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Good Intentions, Unintended Consequences: How United States v. James Will Affect Federal Sexual Abuse Analysis

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GOOD INTENTIONS, UNINTENDED CONSEQUENCES: HOW *UNITED STATES V. JAMES* WILL AFFECT FEDERAL SEXUAL ABUSE ANALYSIS

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I. INTRODUCTION

Cerebral palsy is a group of disorders that affects a person's ability to move.[1] Although the symptoms of cerebral palsy vary, all individuals with cerebral palsy experience some degree of movement and posture impairments, and many have related conditions, including intellectual disability.[2] Most individuals with cerebral palsy, however, are capable of communicating.[3] Those who are unable to speak or who do not have total control over their body movements often communicate through established non-verbal methods, including text-to-speech or eye tracking technology, voice synthesizers, or sign language.[4]

In *United States v. James*,[5] the Ninth Circuit held that the evidence presented[6] was sufficient to establish that T.C., a twenty-eight year old woman with cerebral palsy, was physically incapable of communicating her unwillingness to engage in a sexual act with the defendant, Christopher James ("James").[7] The case turned on the Ninth Circuit's holding, which broadly interpreted the statutory

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1. *Facts About Cerebral Palsy*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/ncbddd/cp/facts.html (last updated July 13, 2015).

2. *Id.*

3. *Communication*, MYCHILD, http://www.cerebralpalsy.org/information/communication (last visited July 23, 2016).

4. *Id.*

5. 810 F.3d 674 (9th Cir. 2016).

6. *See infra* Part II.

7. *James*, 810 F.3d at 681–82.

phrase—"physically incapable" of communicating an unwillingness to engage in a sexual act.[8] The interpretation of this language in 18 U.S.C. § 2242(2)(B) ("§ 2242(2)(B)"),[9] the federal non-aggravated sexual abuse statute,[10] was a matter of first impression for the Ninth Circuit.[11] In its opinion, the circuit court expressly declined to follow guidance from states that had interpreted similar language in their respective rape statutes.[12]

The majority asserted in the last paragraph of their opinion, perhaps as a parting thought, that "[t]he law in its majesty protects from assault those who are too weak and feeble to protect themselves."[13] That phrase is revealing of the majority's focus and attention throughout its opinion. While that theory appears as a noble approach to the law on its surface, the circuit court's holding, in effect, reinforces a paternalistic view of the law and unreasonably broadens the statute's meaning beyond what Congress likely intended.

Certainly, statutory laws must protect victims of sexual abuse.[14] But *James*'s holding may lead to vast and unanticipated consequences for alleged violators of § 2242(2)(B) in future cases. The majority's broadened interpretation of the statute—finding that a defendant can be convicted under § 2242(2)(B), even when the

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8. *Id.* at 682.

9. Section 2242(2) of Title 18 of the United States Code states in full:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—
>
> (2) engages in a sexual act with another person if that other person is—
>
> (A) incapable of appraising the nature of the conduct; or
>
> (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act . . . .

18 U.S.C. § 2242(2) (2012).

10. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE: EVIDENCE § 5414 (Supp. 2016) (noting that an example of a non-aggravated act of sexual abuse is where one person takes advantage of a person who is mentally or physically unable to consent to the sexual act).

11. *James*, 810 F.3d at 676.

12. *Id.* at 680–81 (rejecting the narrower "physically helpless" standard employed by Connecticut and New York courts in favor of a broader "physically incapable" standard).

13. *Id.* at 683.

14. One of Congress's intentions in enacting the Sexual Abuse Act of 1986 was to expand the offense to reach all forms of sexual abuse, thereby further developing statutory avenues for victims of sexual crimes. *See* H.R. REP. NO. 99-594, at 10–11 (1986), http://files.eric.ed.gov/fulltext/ED274931.pdf.

victim had some awareness of the situation[15]—has potentially dangerous consequences. First, because the federal government and not the State of Arizona has jurisdiction over sexual assault crimes in Indian Country,[16] this holding furthers an imbalance of federal and state law standards for sexual assault crimes that Congress had attempted to eliminate when it enacted the statute.[17] The majority seems to forget or to resist Congress's intent in evening the imbalance between federal and state laws when it specifically put forth its reasoning in distinguishing its interpretation of the federal "physically incapable" standard from the "physically helpless" state standard equivalent.[18]

