Investigating Sexual Assault Against People with Disabilities

Part 3: Evaluating Capacity to Consent to Sexual Acts

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Authors

Dr. Kimberly A. Lonsway has served as the Director of Research for EVAWI since 2004. Her research focuses on sexual violence and the criminal justice and community response system. She has written over 60 published articles, book chapters, technical reports, government reports, and commissioned documents – in addition to numerous training modules, bulletins, and other resources. She has volunteered for over fifteen years as a victim advocate and in 2012, she was awarded the first – ever Volunteer of the Decade Award from the Sexual Assault Recovery and Prevention (SARP) Center in San Luis Obispo, CA. She earned her PhD in the Department of Psychology at the University of Illinois, Urbana – Champaign.

Sgt. Joanne Archambault (Retired, San Diego Police Department) is the Chief Executive Officer for EVAWI. In 2003 prior to founding EVAWI, Sgt. Archambault worked for the San Diego Police Department for almost 23 years, in a wide variety of assignments. During the last 10 years of her service, she supervised the Sex Crimes Unit, which had 13 detectives and was responsible for investigating approximately 1,000 felony sexual assaults each year. Sgt. Archambault has provided training for tens of thousands of practitioners, policymakers and others – both across the country and around the world. She has been instrumental in creating system – level change through individual contacts, as well as policy initiatives and recommendations for best practice.

Shirley Paceley is the founder and director of Blue Tower Training in Decatur, Il. Blue Tower has resources in 48 states and 15 countries; she has spoken in over 30 states as well as in Iceland and Guam. Ms. Paceley has worked with people with disabilities for 40 years and has a Master’s degree in Clinical Psychology. She is on the Editorial Board of Sexual Assault Report. Ms. Paceley is a Project Advisor to the National Center for Criminal Justice and Disabilities. She also served on a national roundtable to develop a national strategy to end sexual abuse of children with disabilities.

Ms. Paceley developed the WE CAN Stop Abuse Curriculum for people with developmental disabilities and authored My Body My Choice as well as numerous book chapters and articles, music CDs, and DVDs. Ms. Paceley serves on the Illinois Imagines Team that facilitates systems change to enhance the response to survivors of sexual assault who have disabilities. Ms. Paceley also serves on the Illinois Family Violence Coordinating Council Responding to Survivors with Disabilities Committee which developed the first and only model statewide protocols for law enforcement and prosecutors in responding to victims with disabilities. Ms. Paceley also serves as Project Coordinator of Ensision Illinois, which addresses domestic violence in the lives of
people with all kinds of disabilities. Ms. Paceley also provides inspirational trainings and coaching. She also published the book, Living Joy-Fully.

Christine Herrman has over two decades of working to end violence against women. She started her career as a victim advocate and community services coordinator at a domestic and sexual violence program in her hometown of Ketchikan, Alaska. In that role, she provided prevention education and victim services to communities in the area, including towns, logging camps, Native villages, and settlements. Christine attended law school at Duke University, where she established a collaboration between the local rape crisis center and law students to provide advocacy services to sexual assault victims. After graduating from law school in 1999, Christine returned to the Pacific Northwest, where she served as a prosecutor in King County, Washington, focusing on sex crimes and crimes against children. In 2008, Christine assumed leadership of the Oregon Attorney General’s Sexual Assault Task Force, a statewide nonprofit organization that provided training and technical assistance to professionals in Oregon and nationwide on prevention of and response to sexual violence. Christine recently joined the Vera Institute of Justice in New York City as Project Director in the Center on Sentencing and Corrections. In this role, she is working on national technical assistance and research projects related to the conditions of confinement of vulnerable individuals, including one addressing the overreliance on segregation and one providing assistance to facilities implementing the Prison Rape Elimination Act. Christine is a member of the board of directors of the Oregon Crime Victim’s Law Center, and a member of CounterQuo.
This is the third installment in our series on successfully investigating sexual assault against people with disabilities. In the previous installment, we introduced the topic of how to evaluate a victim’s general capabilities during the course of a sexual assault investigation. This is relevant when the victim’s cognitive disability might be severe enough to preclude the ability to consent to sexual acts. If this is the case, the victim’s lack of capacity to consent constitutes a legal element of the crime. In this installment, we continue this topic by discussing the more formal assessment of a victim’s specific capacity to consent to sexual acts.

Severe or Profound Cognitive Disabilities

While any disability the victim has can affect a sexual assault investigation, only cognitive disabilities have the potential to constitute a legal element of the crime. The question is whether the impairment is severe enough to prevent the person from being able to legally consent to sexual activity. If so, the investigation must establish three legal elements:

1. Sexual contact or penetration was committed by the suspect against the victim.
2. The victim lacked the capacity to consent to the sexual activity, based on a severe cognitive impairment.
3. The suspect knew, or should have known, the severity of the victim’s cognitive impairment.

