Capacity to Consent to Sexual Behavior

Scott J. Modell, Ph.D.

Context

- History and Perception
  - Sexuality and Disability
  - Eugenics

- Knowledge and Understanding of Rights
  - Often have the belief that someone other than themselves should decide whether they should have intimate relationships (Eastgate et al., 2011).
  - This lack of knowledge and understanding of their rights can increase their vulnerability and risk to sexual abuse.

Rights

- Intimate relationships between individuals with intellectual disabilities are not illegal
- Intimate relationships between someone who does not have an ID and someone who does are not illegal
  - Concern?
- Legality is only relevant if the person is under the legal age of consent of the state or has been determined to not have the capacity to consent
- Capacity to consent in this context is a person's ability to consent to sexual activity
Rights

- Different states have very different standards around sexual consent capacity

- New York: "Morality Standard"
  - A person must be mentally capable of understanding the social mores of sexual behavior.
  - A person must be capable of understanding the non-criminal penalties (e.g., ostracism, stigmatization) that society may impose for conduct it labels as sexually immoral.

- New Jersey:
  - Only requires that a person must understand the sexual nature of an act and that the person’s decision to engage in the sexual behavior is voluntary. There is no requirement that he/she understand the potential risks and consequences of the behavior.

- California:
  - "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.)

Consent: RCW 9A.44.010(7)

Washington:

- Requires actual words or conduct indicating freely given agreement to have sexual contact/intercourse
Rights

- Different states have very different standards around sexual consent capacity
- Given these differences, an individual can be deemed to have sexual consent capacity in one state and not in another.
- Capacity is a dynamic concept and can change over time
  - Capacity can be described as a state not a trait

Rights

- Age of Sexual Consent varies significantly
- In most states by age 18, individuals are legally presumed to have the freedom, ability and right to make all choices related to their person and property
- Any rights so removed may only be accomplished by a specific court order designating what power is being taken from the person and transferred to a conservator

Rights and Risk

- Research suggests people with intellectual disabilities have:
  - Lower levels of knowledge about sexuality
  - Less experience with dating, intimacy and sexual interaction
  - Fewer opportunities to learn about sexuality
- The lack of sexual knowledge, relationship experience, and protection skills may:
  - Increase the risk of abuse
  - Impair the ability to recognize an experience as abusive
History

- Home
  - Parents/Caregivers?
  - Siblings?
- School
  - Sex Education?
  - What do other students get?
- Community
  - Peers?
- Healthy Relationships
  - Interaction with the Criminal Justice System
    - Victim
    - Offender

Assessment of Capacity

Things to Consider before Assessment:

- Assessments of capacity should be free of moral judgments about a person's preferred lifestyle
  - Sexual Partners
    - Gender
    - Number over time
    - Number at one time

- Understanding about safe sex and practicing safe sex should not be confused
- Be aware of the: “Ability to Parent” Standard

Assessment of Capacity

- Unique aspects of sexual consent capacity differentiate it from other forms of consent capacity (Kennedy, 1999).
  - Example: Medical treatment decision
    - Given information upon which a decision is to be made
    - Opportunities to discuss this information with others and obtain advice from one’s physician and significant others
  - There are many opportunities to weigh the risks and benefits of decisions with other individuals.

- In contrast decisions regarding sexual activities are done alone without the opportunity, or desire, to consult with others, and in a situation that often requires a relatively rapid response
  - There can be no surrogate decision maker for sexual relations
Legal/Clinical Criteria for Consent

The most widely accepted legal criteria:

- Knowledge (Information)
- Rationality (Capacity)
- Voluntariness (Lack of Coercion)

Capacity Assessment: Knowledge

Elements of “Knowledge” in Sexual Consent Capacity:
- Basic knowledge of sexual activities / behaviors
- Basic knowledge of the difference between Private vs. Public
- Basic knowledge of birth control
- Basic knowledge of STIs and avoidance