Further, the majority's holding upends the well-established rule of lenity, which requires courts to resolve ambiguities in criminal statutes in favor of the defendant.[19] The rationale behind the rule of lenity is twofold: first, the criminal defendant should be given a fair warning that his or her conduct would violate the statute in question, and second, because of the seriousness of criminal punishment, the legislature—not the courts—should define criminal activity.[20]

Lastly, the practical effect of the *James* holding is that it may affect social policy, specifically for the disabled community, by

15. The majority cited other federal cases upholding the defendant's conviction under § 2242(2)(B) in instances where the victim was "physically hampered" due to sleep, intoxication, or drug use and, therefore, was rendered physically incapable of communicating unwillingness to engage in the sexual act. *James*, 810 F.3d at 681; *see, e.g.*, United States v. Carter, 410 F.3d 1017, 1028 (8th Cir. 2005) (ruling that victim was physically incapable where the lingering effects of marijuana may have hindered her ability to object to the abuse); United States v. Morgan, 164 F.3d 1235, 1240 (9th Cir. 1999) (upholding defendant's conviction where the victim repeatedly gained and lost consciousness as an effect of alcohol); United States v. Barrett, 937 F.2d 1346, 1348 (8th Cir. 1991) (upholding conviction where victim, though not fully awake, vaguely remembered someone pulling off her underwear).

16. The "special maritime and territorial jurisdiction of the United States in § 2242 includes Indian Country. *See* United States v. Begay, 42 F.3d 486, 498 (9th Cir. 1994).

17. "Members of Congress worried that antiquated federal laws and modernized state laws criminalized different conduct, an imbalance of particular concern in Indian country." United States v. Bruguier, 735 F.3d 754, 772 (8th Cir. 2013) (stating that the genesis of the Sexual Abuse Act of 1986 was Congress's recognition that federal law was becoming increasingly inconsistent with state law). *See* Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87, 100 Stat. 3592, 3620–24 (1986) (codified as amended at 18 U.S.C. §§ 2241–44, 2246 (2007)).

18. The majority stated that federal law should not be dependent on state law here because state law punishes non-consensual sexual intercourse; in contrast, federal law does not have this language's counterpart in its statute. *James*, 810 F.3d at 679. The majority also stated that the state law phrase 'physically helpless' was too narrow to cover instances where a victim may be merely physically incapacitated. *Id.* at 681.

19. United States v. Bass, 404 U.S. 336, 348 (1971).

20. *Id.* at 347–48; *see James*, 810 F.3d at 684 (Kozinski, J., dissenting).

deepening existing stereotypes of disabled individuals, failing to differentiate between the wide spectrum of abilities amongst disabled persons, and stifling sexual encounters between non-disabled and disabled individuals.[21]

It is the position of this Comment that the majority's holding in *James* was an example of improper judicial activism and judicial overreach. Part II sets forth the factual background of the case. Part III takes an in-depth look at both the district court's and the Ninth Circuit majority's reasoning behind their differing interpretations of § 2242(2)(B). Part IV analyzes the significance of the majority's holding and illustrates, procedurally, the importance of the criminal charge and of the principles of statutory interpretation in the American criminal justice system. Part IV also provides important policy reasons why the majority missed the bigger picture underlying the realistic implications of its holding. Part V examines the impact of this case on the disabled community. Finally, Part VI concludes by predicting the significance of this holding on future federal sexual abuse cases.

II. BACKGROUND

On August 23, 2011, T.C.'s aunt found James and T.C., a then twenty-eight year old adult woman with cerebral palsy, having sex on the porch of T.C.'s grandparents' home.[22] The incident occurred within the boundaries of the Fort Apache Reservation in Indian Country.[23] T.C.'s aunt rushed T.C. to the hospital, where a vaginal examination revealed torn tissue and bleeding from a laceration.[24] James later admitted to investigators from the Bureau of Indian Affairs ("BIA") that he had sex with T.C.[25] James confessed he had removed T.C. from her wheelchair, pulled off her pants and underpants and his own pants, and penetrated her digitally and with his penis.[26] In a statement, James wrote: "I'm ashamed and confusted [sic]. I don't know what made me do what I did . . . . I will not

21. *See infra* Part V.