In theory, a consent defense cannot be raised in such a case. However, there is no “bright line” for establishing how severe a cognitive impairment must be to render an individual incapable of consent. This must be determined based on the evidence gathered during a thorough law enforcement investigation, including a current assessment of the victim’s disability and a formal evaluation of the victim’s capacity to consent.

Conducting a Formal Evaluation of Capacity to Consent

There are a number of characteristics that influence an individual’s ability to consent to sexual activity, including their IQ, adaptive behavior, and current sexual behavior, as well as any sex education they may have received (Kennedy & Niederbuhl, 2001). Various tests are used around the country to evaluate such characteristics and make this determination. Knowing what test is used in your jurisdiction will guide the questions that need to be addressed during the law enforcement investigation.

On the following page, we provide a summary of the various tests for capacity to consent that are used in each state. The material is adapted from Morano (2001), but it has been updated with new information as of December 2013.
<table>
<thead>
<tr>
<th>Name of Test</th>
<th>States that Use This Test</th>
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<tr>
<td><strong>Nature of Conduct</strong>: This test requires that a person have an understanding of the sexual nature of any sexual conduct as well as the voluntary aspect of such activity, in order to be considered capable of consent.</td>
<td>Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, and Utah.</td>
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<tr>
<td><strong>Nature and consequences</strong>: This test requires that a person understand both the nature and consequences of a sexual act in order for consent to be valid. Additionally, the individual must understand the potential risks of sexual behavior, including negative outcomes such as unwanted pregnancy or sexually transmitted infections.</td>
<td>Alabama, Alaska, Arizona, Arkansas, Indiana, Iowa, Kansas, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and Wyoming</td>
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<tr>
<td><strong>Morality test</strong>: This test necessitates that a person have a moral understanding of sexual activity in addition to understanding its nature and consequences for consent to be valid.</td>
<td>Colorado, Hawaii, Idaho, Illinois, New York, and Washington</td>
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<tr>
<td><strong>Totality of circumstances</strong>: This test requires the fact finder to examine all of the relevant circumstances to determine whether the victim was capable of consenting to the sexual acts in question.</td>
<td>Illinois</td>
</tr>
<tr>
<td><strong>Evidence of mental disability</strong>: This test must consider “evidence of mental disability.”</td>
<td>Connecticut, Maryland, Massachusetts, Michigan, Mississippi, Missouri, South Dakota, West Virginia, and Wisconsin</td>
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<tr>
<td><strong>Judgment test</strong>: This test is used to determine whether the individual can give knowing and intelligent consent to sexual activity.</td>
<td>Georgia and Minnesota</td>
</tr>
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Law enforcement professionals are not required to become experts in determining a victim’s capacity to consent to sexual activity. However, understanding the test used in a particular jurisdiction can help guide officers and investigators in the type of information that should be gathered to help others make that determination. For more detailed information on each of these tests, please see the OLTI Module entitled: *Successfully Investigating Sexual Assault Against People with Disabilities.*
Specific Questions That Can Be Asked

While the specific questions asked during an assessment will vary based on the test used in a particular jurisdiction, it will be important to begin by establishing what terms the victim uses for male and female genitalia. Once these terms are established, the interviewer should use the same words the victim does and proceed by asking questions such as the following:

- What do boys/girls do with that part of their body [using the victim’s terms]?
- Do you have a ______?
- What do you call it when a man puts his ______ inside a woman’s__________? Do you know a name for that?
- What is sex?
- Why do people have sex?
- Where do babies come from?
- If a woman wants to have a baby, what does she do?
- If a woman wants to stop from having a baby, what does she do?
- Do boys have babies?
- When a man does that, does he like it? Does a woman?

Other questions can address whether the victim understands that people can contract a disease from sexual activity, is able to differentiate between appropriate and inappropriate times and places to have sex and recognizes situations or people that may pose a threat (Kennedy & Niederbuhl, 2001).

Up Next

Now that we have provided an overview of how to evaluate the victim’s general capabilities as well as their specific capacity to consent to sexual acts, we transition to the topic of the victim interview. In the next two bulletins, we will provide information on how to prepare for, and conduct the detailed follow-up interview with a victim who has an intellectual or developmental disability.

For More Information

This training bulletin is an adapted excerpt from the OnLine Training Institute (OLTI) module entitled: Successfully Investigating Sexual Assault Against People with Disabilities by Sgt. Joanne Archambault (Retired, San Diego Police Department), Kimberly A. Lonsway, PhD., Shirley Paceley, MA, and Christine Herrman, JD.
For more information, you can register for the interactive training module in the OLTI, or you can print out the document in our Resource Library. Please note, however, that the document version does not include the review exercises or test questions that are included in the OLTI. After successfully completing the module in the OLTI and passing the end-of-course test, you can also download a personalized certificate of completion.

References
