

Putting the “Sex” in Sexagenarian: Older Adults, Dementia and the Case of Henry Rayhons

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Consent to Sex

The legal standard for consent to sexual activity is a much-discussed topic across the country, and New York State is no exception. On July 7, 2015, the Governor signed a bill into law which requires students on all New York State college campuses to use an “affirmative consent” standard when engaging in sexual activity.¹ This heightened standard has gained popularity against a national background of high profile cases and alarming statistics, with one in five women sexually assaulted while in college.² New York may be one of the first states to usher in a national trend.³ The American Law Institute is currently revising Article 213 of the Model Penal Code which governs sexual assault and has not been updated since the early 1960s. The current proposed draft would adopt the affirmative consent standard more generally, criminalizing all sexual activity undertaken without express consent by both parties.⁴

Our society’s movement towards a legal standard that views express communication as the hallmark of consent provides an important opportunity to consider the sexual rights and vulnerabilities of those who may not be capable of meeting this standard, such as older adults with some degree of cognitive impairment. Last year’s Iowa case of *People v. Rayhons* is illustrative, casting a national spotlight on the complex intersection of aging, sexuality and dementia.

The Rayhons Case

In April 2015, Henry Rayhons, 78, a nine-time state legislator, was acquitted of third-degree felony sexual abuse. Rayhons was accused of having sex with his wife, Donna, who suffered from Alzheimer’s disease and lived in a long-term care facility. The relationship was a second marriage for both, who met through their church choir in 2007. The State’s case was not based on any evidence of Donna Rayhons having re-



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sisted or refused sexual activity with her husband. In fact, witnesses testified that she always responded positively to his visits and acted affectionately towards him.⁵ The prosecution’s contention, however, was that facility personnel determined that Donna Rayhons’ dementia rendered her incapable of consenting to sex, and further, that Henry Rayhons was informed of this conclusion. The prosecution alleged that a criminal act occurred when Henry Rayhons had sex with his wife in her room at the facility, subsequent to being informed that she was not capable of consenting to sexual activity. At trial, Henry Rayhons testified that he had engaged in sexual activity with his wife while she lived in the nursing home, though not on the date alleged by the prosecution, when he claimed they held hands, kissed and prayed together. Rayhons said that his wife would sometimes initiate sexual contact, which she clearly enjoyed, when he came to visit her in the nursing home. Rayhons became tearful on the stand, referring to Donna, who passed away shortly after charges were filed, as “my queen.”⁶

The jury also heard a recording of the care plan meeting at Donna Rayhons’ facility, attended by Henry Rayhons and two of his stepdaughters, during which Henry Rayhons was allegedly informed that his wife had been deemed incapable of consenting to sexual activity. The audio revealed that the issue of sexual activity was discussed for approximately one minute, and the word “sex” was never uttered. Rather, Henry Rayhons was referred to a printed list of staff recommendations for Donna Rayhons’ care, which included a

doctor's statement that she could not consent to sexual activity given her cognitive state. Nobody explained what the sentence meant, but Henry Rayhons could be heard on the tape saying, "That's not a problem."⁷

Sexuality and Older Adults: Myths and Facts

This complex and emotionally charged case provides a microcosm through which to view issues of older adult sexuality. First, it highlights the degree to which older adult sexuality is so often viewed through a cloud of ageism, which pigeonholes both sexual expression and, by extension, sexual abuse, as the province of the young, with no meaningful connection to the lives and health of older adults. Research has shown that the opposite is true. In a 2007 study, most of the over three thousand older adults surveyed remained sexually active, though the frequency of the activity decreased with age, and continued to view sex as an important part of life. Among respondents aged 75 to 85, 54% of those who reported being sexually active had sex two to three times a month, and 23% had sex once a week or more. Additionally, the study found a dramatic positive correlation between older adults' health and sexual activity.⁸ Relatedly, a study of 1,292 people aged 60 and older found that, while the percentage of people having sex at least once a month decreased with age, the percentage of those who were "very happy" with the sexual activity they were engaged in rose as people aged.⁹ It seems that not only are many older adults engaged in sexual activity throughout their lives, but the positive impact that sexual activity has on a person's life actually increases as that person ages.