22. T.C. is also James's niece. *James*, 810 F.3d at 677.

23. *Id.* The federal government had jurisdiction to indict James because the State of Arizona did not have jurisdiction over sexual assault crimes committed in Indian Country. *Id.* (citing United States v. Mitchell, 502 F.3d 931, 946 (9th Cir. 2007)).

24. *Id*.

25. *Id.*

26. *Id.*

forgive me [sic] but I do ask God for forgiveness. [T.C.] is not to bleame [sic] either. She was incent [sic] of all things."[27]

T.C. suffers from severe developmental disabilities as a condition of her cerebral palsy.[28] She has noticeable physical limitations and uses a wheelchair.[29] She is incapable of walking without assistance, must be lifted in and out of her wheelchair, and cannot use her hands or upper body.[30]

T.C. primarily communicates nonverbally by using gestures and sounds.[31] Importantly, however, T.C. is capable of verbalizing yes and no.[32] Though T.C.'s longtime caregiver occasionally had trouble understanding T.C., the caregiver nevertheless testified at trial, "[S]he can say short phrases, two or three words."[33] The caregiver also testified that T.C. is able to communicate her needs and desires, such as when she needs to go to the bathroom, when she wants to do something, or when she does *not* want to do something.[34] Further, the BIA agent who interviewed T.C. after the incident testified that T.C. responded to his questions by nodding her head for yes and shaking her head for no.[35] Also, T.C.'s uncle testified that T.C. gives a mean look and growls if the television station is changed against her will.[36]

After James confessed, the government charged him with two counts of sexual abuse in violation of 18 U.S.C. § 2242(2)(B), the subsection regarding *physical* incapacity.[37] For unknown reasons, the government declined to charge James under § 2242(2)(A), the subsection addressing a victim's *mental* capacity.[38] The government also did not offer expert witness testimony to establish T.C.'s cognitive impairments; rather, the government relied solely on the lay opinion testimony of her family, the emergency room nurse, her caregiver, and the BIA agent to establish the level of T.C.'s cognitive

27. *Id.*
28. *Id.* at 676–77.
29. *Id.* at 676.
30. *Id.*
31. *Id.* at 676–77; *see* Transcript of Proceedings at 13:10–11, United States v. James, 2013 WL 5423979 (No. 11-8206) [hereinafter Transcript of Proceedings].
32. The government's counsel stated this in her opening statement. Transcript of Proceedings, *supra* note 31, at 13:11; *see James*, 810 F.3d at 677.
33. *See* Transcript of Proceedings, *supra* note 31, at 13:10–16.
34. *James*, 810 F.3d at 685 (Kozinski, J., dissenting).
35. *Id.*
36. *Id.*
37. See *supra* note 9 for the text of 18 U.S.C. § 2242(2) in its entirety.
38. *James*, 810 F.3d at 677.

awareness.[39]

On July 30, 2013, a three-day jury trial commenced.[40] James moved for a judgment of acquittal at the close of the government's case and, again, at the close of trial.[41] The district court reserved its ruling on both motions until it heard the jury's verdict.[42] The jury convicted James on both counts.[43] After oral arguments and post-trial briefing, the judge granted James's motion for acquittal, and Judgment of Acquittal was entered on September 26, 2013.[44] The government timely appealed.[45]

III. THE REASONING OF THE COURT

A. The District Court's Reasoning

In assessing whether to grant the defense's motion for acquittal, the district court first looked to interpret the meaning of "physically incapable" under § 2242(2)(B).[46]

The district court began by analyzing the legislature's intent in drafting the statute.[47] Congress enacted § 2242(2)(B) as part of the Sexual Abuse Act of 1986, which was a step towards modernizing and reforming the federal rape statutes.[48] The House Judiciary Committee explicitly defined all of the elements of each offense under § 2242, but did not elaborate on the definition or meaning of "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act" under subsection (B).[49]

Since the district court did not find, and the parties did not cite, any federal cases that clarified the meaning of "physically incapable," the district court turned to state courts that had

39. *Id.*

40. *Id.*

41. *Id.* at 678. Rule 29 of the Federal Rules of Criminal Procedure requires that "the court on the defendant's motion must enter a judgment for acquittal of any offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29.

42. *James*, 810 F.3d at 678.