Does the Person Understand:
- Social and legal constraints on time, place and context to engage in sexual behaviors
- Certain sexual activities are against the law and have consequences (prostitution, public exposure, pedophilia, rape)
- Pregnancy and STI prevention
- Physical, legal and ethical responsibilities associated with pregnancy and parenting

Capacity Assessment: Knowledge

Knowledge Operationally Defined:
- Is he /she able to identify various sexual behaviors including intercourse, as well as potential outcomes of sexual activity including STIs, pregnancy and parenting?
- Is he/she able to identify public versus private places?
  - Use of Pictures
- Is he/she able to identify appropriate places for sexual behaviors?
- Is he/she able to identify illegal sexual behavior?
  - Consequences for those behaviors?
- Is he/she able to discuss consequences for parenting?
Cognitive Functions of Knowledge

- Cognitive abilities indicative of Knowledge:
- Semantic Memory
- Autobiographical or Episodic Memory
- Executive Functioning
- Procedural Memory

Semantic Memory
- A structured record of facts, meanings, concepts and knowledge about the external world that we have acquired. It includes generalized knowledge that does not involve memory of a specific event
  - The concept of what a cat is
  - The idea of what a car is
  - Knowledge that Annapolis is the capital city in Maryland
  - Knowing what a dinosaur is
  - Knowledge of what a phone is used for
  - Knowing what a broom is used for
  - Knowing the difference between a cow and a bird
  - Knowing for what purpose one would use a spoon

Semantic Memory for Capacity to Consent to Sexual Behavior
- Basic biological information regarding:
  - Conception
  - Pregnancy
  - Sexually transmitted infections
  - Methods of preventing risks
  - Social mores concerning sexual behavior and illegal sexual activities
Cognitive Functions of Knowledge

- Autobiographical or Episodic Memory
  - May be required to appreciate motives of potential partner (exploitation, harm, consequences of breaking up)
  - A category of long-term memory of autobiographical events (times, places, associated emotions and other contextual knowledge) that can be explicitly stated
  - It is our memory from which we can reconstruct the actual events that took place at any given point in our lives
  - Individuals tend to see themselves as actors in these events, and the emotional charge and the entire context surrounding an event is usually part of the memory, not just the bare facts of the event itself

Cognitive Functions of Knowledge

- Executive Function
  - Executive function refers to a set of mental skills that work together to help a person achieve goals. Executive function includes the ability to:
    - Manage time and attention
    - Switch focus
    - Plan and organize
    - Remember details
    - Integrate past experience with present action
  - When executive function breaks down, this can affect a person's ability to:
    - Work or go to school
    - Function independently
    - Maintain appropriate social relationships

Cognitive Functions of Knowledge

- Executive function can be divided into two categories:
  - Organization and Regulation
    - Organization involves gathering information and structuring it for evaluation. Regulation involves taking stock of the environment and changing behavior in response to it.
      - Classic Example: Seeing chocolate cake on the dessert cart at a restaurant
        - Executive function reminds you about your goals of eating less sugar and losing weight
      - Capacity Example: Having someone give you a hug. Seeing a video or picture of someone naked eliciting sexual feelings
        - Executive function reminds you about appropriate partners or time and place for sexual behavior
  - Tools to Assess Executive Function
    - Behavior Rating Index of Executive Function (BRIEF)
    - WISC-IV
Cognitive Functions of Knowledge

- Procedural Memory
  - A type of long-term memory of how to perform different actions and skills
  - It is the memory of how to do certain things
    - Riding a bike, tying your shoes, and cooking an omelet
  - Procedural memory is created through "procedural learning" or, repeating a complex activity over and over again until all of the relevant neural systems work together to automatically produce the activity
  - Procedural Memory for Capacity to Consent to Sexual Behavior:
    - May be necessary for utilizing devices for the prevention of pregnancy and the spread of sexually transmitted infections
    - May be necessary for carrying out a safety plan

Case Example: Amy, Age 19, IQ 32

- Amy could not cook, use a bus, or do simple arithmetic. She could not hold down a job, handle money, or cast an independent vote. She conversed at the level of a nine or 10 year old and read at the level of a seven or eight year old. Although she had attended high school, she was not qualified for a diploma. "Amy had some idea of what sexual intercourse was, including that it could result in pregnancy. However, her understanding was on the same level as the children's rhyme, 'First comes love, then comes marriage, then comes a baby in a baby carriage.' She did not understand that sex could result in disease."