Unfortunately, mistaken attitudes towards the role of sexuality in the lives of older adults seem to be prevalent even among the professionals who work with them. In the same 2007 study referenced above, only 38% of men and 20% of women reported having discussed sex with a physician since the age of 50.¹⁰ Age-related medical issues that may prevent older adults from leading sexually satisfying lives, and which might be mitigated with help from a physician, thus go unresolved, and the stereotype that older adults are not having sex becomes a self-fulfilling one. Conversely, reticence to discuss sexuality may keep professionals from uncovering signs of abuse. The Rayhons were no exception to this trend, as evidenced by the apparent lack of importance accorded to their sexual relationship during Donna Rayhons' care plan meeting, and the general squeamishness demonstrated by the staff towards even uttering the word "sex" in the context of a relationship between two older adults, one with apparent cognitive impairment, even within the context of a marital relationship.

Legal Standard for Capacity to Consent to Sexual Activity

Cognitive impairment introduces another layer of complexity to the issue of older adult sexuality. What is the legal standard for capacity to consent to sexual activity, and how can that standard be applied in cases of dementia, where a person's capacity is far from static, but may change based on time of day, surroundings, medical conditions and other external stressors? Our legal system must strike a balance between the fundamental right of all citizens, regardless of age, to private sexual activity, enshrined by the Supreme Court in *Griswold v. Connecticut* and *Lawrence v. Texas*,¹¹ with the *parens patriae* obligation of the state to protect individuals unable to protect themselves.

In New York, the standard for capacity to consent to sexual activity is defined in the context of criminal law, which includes lack of consent as an element of any sexual offense. Lack of consent may result from "incapacity to consent"¹² due to "mental disability"¹³ which is defined as "a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct."¹⁴ Courts have elaborated on this standard noting that "understanding the 'nature' of one's sexual conduct implicates a range of human responses, only a part of which is intellectual."¹⁵ Like other standards of capacity, this determination is a functional assessment, and the mere presence of a particular diagnosis, such as dementia, is not sufficient to establish incapacity.¹⁶ Factors implicated in capacity to consent to sexual activity include knowledge of the physical activities in question, an understanding of their physical consequences and effects, and the ability to make a voluntary decision.¹⁷ New York courts have also considered whether an individual is capable of understanding morals or values that exist around sexuality, though not the adherence to a particular set of values.¹⁸ However, there are no generally accepted approaches or criteria for the assessment of these factors in the psychological community.¹⁹ Furthermore, courts seem to have created this standard in the context of evaluating younger individuals with cognitive disabilities, not older adults with dementia or age-related cognitive impairments.

Nuanced Evaluation

Given the uniquely complex and subtle factors at play in decision-making regarding sexual activity, it is critical that attorneys encourage and help facilitate, where appropriate, a nuanced evaluation specifically geared towards a task specific assessment of an older adult's ability to consent to sexual activity, rather than relying on a more general assessment of the older adult's cognitive capacity. Such an assessment should track the specific factors courts look to in analyzing the legal standard. In Donna Rayhons' case, no evidence

was presented of such a specific assessment having been conducted. Rather, her doctor at the long-term care facility testified that his assessment was based on standard cognitive tests that ask simple questions about the day of the week and ask participants to repeat short lists of simple words.²⁰

The Hebrew Home at Riverdale, the long-term care facility that houses the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, has long championed the rights of its residents to engage in sexual activity, developing a Sexual Expression Policy in 1995. The Hebrew Home and the Weinberg Center also developed a tool for professionals to use in assessing consent to sexual activity. The tool is geared towards assessing:

- (a) An individual's ability to express choices/consent, by asking questions such as:
 - a. What are your wishes about this relationship?
 - b. Does your sexual partner make you happy?
 - c. Do you enjoy sexual contact?
- (b) An individual's ability to appreciate sexual activity, by asking questions such as:
 - a. Do you know what it means to have sex?
 - b. What does it mean to you/your partner? What would you do if you wanted the sexual activity to stop?
 - c. How would you respond if your partner wanted the sexual activity to stop?
- (c) An individual's current personal quality of choices, by asking questions such as:
 - a. Was and is physical intimacy important in your life?
 - b. What are your social and companionship wishes?
 - c. What brings happiness or fulfillment to your day?