43. *Id.*

44. *Id.*; *see* United States v. James, No. CR-11-8206, 2013 WL 5423979, at *1 (D. Ariz. Sept. 26, 2013), *rev'd and vacated*, 810 F.3d 674 (9th Cir. 2016).

45. *James*, 810 F.3d at 678.

46. *James*, 2013 WL 5423979, at *2.

47. *James*, 810 F.3d at 678.

48. *See supra* note 14; *see* Sexual Abuse Act of 1986, Pub. L. No. 99-646, § 87, 100 Stat. 3592, 3620–24 (codified as amended at 18 U.S.C. §§ 2241–44, 2246 (2007)).

49. *James*, 2013 WL 5423979, at *3.

interpreted similar language in their own respective rape statutes for guidance.[50] In *State v. Fourtin*,[51] the Supreme Court of Connecticut held that the state rape statute criminalized sexual intercourse with a person who was "physically helpless" at the time of the sexual intercourse.[52] There, the court defined a "physically helpless" person as one who was "unconscious," or for any other reason, was "physically helpless" at the time of sexual intercourse.[53] The *Fourtin* court ultimately concluded that the State of Connecticut had presented sufficient evidence to show that the victim was capable of communicating and that the state did not produce adequate evidence that the victim "was either so unconscious or so uncommunicative that she was physically incapable of manifesting . . . her lack of consent . . . ."[54]

Similarly, the district court found additional support in *People v. Huurre*.[55] In *Huurre*, the New York Court of Appeals affirmed a lower court's determination that a nonverbal woman with cerebral palsy and epilepsy was not physically helpless within the meaning of the New York state statute, which is equivalent to Connecticut's rape statute.[56]

Ultimately, through its analysis of the statute's legislative history and other jurisdictions' judicial interpretations of similar statutes, the district court concluded that a person who is able to communicate unwillingness by vocalizations, gestures, or other actions does not meet the "physically incapable" standard under § 2242(2)(B), even if the person cannot physically resist or lacks mental capacity to perceive.[57] For this reason, the district court held that the evidence presented at trial was insufficient to sustain James's conviction under § 2242(2)(B) in this case[58] and, therefore, granted

50. *See id.* at *3–4.

51. 52 A.3d 674 (Conn. 2012).

52. *Id.* at 676.

53. *Id.* The issue in *Fourtin* was whether the victim, a woman with cerebral palsy, mental retardation, and hydrocephalus, had the physical ability to communicate unwillingness. The evidence presented at trial showed that the victim was nonverbal, but that she was able to communicate by gesturing, vocalizing, and using a communication board. Further, the victim was able to indicate her feelings by groaning, screeching, kicking, biting, and scratching. *Id.* at 677.

54. *Id.* at 690.

55. 603 N.Y.S.2d 179 (App. Div. 1993).

56. *Id.* at 180; *see James*, 2013 WL 5423979, at *4.

57. *James*, 2013 WL 5423979, at *6.

58. *Id.* at *7.

James's motion for acquittal.[59]

B. The Ninth Circuit Majority's Reasoning

Reviewing the lower court's decision to grant James's motion for acquittal under a *de novo* standard, Circuit Judge Richard Tallman, writing for the majority, held that as a matter of first impression, "physically incapable," as used in § 2242(2)(B), was to be defined broadly.[60] The majority's holding expressly rejected the district court's interpretation, which defined "physically incapable" in a manner similar to the "physically helpless" state standard equivalent.[61] The majority instead found that the two standards were separate and distinct.[62] The majority also disagreed with the district court's reasoning, which essentially required T.C. to be totally and completely helpless in order for the jury to properly convict James under § 2242(2)(B).[63]

To support its reasoning, the majority cited the manner in which § 2242(2)(B) had been applied in other federal cases.[64] Although there was no case law that applied § 2242(2)(B) to a victim with cerebral palsy, the court reasoned that other federal courts' interpretation of the same subsection aligned with its conclusion that a defendant may be convicted under § 2242(2)(B) where the victim had some awareness of the situation, like T.C. did in this case.[65] Even though the victim may not have been completely physically helpless, the majority concluded that a physically "hampered" victim

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59. *Id.* at *8. The district court found that, with the evidence presented at trial, the jury could not find beyond a reasonable doubt that T.C. was "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act" at the time of the alleged sexual act. *Id.* at *7.