Capacity Assessment: Rationality

- Elements of "Rationality" in Sexual Consent Capacity
  - Be orientated to person, time, place and event
  - Know difference between fantasy/reality and truth/falsehood
  - Accurately report events
  - Critically evaluate
  - Weigh the pros and cons
  - Make knowledgeable decisions
Capacity Assessment: Rationality

Rationality Operationally Defined:
- Is he/she oriented to person, time, and place?
- Is he/she able to describe the difference between fantasy and reality and truth and lies?
- Is he/she able to accurately respond to questions regarding consequences of sexual behavior?
- Is he/she able to describe process for making choices regarding sexual activity?

Other Considerations:
- IQ
- Co-existing mental health disorders that may impair the individual’s judgment, perception, or thinking

Cognitive Functions of Rationality

Cognitive abilities indicative of Rationality:
- Attention
- Verbal comprehension of information presented by a potential partner
- Semantic memory for presented information
- Historical information that pertains to the current situation
- Information pertaining to the risks and benefits of various sexual activities
- Abstraction and executive functions required for the logical or rational consideration of the benefits and risks of the sexual activity
- Episodic memory for related experiences, personal values, and preferences
- Ability to express a choice

Establishing Choice

Persons with high verbal skills
- Typically, ask what they want or would like to do
- Variables that can affect asking:
  - Individuals with ID are more suggestible and depending on who is in the room when asked what they want to do, it may influence them.
  - The answer to the question being posed is embedded in the question: “You would like to have a job, right?”
  - Asking someone what they want may be limited by their understanding of other available options.
    - Example: “Where do you want to live?” may be responded with their existing placement as they are not aware of other options.
    - Choice must, in part, be an informed choice.
  - A choice of a particular living environment or job may not be related at all to the job or living quarters and related to some other variable, like an uncomfortable bed, or too tight shoes at a particular job.
    - Example: Chris and housing
Establishing Choice
Persons with limited or non-existent verbal abilities
- Observation of engaged activity and emotional response to alternatives.
- Relying on what we observe the person doing leads us to believe that if the person is doing something on an ongoing basis that they like or “choose” that option.
  - Ex. Lion King movie everyday / Eating fish sticks for every dinner
- We must be careful to take what one does as what one “chooses” to do implies that one might be doing something else.
  - There must be alternatives available to talk about choice.
- It can only be asserted that they are choosing to watch Lion King or eat fish sticks if there are opportunities to watch another movie or eat another food.

Establishing Choice
Persons with limited or non-existent verbal abilities
- Relying on emotional reactions can be problematic because we assume that excitement occurs in the context of pleasurable or preferred activity and that anger or fear occurs in the context of displeasurable and nonpreferred activity.
- This can be problematic in understanding the likes and dislikes of persons with severe ID.
  - Not as differentiated as those of typically developing adults. ID / Autism
  - Emotions are typically interpreted in the context of external circumstances.
    - Example: Jumping up and down. Jumping up and down would be evaluated as “excitement” if in context mom arrived to take the person to their favorite ice cream store. But, the behavior of jumping up and down would be evaluated as “fear” if the person is in a doctors office and the nurse has just arrived to give an injection.
- Assuming perseveration is an indicator of choice.
- Just because the person with ID is perseverating on train schedules, does not mean they want to access using a train. It might, but it also may mean that they fear what they are perseverating on and are self managing by perseverating.

