





F.A.C.T.S.
**Forensic Assessment of
Consent To Sex**

An Objective Test

The background is a collage of four quadrants. The top-left quadrant is purple and shows a stack of books. The top-right quadrant is pink and shows a clock face. The bottom-left quadrant is green and shows a stack of books. The bottom-right quadrant is yellow and shows a clock face. The text is overlaid on these images.

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Consent to Sex

QuickTime™ and a
TIFF (Uncompressed) decompressor
are needed to see this picture.

- What determines consent?
- When is consent questioned?
- When should consent be questioned?
- Who is qualified to assess for whom?
- What are the pitfalls of an erroneous conclusion?





What determines consent?

- Each state has statutory language to discriminate between consensual and non-consensual sexual contact.
- Most identify age, consciousness, and *ability to understand the nature and consequences of the act*.
- In addition, there is language regarding threat (perceived and real), use of a weapon and force.



When is consent questioned?

- When an individual states s/he has been a victim of rape and has a disability.
- When an individual with a developmental (or other) disability is discovered to have had sexual interaction
- When an individual's ability to consent appears to be otherwise compromised.

When should consent be questioned?

- When any individual states she has been a victim of sexual assault?
- When such a person has a disability?
- When such a person is elderly?
- Whenever a dependent person makes known their desire for sexual activity?





When should consent NOT be questioned?

- As a condition of admission into a residential care program or facility;
- As a matter of procedure for anyone with a disability to receive social services;
- For all individuals with developmental disabilities who want to have a sexual relationship.



Who is qualified to assess for whom?

- Scary question!
- Best if there are legal grounds for inquiring into an individual's ability to consent; and
- A team of qualified individuals participate in assessment of the outcome; and
- Consideration for consequences is present.

What are the pitfalls of an erroneous conclusion?

- One is that if a consent question is determined “forever” rather than on a case by case basis, an individual usually able to consent could be decreed unable to consent, thus all future sexual contacts would logically be considered sexual assault...a bad situation for their partners!!!





Quick Background

- Essence: Did the person know he or she was going to have sex and want to?
- How much mastery of human anatomy & physiology is required to know if one wants to be sexual with another person?
- Must one demonstrate an understanding of the reproductive, sexual, nervous, skeletal, respiratory and digestive systems PRIOR to engaging in sex?



Okay, we took off our clothes, I got on top of you... How long 'til it starts feeling good?

I don't know but I've got a headache already!



Quick Background

- How much understanding of community and social living is or should be required?
- How much personal or physical autonomy is needed for the person to know his or her sexual desires and attractions?
- Who decides what partner another person may have?

Quick Background

- Application of standards that do not match the ability, culture or knowledge base of the individual are sure to fail the person, as well as fail to answer the question.
- Administration of supportive evaluations (IQ, SSSQ, ADLs) are not a substitute for direct questioning about the event and consent.





F.A.C.T.S.

- This instrument is designed to be used by a multidisciplinary team
- Administered by one person
- Results discussed with the team
- In consideration of one situation for the individual being assessed.
- Originally designed for individuals with developmental disabilities.



- Questions are in Plain English
- Questions relate only to the issues of legal consent to sex
- Questions can be read to the alleged victim
- Options are presented to simplify if the victim cannot understand the first option.



The instrument is designed to assess the individual's understanding of the "nature and consequences of the act" of sexual intercourse.

- Challenge: Defining...
- The nature
- The consequences
- The act



Procedure - Typical Interview

■ Step One

- Developing Rapport
- Obtain consent to audiotape or videotape

■ Step Two

- Administer Declaration of Understanding the Difference between the truth and a lie

■ Step Three

- Administration of the instrument

■ Step Four

- Positive interview termination



Understanding “the Act”

- Does “having sex” mean
 - Taking your clothes off?
 - When you bite each other?
 - Teaching about sex?
 - Putting a penis into a woman’s vagina?
 - Putting a penis into someone’s butt?
 - Somebody touches you “down there”?



Understanding “the Act”

- Why do people have sex?
 - Open question...suggestions
 - To have a baby
 - To show love
 - It's fun
- What can you tell me about sex?
 - When is it OK to have sex?
- Who decides if you can be alone with another person?
- Who decides if you can have sex?
- What are the rules about having sex?