60. United States v. James, 810 F.3d 674, 679 (9th Cir. 2016).

61. *Id.*

62. *Id.* at 681. The Ninth Circuit majority stated:

> "Physically helpless" suggests a lack of physical ability to do anything while "physically incapable" is a term that is more susceptible to application to various factual situations that can come before a jury. A victim could have a physical incapacity to decline participation or be incapable of communicating unwillingness to engage in a sexual act and still not be physically helpless.

Id.

63. *Id.* at 682.

64. *Id.* at 681; *see* United States v. Carter, 410 F.3d 1017, 1028 (8th Cir. 2005); *see, e.g.*, United States v. Morgan, 164 F.3d. 1235, 1237–38 (9th Cir. 1999) (in the sentencing stage, the court held the defendant violated § 2242 where the victim repeatedly gained and lost consciousness and "was unconscious or nearly so" at the time of intercourse).

65. *James*, 810 F.3d at 679–81.

would be classified as "physically incapable" under the statute.[66] To further support its position, the majority noted that federal law did not have a provision criminalizing non-consensual sexual intercourse, like many state statutes had incorporated into its laws.[67] The court's holding, which broadens the meaning of § 2242(2)(B), however, fills that noticeable gap in federal law, although the absence of non-consensual sexual intercourse in the federal statute may have been what Congress intended and not an oversight.[68]

Further, and perhaps more troubling, the majority asserted it was more important that questions of fact—such as whether T.C.'s condition rendered her physically incapable—go to the jury.[69] The majority's rationale is disconcerting because allowing a jury to fact-find and to determine guilt based upon an unclearly defined legal standard runs contrary to the law.[70] The majority reasoned that they should follow cases that used the broader, more encompassing phrase ("physically incapable") rather than the narrower phrase ("physically helpless") because it would allow more cases to be submitted to the "good judgment of a jury."[71]

Applying the *Jackson v. Virginia* standard[72] to the facts of this case, the majority held that the evidence produced by the government was sufficient to establish that T.C.—despite being able to communicate nonverbally—was physically incapable of communicating her willingness to engage in the sexual act and physically incapable of declining participation in the sexual act.[73]

IV. ANALYSIS

James's broadened interpretation of the meaning of "physically

66. *Id.* at 681.

67. *Id.* at 679.

68. *See id.* ("Noticeably absent from 18 U.S.C. § 2242 is a provision punishing non-consensual sexual intercourse.").

69. *Id.* at 681.

70. *Id.* at 684 (Kozinski, J., dissenting) ("The function of the jury is to find facts and determine guilt by applying known legal standards, not to make up the law as it goes along. The majority's 'let the jury decide what's illegal' approach is unwise and, most likely, unconstitutional.").

71. *Id.* at 682 (majority opinion).

72. 443 U.S. 307, 318–19 (1979) (noting that the *Jackson* standard for reviewing the sufficiency of evidence to support a criminal conviction is articulated as: "[A]fter viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

73. *James*, 810 F.3d at 6828–30; *see supra* Part II.

incapable" under § 2242(2)(B) is likely to have significant ramifications on future cases involving a victim's communicative capabilities in a sexual assault case that falls under federal law. The majority's holding is the result of improper judicial overreach into Congress's role of lawmaking. Procedurally, *James* also reflects on the importance of the government's charge for a criminal defendant[74] and the necessity of jurors applying an established legal standard to the facts of a case. Further, *James*'s holding disregards the principle of statutory interpretation and the rule of lenity.

A. The Majority's Justifications Are Based on an Unsteady Foundation

The Ninth Circuit's broadened definition of a "physically incapable" sexual assault victim overreaches its judicial boundaries and confers superfluous interpretation to a statute with a clear and plain meaning. Judge Alex Kozinski, the dissenting judge, stated this point well. Judge Kozinski recognized the statute's clear meaning: "The government must prove that the alleged victim had a physical impairment and that this impairment made it impossible for [the alleged victim] to say no to . . . or to otherwise indicate nonconsent to sexual acts."[75] He also criticized the majority for overstepping its boundaries and filling in the gaps created by the language in the federal statute—a task that is for Congress, not the judiciary.[76] Further, Judge Kozinski responded to the majority's point regarding the fact-finding function of the jury by urging that the jury must determine guilt by applying established legal standards, not to "make up the law as it goes along."[77]