Providing for Choice
- Depends on the availability of alternatives. There can be no choice if only one alternative is available.
  - Example: Speaking English
- Several factors to consider when providing choice:
  - Choice is not just a matter of having alternatives. Alternatives must be “actually available” to the person. “Actually available” or psychologically available means that the person must have more than mere exposure to those alternatives.
  - Experience is the key in genuine choice. Experience means participation. Participation with respect to the activities involved as well as in the outcomes of those activities.
  - To choose between bowling and bungee jumping is only a choice if you have actually been bungee jumping.
Providing for Choice

- Direct versus indirect experiences
  - An example of indirect experiences would be a neurotypical person learning about the Sistine Chapel by reading about it and going online to Google Earth and looking at it. Then they do the same for the Roman Coliseum. After doing both they make a choice to see the Coliseum. No one would argue that this is a choice.
  - However, persons with ID are limited in their verbal repertoires which in turn limits their ability to have an indirect experience substitute for a direct one. What one knows about the Sistine Chapel and the Roman Coliseum by direct experience is quite unlike what one knows by way of books and pictures.
  - In short, genuine and full experience of alternatives in a choice situation for persons with ID means having previously engaged with those alternatives directly.

Providing for Choice

- When making choices, the “chooser” has to come into contact with the different consequences or outcomes of the choice.
  - For example, a person with ID chooses to stay home from work and the parent/guardian makes up for the loss of income produced by choosing to stay home.
  - As such, staying and home produces the same outcome as going to work. Therefore, there are really not two alternatives from which to choose, but only one.
  - Hence, no choice.

- What happens when a person with ID makes a choice we consider poor?
  - To what extent do we allow poor choices?
  - Do persons with ID have a right to make poor choices?
  - In other words, allowing their choice to come into contact with the consequence of that choice? As much as possible, yes.
  - Exceptions should be made for clear issues of safety or behavior that we would consider extreme anti-social behavior. For example, one adult I know “chose” to masturbate all day long.

Providing for Choice

- Choice is impacted by the quality of characteristics of the alternatives available from which to choose.
- For example, if you provide a child with the choice of eating her vegetables or going to bed hungry.
- Or provide an adult with ID the choice of doing his chores or going to his room.
- Aversive control can be disguised as “choice” if the choices provided are poor.
- We should try to recognize that choices between bad alternatives is coercion and not in freedom of choice.
Case Example: Cynthia, Age 30, IQ 45

- The victim testified as follows in response to the question whether she resisted: "If I didn't let him do it he would just stand there and wouldn't let me get anything done and I didn't want him to stand there all day and not let me get anything done for I was busy and I told him I was busy and had work to do and that I didn't have time. . . . I didn't want him to stay there all day for I wouldn't get anything done."

Capacity Assessment: Voluntariness

- Elements of "Voluntariness" in Sexual Consent Capacity
  - Has the ability to take self-protective measures against unwanted intrusions, abuse and exploitation
  - Understands that they have a right to say “No”
  - Understands that they can refuse to have sex
  - Understands that “No” means stop
  - Understands imbalance of power
  - Understands concept of consent

Capacity Assessment: Voluntariness

- Voluntariness Operationally Defined:
  - Does he/she have the ability to say “no”?
  - Is he/she able to communicate "no" verbally or non-verbally, and are able to remove himself or herself from the situation at hand, indicating a wish to discontinue the interaction?
  - Is he/she able to describe how they would apply “no” in a physical or sexual context?
  - Is he/she able to identify what being exploited may mean for them?
  - Is he/she able to call for help?
Capacity Assessment: Voluntariness

- Other Considerations
  - Does he/she tell you they enjoy the activity or not?
  - Has he/she engaged in the activity willfully?
  - Does he/she make repeated attempts to engage in the activity on their own?
  - Does he/she try to escape from the activity?

Cognitive Functions of Voluntariness

- Cognitive abilities indicative of Voluntariness
  - Attention
  - Abstraction
  - Executive functions for the consideration of factors that could imply coercion, unfair persuasion, or inappropriate inducements
  - Semantic and episodic memory may be required for contrasting the current circumstances with those previously experienced (directly or indirectly).