All of the above questions should be formulated in a way that will make it easiest for the older adult to meaningfully respond. Consider using short and simple words and sentences, using examples based on the older adult's particular circumstances and breaking the conversation into several shorter pieces. It is critical to note that individuals suffering from dementia may be capable of formulating preferences and choices even if they are no longer able to verbally express those decisions.²¹ Therefore, an individual's non-verbal cues (facial expressions, body language, shifts in emotions and mood when coming into contact with the potential sexual partner) may be just as critical, if not more

so, than the questions themselves. It is also important that the evaluation consider the individual's relationships and values, both before the onset of the cognitive impairment as well as currently.

Sexual Abuse

Very few statistics are available about the prevalence of sexual abuse among older adults, due, at least in part, to the high level of stigma surrounding the issue. According to one study, over 60,000 rapes of women over 50 years old are reported annually.²² Many more may actually occur, given that both sexual assault and elder abuse are dramatically underreported crimes.²³ Moreover, sexual abuse, like other forms of abuse, is more likely to cause severe or long-lasting injuries when the victim is an older adult. In two separate studies, a significantly higher percentage of post-menopausal sexual assault victims had genital trauma, as compared with younger victims.²⁴ According to a 2008 study, older adults with dementia exhibit the same post-sexual abuse behavior symptoms of distress as cognitively intact individuals in the same age demographic.²⁵ It is critical that attorneys be mindful of the prevalence of sexual abuse and the extent of its medical and emotional consequences, particularly among cognitively impaired individuals whose ability to communicate verbally may be limited.

Family Discord: An Attorney's Role

Another issue illuminated by the Rayhons case is the role that internal family discord can play in situations where a cognitively impaired older adult is engaging in sexual activity. Henry and Donna Rayhons both had children from previous marriages, and Donna Rayhons' daughters seemed to have repeatedly disagreed with Henry over various issues involving Donna's care, such as the frequency of her trips outside of the long-term care facility.²⁶ While one of Donna's daughters, who testified against Henry, denied playing any role in initiating the criminal case, it seems likely that children, grandchildren or other family members may oppose the sexual activity of a loved one with dementia if the relationship is a new one or one that challenges their personal values or sense of family obligation. If the older adult in question is living in a long-term care facility, staff may be incentivized to follow the preferences of family members, since they are the likely source of liability. An older adult with cognitive impairment is unlikely to be able to assert his rights by taking legal action against a facility, whereas an outraged family member may well threaten suit.²⁷ Given their knowledge of the typical interests at play, attorneys should encourage clients to think through the implications of their particular family dynamics as part of holistic legal planning. Particular family dynamics around issues like sexuality may bear directly on a cli-

ent's advance and estate planning choices, and should be part of the conversation an attorney has with a client before executing such documents.

Conclusion

Older adult sexuality is a complex topic, particularly as our youth-oriented society moves towards a model of consent, which, by definition, excludes many older or disabled adults. As the Rayhons case demonstrates, older adults, particularly those with some form of cognitive impairment, are vulnerable both to sexual abuse, which, when it occurs, is so difficult to identify and to prove beyond a reasonable doubt, and to having their rights to sexual expression curtailed, with devastating physical and emotional consequences. Elder law attorneys are aptly positioned to assist clients in navigating this issue by: combating stereotypes regarding older adult sexuality, encouraging frank discussion of a client's wishes for their sexual life as part of the legal planning process, including the ways in which family dynamics may prove relevant, and encouraging or arranging for appropriately nuanced evaluations of an older adult's capacity to consent to sexual activity, in accordance with New York State law. Attorneys should also be aware of the reality of elder sexual abuse and be prepared to identify it and to alert law enforcement where appropriate. Integrating these services and skills into an elder law practice is an important boon for clients and a step towards fewer cases like *People v. Rayhons*.