Here, the evidence produced at trial indicated that T.C. was able to communicate: witnesses including the BIA agent, T.C.'s longtime caregiver, and T.C.'s uncle testified that she "can say yes or no," "communicates by nodding or shaking her head and making grunting

74. *See James*, 810 F.3d at 686 (Kozinski, J., dissenting). A person with cerebral palsy will likely have both mental and physical incapacities, but the government in this case charged James under § 2242(2)(B), which involves a victim's *physical* incapability. *Id.* The government did not charge James under § 2242(2)(A), which involves a victim's *mental* incapability. This is important because evidence as to T.C.'s mental incapability—"mental limitations, developmental delay, and lack of knowledge about sex"—cannot justify James's conviction under § 2242(2)(B). *Id.*

75. *Id.* at 684.

76. *Id.*

77. *Id.*

sounds," and "responds to questions by nodding her head for yes and shaking her head for no."[78] Although her means were unconventional and mostly nonverbal,[79] witness testimony and the government counsel's own opening statement all indicated that T.C. was able to physically communicate.[80]

Particularly with individuals with cerebral palsy, the range of communication is wide.[81] Individuals with cerebral palsy are sometimes unable to use speech and, as a result, alternate methods of communication are necessary.[82] In fact, most people with cerebral palsy are able to communicate even if they are primarily nonverbal.[83]

The majority's opinion disregards the recognized ability of individuals with cerebral palsy to communicate in a nonverbal manner. In contrast with the district court, the majority found that the evidence produced at trial was sufficient to permit a rational juror to find that T.C.'s cerebral palsy was so severe that it rendered her incapable of being understood by others and, therefore, incapable of communicating to James her unwillingness to participate in the sexual act.[84]

The majority's reasoning, however, misses the central point. Section 2242(2)(B) requires the alleged victim to be physically unable to communicate dissent to participate in the sexual act, and

78. *Id.* at 685; *see supra* Part II.

79. *James*, 810 F.3d at 686 (Kozinski, J., dissenting). *But see* Reply Brief of Appellant at 4, United States v. James, 810 F.3d 674 (9th Cir. 2016) (No. 11-8206) (noting that "T.C.'s physical manifestations were not always consistent with her emotions" and that even when T.C. nodded her head "yes" or "no," her actions were always in response to a question and were not always accurate).

80. *James*, 810 F.3d at 686 (Kozinski, J., dissenting) (citing United States v. James, No. CR-11-8206, 2013 WL 5423979, at *1 (D. Ariz. Sept. 26, 2013), *rev'd and vacated*, 810 F.3d 674 (9th Cir. 2016)); s*ee* Transcript of Proceedings, *supra* note 31, at 13:10–11.

81. *What Is Cerebral Palsy?*, CEREBRAL PALSY ALLIANCE, http://www.cerebralpalsy.org.au/what-is-cerebral-palsy (last visited July 23, 2016) ("Cerebral palsy is a physical disability that affects movement and posture . . . [It] affects people in different ways . . . People who have cerebral palsy may also have visual, learning, hearing, speech, epilepsy, and intellectual impairments.").

82. *Communication*, MYCHILD, http://www.cerebralpalsy.org/information/communication (last visited July 23, 2016).

83. *Id.*; *see Speech and Language Therapy*, MYCHILD, http://www.cerebralpalsy.org/about-cerebral-palsy/treatment/therapy/speech-language-therapy (last visited July 23, 2016) (indicating gestures, symbols, signing, touch, picture boards, computer-based aids, and voice synthesizers are tools to assist individuals with cerebral palsy in communicating); *Cerebral Palsy and Communication*, CEREBRAL PALSY SOURCE, http://www.cerebralpalsysource.com/About_CP/communication_cp/index.html (last visited July 23, 2016) ("Communication is a very important tool for someone with cerebral palsy trying to express them self [*sic*].").

84. *James*, 810 F.3d at 682.

the evidence at trial showed that T.C. *was* physically able to communicate her needs and desires, despite her methods of communication in a non-traditional manner.[85] For that reason, it is troublesome to understand how the majority found that the evidence on the record supported a factual conclusion that T.C. was physically incapable of communicating.