Understanding “the Nature”

- Who usually has sex together:
 - Boyfriend/girlfriend
 - Brothers/sisters
 - Husband/wife
- What is the meaning of sex:
 - It means you are normal
 - It feels good
 - It proves you love someone
- Do you have to have sex if someone asks you to?
- What do people feel after they’ve had sex? (NOT exhausted !!)

Understanding “the Consequences”

- What happens when two people have sex?
- What happens if one wants to and the other does not?
- What can happen after people have sex?
 - Desire to do it again
 - Woman can get pregnant
 - They both feel happy
 - One can go to jail



Vocabulary Comprehension Assessment

- The instrument contains a comprehensive list of terms related to sexuality, sexual assault, forensic intervention, medical treatment and criminal conduct.
- This provides for deeper conversation and assessment of the individual's exposure to and understanding of typical terms.





Questions related to the specifics of the Act in the Case under Investigation

- Why did (or what happened that made) sex happen between you and xxx?
- Did you know there was going to be sex when he told you to go with him? YES / NO
- Did you want to have sex with him? YES / NO



Questions related to the specifics of the Act in the Case under Investigation

- If “no” to “did you want to...”
- What happened that made
 - you go to x location?
 - The sex happen?
- Did you want it to stop?
 - Why? What did you want to do to make it stop? Were you able to?
- What do you call what he did to you?



Questions related to the specifics of the Act in the Case under Investigation

- If “yes” to “did you want to...”
- Would you want to have sex with xxx again?
- Can you have sex with him again?
- Will you be able to?
- Would you like to have sex with a different person?

Questions related to the specifics of the Act in the Case under Investigation

■ When sex happened what feelings did you have?

- Mad
- Happy
- Excited
- Sad
- Stupid
- Proud
- Dirty
- Disappointed
- Upset
- Alone
- In-love
- Guilty
- In trouble
- Helpless



Questions related to the specifics of the Act in the Case under Investigation

- Questions about the individual's perception of the relationship between them
- Questions regarding possible pregnancy
- Questions regarding possible STIs
- Questions if someone will be angry with him or her for having sex with this person.



Results when Interviewing Susan S.



Case of Susan S.

■ Profile:

- 22 year old woman, lives at ICF/DDH/MR
- Moderate mental retardation, no other problems, verbal, cooperative
- Parents deceased, sister her conservator upon advice of attorney
- Had opted x3 to take in-house sex ed class

■ Obtaining background data:

- ICF/DD/MR refused to provide Sex Education curriculum
- Conservator, 24 year old sister, naïve to the issues, very cooperative



Case of Susan S.

■ Case presentation

- Staff saw Susan in the hallway with blouse buttoned askew, questioned Susan about this
- Learned that Susan had been “out with her boyfriend” and had had sex with him
- Staff called 911, had her transferred to rape emergency treatment hospital
- Disability services case manager spoke with District Attorney, referred case to NB
- Victim denied sexual assault, states sex occurred and was consensual
- Staff state their sex ed program & policy permit sex but not at the residence (then where?)





Case of Susan S.

■ Case presentation (continued)

- Boyfriend, employed at local department store, had been arrested and incarcerated.
- Boyfriend states it was consensual
- DA requests assistance to determine if Susan understands the nature and consequences of the act.
- If Susan is unable to understand, boyfriend will be charged with statutory rape.
- If Susan is able to understand and did consent, charges will be dropped.



Understanding “the Act”

- Does “having sex” mean
 - Taking your clothes off?
 - When you bite each other?
 - Teaching about sex?
 - Putting a penis into a woman’s vagina?
 - Putting a penis into someone’s butt?
 - Somebody touches you “down there”?



Understanding “the Act”

- Why do people have sex?
 - Open question...suggestions
 - To have a baby
 - To show love
 - It's fun
 - Because we like to pretend we are boyfriend and girlfriend.
- What can you tell me about sex?
 - When is it OK to have sex?
 - When no one else can see you.
- Who decides if you can be alone with another person?
- Who decides if you can have sex?
- What are the rules about having sex?
 - It's OK to have sex but not at where I live.