Endnotes

1. NY EDN. LAW §6432-a.
2. Glenn Kessler, *One in five women in college sexually assaulted: an update on this statistic*, The Washington Post, December 17, 2014, at <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/> (last viewed August 11, 2015).
3. A group of parents of college students recently attempted a modern solution to this issue by creating an app, Good2Go, which documents the affirmative consent and level of intoxication of both parties prior to a sexual encounter, as well as providing education about affirmative consent. The app's first version was removed from Apple's App Store in October 2014 amid concerns regarding evidentiary validity and privacy, and a new version is currently in development. See Anita Ramasastry, *Good2Go? Good and Gone? Why an Affirmative Consent App Is a Risky Proposition*, Verdict: Legal Analysis and Commentary from Justia, October 21, 2014, at <https://verdict.justia.com/2014/10/21/good2go-good-gone-affirmative-consent-app-risky-proposition> (last viewed August 12, 2015); <http://good2goapp.com/>.
4. Judith Shulevitz, *Regulating Sex*, The New York Times, June 27, 2015, at http://mobile.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?_r=0 (last viewed August 11, 2015).
5. Pam Belluck, *Sex, Dementia and a Husband on Trial at Age 78*, The New York Times, April 13, 2015, at <http://www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html> (last viewed August 11, 2015).
6. Tony Leys, *Rayhons testifies, denies he had sex with wife*, The Des Moines Register, April 17, 2015, at <http://www.desmoinesregister.com/story/news/crime-and-courts/2015/04/17/henry-rayhons-testimony-sex-abuse-trial/25941879/> (last viewed July 29, 2015).
7. *Id.*
8. Sexual activity was defined by the study as "any mutually voluntary activity with another person that involves sexual contact whether or not intercourse or orgasm occurs."
9. *Healthy Sexuality and Vital Aging*, National Council on Aging, Washington, D.C., 1998.
10. Lindau ST, Schumm LP, Laumann EO, Levinson W, O'Muirheartaigh CA, Waite LJ., *A Study of Sexuality and Health among Older Adults in the United States*, The New England Journal of Medicine. 2007;357(8):762-774. doi:10.1056/NEJMoa067423.
11. 381 U.S. 479 (1965); 539 U.S. 558 (2003).
12. NY Penal Law 130.05 (2) (b).
13. *Id.* at 130.05 (3)(b).
14. *Id.* at 130.00 (5).
15. *People v. Cratsley*, 86 NY2d 81, 87 (NY, 1995).
16. *Id.* citing *People v. Easley*, 42 NY2d 50, 54-55 (1977).
17. American Bar Association Commission on Law and Aging/ American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, 64, 2008.
18. *People v. Cratsley*, 86 NY2d at 87.
19. American Bar Association Commission on Law and Aging/ American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, 67, 2008.
20. Tony Leys, *Doctor testifies to Donna Rayhons' mental state*, The Des Moines Register, April 14, 2015, at <http://www.desmoinesregister.com/story/news/2015/04/13/henry-rayhons-trial-mental-health-sex-abuse/25726131/> (last viewed August 12, 2015).
21. Tenenbaum, Evelyn, *To Be or To Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, Ind. L. Rev., 675, 713 (2009).
22. NCEA, 2005. Available at: <http://www.ncall.us/sites/ncall.us/files/resources/NCALL%20Sexual%20Abuse%20in%20Later%20Life%20Fact%20Sheet2014.pdf>, accessed August 4, 2015.
23. Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, New York City Department for the Aging, *Under The Radar: New York State Elder Abuse Prevalence Study*, 2011:2, available at: <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>. Accessed August 4, 2015. (Only 1 in 24 cases of elder abuse in New York State is reported to law enforcement or social service agencies.); Justice Department, *National Crime Victimization Survey: 2008-2012*. (68% of sexual assaults were not reported).
24. Muram, D. Miller, K. & Cutler, A. (1992), *Sexual Assault of the Elderly Victim*. Journal of Interpersonal Violence, 7(1): 70-76. (51% of victims 55+ experienced genital trauma, compared with 13% of victims age 18-45.); Ramin, S.M., A.J. Satin, I.C. Stone Jr. & G. D. Wendel Jr. (1992), *Sexual Assault in Postmenopausal Women*. Obstetrics and Gynecology, 80(5): 860-864. (43% of postmenopausal victims experienced genital trauma, as compared with 18% of younger victims.).
25. Burgess, A. Ramsey-Klawnsnik, H. & Gregorian, S. (2008), *Comparing Routes of Reporting in Elder Sexual Abuse Cases*. Journal of Elder Abuse and Neglect, 20(4): 336-352.
26. Tony Leys, *Henry Rayhons' stepchild denies bitterness played role*, The Des Moines Register, April 11, 2015 at <http://www>.

desmoinesregister.com/story/news/2015/04/10/henry-rayhons-sex-abuse-trial-testimony/25588455/ (last viewed August 4, 2015).

27. See Tenenbaum, *supra* note 21 at 705.

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