B. The Majority Gave Short Shrift to Established Rules of Criminal Procedure and Overreached Its Judicial Boundaries

The majority attempted to justify its sweeping holding by reconciling it with the broader notion that the law should protect the weak and feeble.[86] The majority used this concept as policy background to support its interpretation that a broader meaning of the "physically incapable" standard in § 2242(2)(B) was appropriate.[87] As a result, however, the majority's holding missed its intended mark. The law should indeed aim to protect the weak and feeble from being taken advantage of in instances of sexual abuse, but at what cost?

It is a historically fundamental principle of the American criminal justice system that "[t]he Constitution protects a criminal defendant from being convicted [of a particular charge] except on proof beyond a reasonable doubt."[88] Here, the government charged James for non-aggravated sexual abuse under § 2242(2)(B) rather than § 2242(2)(A), the "mental incapacity" subsection.[89] Under the facts of the case, it seems as if subsection (A) of the statute would be a more appropriate charge.[90] Even if the evidence at trial would have established that T.C. did not possess the mental capacity to appraise the nature of the sexual act with James, the presumption that T.C.'s limitations were purely physical must stand because the government

85. *See supra* Part II (noting that T.C.'s caregiver testified that T.C. is able to communicate when she wants to do something and when she does *not* want to do something).

86. *James*, 810 F.3d at 683.

87. *See id.*

88. 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 502 (4th ed., 2009); *see* Miles v. United States, 103 U.S. 304, 309 (1880).

89. *James*, 810 F.3d at 678–79.

90. Section 2242(2)(A) criminalizes those who "knowingly . . . engage in a sexual act with another person if that other person is *incapable of appraising the nature of the conduct* . . . ." 18 U.S.C. § 2242(2) (2012) (emphasis added).

did not charge James under § 2242(2)(A).[91] T.C. may or may not have been mentally capable of appraising the nature of James's sexual conduct, but through witness testimony, the evidence shows that she was capable of *physically* expressing her emotions and otherwise communicating her intent to others.[92]

Also, significantly, the government did not elicit testimony from a witness who personally knew T.C. to establish that she was physically *incapable* of expressing refusal or disagreement.[93] Procedurally, James should not have been convicted under § 2242(2)(B) unless substantively and beyond a reasonable doubt, the evidence presented at trial established that T.C. was physically incapable of communicating her unwillingness to engage in the sexual act. This Comment asserts that the government did not meet its burden in its case-in-chief, as both witness testimony and the government's own counsel indicated that T.C. was physically capable of communicating.[94]

Moreover, the judiciary overstepped its boundaries by interpreting the "physically incapable" standard in a completely distinguishable manner than how states have interpreted their respective rape statutes. Congress passed § 2242(2) as part of the Sexual Abuse Act of 1986[95] in recognition that the antiquated federal laws regarding sexual abuse criminalized different conduct than the modernized state law equivalents.[96] In effect, this would particularly be of concern for Indian Country jurisdictions, in which federal law, not state law, governs sexual assault crimes.[97] The majority dismissed the legislative concern when it simply stated, "[R]elying on state law as the district court did is problematic."[98] The majority's weak justification[99] for its departure from established state law that addresses the same issue fails to consider the effect its interpretation would have in deepening this rift between state and federal law

91. *James*, 810 F.3d at 686 (Kozinski, J., dissenting).

92. *See supra* Part II.

93. *James*, 810 F.3d at 686 (Kozinski, J., dissenting). Although the nurse examiner who treated T.C. after the sexual act testified that T.C. could not respond to her questions, this testimony is not dispositive towards the point that T.C. could not physically communicate. *Id.*

94. *See* Transcript of Proceedings, *supra* note 31, at 13:10–11.

95. United States v. Bruguier, 735 F.3d 754, 765 (8th Cir. 2013).

96. *Id.* at 772; *see supra* note 17.

97. *Bruguier*, 735 F.3d at 772; *see supra* note 16.

98. *James*, 810 F.3d at 679.

99. *See supra* Part III(B).

statutes for the same or similar crime.