Understanding “the Nature”

- Who usually has sex together:
 - Boyfriend/girlfriend
 - Brothers/sisters - NO!
 - Husband/wife
- What is the meaning of sex:
 - It means you are normal
 - It feels good
 - It shows you love someone
- Do you have to have sex if someone asks you to? No, only if you want to.
- What do people feel after they’ve had sex? (NOT exhausted !!) I feel happy.

Understanding “the Consequences”

- What happens when two people have sex? They feel good.
- What happens if one wants to and the other does not? I don't know, I guess they don't do it.
- What can happen after people have sex?
 - Desire to do it again
 - Woman can get pregnant, not me, because he wore the rubber penis. And I take a pill.
 - They both feel happy
 - One can go to jail



Vocabulary Comprehension Assessment

- The instrument contains a comprehensive list of terms related to sexuality, sexual assault, forensic intervention, medical treatment and criminal conduct.
- This provides for deeper conversation and assessment of the individual's exposure to and understanding of typical terms.



Questions related to the specifics of the Act in the Case under Investigation

- Why (or what happened that made) sex happen between you and xxx? *We had a date!*
- Did you know there was going to be sex when he told you to go with him? **YES / NO**
- Did you want to have sex with him? **YES / NO**





Questions related to the specifics of the Act in the Case under Investigation

- If “no” to “did you want to...”
- What happened that made
 - you go to x location?
 - The sex happen?
- Did you want it to stop? Yes
 - Why? He was doing it too hard. What did you want to do to make it stop? I wanted him to do it softer. Were you able to? Yes, then it was really good.
- What do you call what he did to you?
 - We were “doing it”. Making love. You know.

Questions related to the specifics of the Act in the Case under Investigation

- If “yes” to “did you want to...”
- Can you have sex with him again? I don't know.
- Will you be able to? I don't know.
- Would you want to have sex with xxx again? No...I don't want him to go to jail again.
- Would you like to have sex with a different person? I don't know, maybe.





Questions related to the specifics of the Act in the Case under Investigation

- When sex happened what feelings did you have?
 - Mad
 - Happy
 - Excited
 - Sad
 - Stupid
 - Proud
 - Dirty
 - Disappointed
 - Upset
 - Alone
 - In-love
 - Guilty
 - In trouble
 - Helpless

Questions related to the specifics of the Act in the Case under Investigation

- Questions about the individual's perception of the relationship between them. We liked to pretend we were boyfriend and girlfriend.
- Questions regarding possible pregnancy. He used the rubber penis. I take a pill.
- Questions regarding possible STIs. He says he has nothing.
- Questions if someone will be angry with them for having sex with this person. I guess the staff.





Final Assessment

- Susan understood “the Act”
- Susan understood “the nature”
- Susan understood “the consequences”
- Susan knew she was going on a date, and that sex was part of the date.
- She had wanted and planned to have sex with her date.
- She had consented to sex.



Additional Issues

- She liked her boyfriend a lot
- She also liked that he was “normal”, that is, he did not have a disability.
- She knew he was not available as a full time boyfriend because of his marriage.
- She knew and was on good terms with the wife.



Additional Issues

- She had taken the sex education class x3 and had learned (and respected) their rule not to have sex at home.
- She had a rudimentary understanding of STIs & birth control.
- She met her boyfriend when he had been an employee at her home.

When law clashes with norms or “moral” issues

- Having sex with someone married to another
- Having sex with someone in an authority position (work supervisor, teacher) or other employee (janitor, secretary, Director)
- Having sex with someone of a different race/religion/class.
- When one has a developmental disability and the other does not.



Consent ≠ Informed Consent

- **Consent** is a legally defined condition of actively stating or demonstrating agreement
- **Informed consent** is a legal-medical affirmation of the understanding of the benefits and risks of undergoing a medical procedure or intervention.





Use of this Instrument

- Should be used to assess consent when there is a forensic reason to do so
- Should be administered by a qualified forensic mental health specialist or qualified MDT team member
- Results are best determined by those familiar with the culture of disability and issues of sexuality, sexual assault, undue influence and partner choice limitations and preferences.



Adaptations to similar populations

- Adaptations for use with individuals with a different cultural background
- Elders
- Individuals with dementia



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The End!

Have a GREAT DAY !!!

Thank you!