Case Example: Robert, Age 23, IQ 80 and Tim, Age 24, IQ 75

- One of the victims answered, "'Yep,'" when asked if he "agreed to have sex with [defendant] freely and voluntarily," and the other one "agreed he voluntarily did the acts with [defendant]."
  - Testimony included that the defendant had befriended both victims (who were best friends) and "explained to one of the victims that friends kiss, go to bed together and engage in sex."
  - "[Defendant] also told victim about the cave [anal sex], explaining what it meant and that 'it was cool' and 'would feel good.'"
Case Example: Robert, Age 23, IQ 80 and Tim, Age 24, IQ 75

- Defendant initiated the cave, directing one of the victims "to take off his clothes, lie on the bed, and do as directed." He also told one of the victims not to tell. Over time, one of the victims "just got used to it and 'cooperated.'" The other victim testified, "he was confused and had mixed feelings when [the defendant] showed him pornographic videos and asked him to do sexual things. [This victim] did not know whether it was right to stay or go at those times. He agreed he voluntarily did the acts with [the defendant] because '[he] was told.'"

Assessing Capacity: Process

- Identify Expert(s)
- Review of relevant records including:
  - Information about reproductive ability
  - Psychiatric/Psychological
  - School Records
  - Any information on previous sexual education and history
- Discussions with selected people who know or work with the individual being assessed (e.g., parents, siblings, staff members at a residential provider agency)
- Interview with the person which includes evaluating mental status and identifying information about the person’s relevant knowledge, rationality and voluntariness. In the interview, be sure to evoke information about relevant sexual knowledge and history.
- Use questions/concepts and operational definitions provided here as a guide

Capacity to Consent Case Example

- Linda
  - Handout
Human Limitations

Limits to Capacity

- Limits of short term memory
  - Magic number 7 (7 +/- 2)
  - Chunking
    - Simple example: 9-5-7-5-2-2 vs. 957-7522
    - In more complicated situations, we miss or lose information by chunking
- Missing or losing information results in bias
  - Fundamental attribution error
  - Selective attention

Decisions Under Stress

- It is unsurprising that stress impacts our decisions
- What is surprising is that almost anything can be as stressful
  - Remembering simple things
  - Containing simple emotions
  - Making decisions
Remembering

- Students
  - Remember 7 digit number (High Stress)
  - Remember 2 digit number (Low Stress)
  - Choose snack of chocolate cake or fruit
  - High Stress were more likely to choose chocolate cake

Containing Emotion

- Students
  - Watch Movie; Don’t Cry (High Stress)
  - Watch Movie; Cry if you want to (Low Stress)
  - Complete geometry problems; Squeeze hand exerciser
  - High Stress were more likely to give up

Making Decisions

- Shoppers
  - Deciders (High Stress)
  - Non-Deciders (Low Stress)
  - Hold hand in bucket of ice water
  - Deciders were more likely to pull hand out more quickly

\* Deciders asked prefer this or that. Non-deciders asked opinion of this and that.
Making Meaningless Decisions

- All types of stress
  - Remembering
  - Containing emotion
  - Making other decisions
- Adversely impact our decision making and/or performance

Making Decisions That Matter

- Data from more than 1,000 Israeli prison parole board hearings; all felony offenses

Making Decisions That Matter

- Data from more than 1,000 Israeli prison parole board hearings; all felony offenses
- Favorable ruling much more likely early in the day or after a food break
What’s the Point?

- Our capacity to process information is limited
- The more decisions we make, the harder each one is
- The “stress” associated with this causes us to be
  - Reckless (and start considering irrelevant information)
  - Avoidant (and maintain status quo)
- This impacts our ability to gather and synthesize information
- Planned decision making for adults with IDD

Final Considerations

- Summary
- Q & A

Contact Info

Scott J. Modell, Ph.D.
916-548-5041
sm@modellconsulting.com