Finally, in criminal cases where the statutory interpretation is ambiguous, the rule of lenity mandates that all doubts must be resolved in favor of the defendant.[100] Not only does the majority neglect to address this important principle, but its opinion also stands the rule of lenity "on its head."[101] The rule of lenity requires that a criminal defendant has fair warning of the criminality of his or her conduct, and when there is a question of statutory interpretation, he or she cannot be punished for it.[102] Because the very crux of the issue in *James* was the definition and scope of the words "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act,"[103] the majority should have applied the rule of lenity and resolved all doubts as to what the statute criminalized in favor of James. As it stands, James had no fair warning that his conduct would violate § 2242(2)(B); it was not apparently obvious that a woman with cerebral palsy, who was arguably unable to verbally communicate, was "physically incapable" of communicating unwillingness to engage in the sexual act.

V. IMPACT AND SIGNIFICANCE OF *JAMES*

In effect, the majority's holding goes beyond the scope of the instant case and will likely result in serious consequences for disabled individuals. The majority's opinion advances existing stereotypes of the disabled community and deepens the divide between non-disabled and disabled persons. It also fails to account for the wide variety of physical and mental impairments amongst individuals and, further, it may have the effect of stifling future consensual sexual opportunities for disabled and impaired persons.

Studies have shown that women with disabilities are stereotypically perceived as having a vulnerability factor. This vulnerability factor includes beliefs that "women with disabilities are

100. *See* United States v. Bass, 404 U.S. 336, 348 (1971).

101. *James*, 810 F.3d at 684 (Kozinski, J., dissenting); *see id.* at 681 (majority opinion).

102. *See* United States v. Gradwell, 243 U.S. 476, 485 (1917) ("that before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute . . . .").

103. *James*, 810 F.3d at 679 ("This case turns on the breadth of the "physically incapable" standard in § 2242(2)(B) . . . .").

asexual, passive, unaware, and therefore, easy prey."[104] Moreover, many women with disabilities have experienced generally "negative stereotypes and barriers to understanding and nurturing their womanhood."[105] The notion that women with disabilities may be perceived as vulnerable individuals does not mean that all sexual contact should be assumed to be unwarranted.[106] In fact, people with disabilities experience sexual "wants and needs similar to their able-bodied counterparts."[107]

Although the majority states that its holding "does not preclude someone suffering from physical disability from ever having consensual sexual intercourse,"[108] its practical effect may do just that.[109] In addressing this point, Judge Kozinski stated, "James will go to prison, likely for many years, because he had sex with someone whose physical handicap impaired her ability to communicate, even though those who knew her testified that she could physically convey the idea of 'no' when she wanted to."[110] This Comment suggests that by enacting its broad holding, the majority further limited the sexual liberty of impaired and disabled individuals and overstepped its boundaries in doing so. Preventing all sexual pleasure and intimacy in the name of protecting the vulnerable is a violation of a person's basic rights.[111]

VI. CONCLUSION

It is not yet certain how *James* will affect future federal sexual abuse cases where the victim is an impaired individual with some physical and mental limitations. Both federal and state case law interpreting the language "physically incapable" or "physically

104. Margaret A. Nosek et al., *Vulnerabilities for Abuse Among Women with Disabilities*, 19 SEXUALITY & DISABILITY 177, 178 (2001).

105. M.A. Nosek et al., *National Study of Women and Physical Disabilities: Final Report*, 19 SEXUALITY & DISABILITY 5, 6 (2001).

106. Jacob M. Appel, *Sex Rights for the Disabled?*, 36 J. MED. ETHICS 152, 153 (2010). This is not to say, however, that vulnerable individuals should not be protected from unwarranted contact. *Id.*

107. Shanna K. Kattari, *Sexual Experiences of Adults with Physical Disabilities: Negotiating with Sexual Partners*, 34 SEXUALITY & DISABILITY 499, 511 (2014).

108. *James*, 810 F.3d at 683.

109. *See id.* at 687 (Kozinski, J., dissenting) ("Today's opinion will make others more reticent about engaging in sex with people who are physically impaired. Their already difficult task of seeking out a partner for sexual gratification will become even more daunting.").

110. *Id.*

111. Appel, *supra* note 106, at 153.

helpless," respectively, is scarce or non-existent. By overstepping its judicial boundaries and broadening a previously clear definition of a victim who is "physically incapable" of communicating and declining participation in a sexual act, the majority sought to cast a wide net to catch sexual offenders without regard to the government's criminal charge and, thereby, resisted the rule of lenity. The majority's effort appears virtuous on its face, but in effect, will likely pose alarming results for the disabled community.