. Powell, "Including Disabled People in the Battle to Protect Abortion Rights: A Call-to-Action," 70 UCLA L. Rev. 774, 793 (2023) (discussing analogous state marriage laws in Tennessee and Massachusetts).

[9] Consistently, the Probate Code allocates certain autonomy rights to people with intellectual and developmental disabilities under conservatorship, including the right to consent or withhold consent to marriage, and to control their own social and sexual contacts and relationships, unless a court orders otherwise. Prob. Code § 2351.5(b)(3), (6).

by means of force, violence, duress, menace, fear, or threats. *See* Pen. Code § 261(a)(2)-(7). SB 258 would reverse the Legislature's 2021 decision by deleting the marital language from section (a)(1). This means that consensual sex within a marriage would be rape if one party is found to lack capacity to consent to sex.

"The California code does not include a definition of capacity to consent to sex and does not require expert testimony on such capacity. Instead, prosecutors, judges, and juries use the standard adopted by *Griffin* in 1897. In practice, appellate courts affirming Section 261(a)(1) convictions readily find that people with even mild or moderate intellectual and developmental disabilities lack capacity to consent to sex,[10] often in factual contexts in which another form of rape set out in section (a)(2)-(7) and other criminal offenses (such as those set out in Penal Code § 288) could have been charged.

"This body of case law raises serious concerns about the rights of people with intellectual and developmental disabilities to make intimate choices free of government interference. As the appellate court acknowledged in *People v. Thompson*, "the state has restricted the ability of developmentally disabled people to have consensual sex." *People v. Thompson*, 142 Cal. App. 4th 1426 (2006). SB 238 would not modify or update existing restrictions but would extend them to married disabled people.

"Oppose Unless Amended

Given the serious autonomy concerns described, DREDF opposes SB 258 unless it is amended. Along with other disability rights stakeholders, DREDF seeks an amendment to provide updated standards on the capacity of people with intellectual and developmental disabilities to consent to sex. DREDF and other stakeholders have offered language and are prepared to work with the author to resolve these concerns. DREDF also recommends that SB 258 be made a two-year bill to permit this work to continue."

7) **Prior Legislation**: AB 1171 (C. Garcia), Chapter 626, Statutes of 2021, repeals provisions of code relating to spousal rape thereby making an act of sexual intercourse accomplished with a spouse punishable as rape if the act otherwise meets the definition of rape.

REGISTERED SUPPORT / OPPOSITION:

Support

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[10] See, e.g., *People v. Thompson*, 142 Cal. App. 4th 1426, 1429, 1431 (2006) (evidence showed that victim knew what sex was, knew that sex causes pregnancy when sperm connects to the egg, had heard of AIDS, had had sex with developmentally disabled boyfriend, could feed and dress herself, and could read at a second-grade level); People v. Mobley, 72 Cal. App. 4th 761, 768, 770-771, 774, 776-777 (1999) (evidence showed that one victim could read, dress himself, hold down a part-time job, handle money, make purchases, vote, use a microwave, use public transportation, and choose friends, and the other victim could read, hold down a job, vote, take public transportation, and choose friends); People v. Boggs, 107 Cal. App. 492, 493-94 (Dist. Ct. App. 1930) (testimony was that victim kept house on a farm for her father and brother for several years, doing the cooking and general housework, attended school, was able to describe dates, places, and events, and knew what sex was and that it could result in pregnancy).

Action Together Bay Area
Alameda County Families Advocating for the Seriously Mentally Ill
American Association of University Women (AAUW) San Jose
American Association of University Women - California
Asian Americans for Community Involvement
Association of Regional Center Agencies
CA Legislative Women's Caucus
California Civil Liberties Advocacy
California District Attorneys Association
California National Organization for Women
California State Sheriffs' Association
Coalition for Gender Equity
Community Solutions for Children, Families, and Individuals
County of Santa Clara
Dawn (democratic Activists for Women Now)
Feminist Majority
Joyful Heart Foundation
Los Angeles County Democratic Party
National Clearinghouse on Marital and Date Rape
National Women's Political Caucus of California
Ruby's Place
San Francisco Senior and Disability Action
Santa Barbara Women's Political Committee
Santa Clara County Democratic Party
Santa Clara County District Attorney's Office
Santa Clara; City of
Silicon Valley Democratic Club
Tahirih Justice Center
The Arc California
Voices of Women for Change
Weave
Women's Equal Justice
Women's March Action

2 private individuals

Oppose

ACLU California Action
Black Women for Wellness Action Project
California Public Defenders Association
Cal Voices
California Attorneys for Criminal Justice
Californians United for a Responsible Budget
Disability Rights California
Disability Rights Education & Defense Fund
Felony Murder Elimination Project
Initiate Justice
LA Defensa

Law Project for Psychiatric Rights (PSYCHRIGHTS)
Local 148 LA County Public Defenders Union
Racial and Ethnic Mental Health Disparities Coalition
San Francisco Public Defender
Smart Justice California, a Project of Tides Advocacy
Universidad Popular

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