

Legal and Evidentiary Considerations in Evaluating Capacity to Consent to Sex

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court “held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct. The holding does not affect a state's legitimate interest and indeed, duty, to interpose **when consent is in doubt.**” (*Anderson v. Morrow*, 371 F.3d 1027, 1032-1033 (9th Cir. 2004))

Although the regulation of sexual conduct is generally a matter of state law, now that decisions regarding consenting adult sex in private have been declared to be protected by the federal constitution, the issue of consent, and the underlying issue of capacity to consent to sex, are federal constitutional issues. As an analogy, criminal law is a matter of state law. But search and seizure law, including whether there is consent to a warrantless search, are issues governed by federal constitutional law. This is because the 5th Amendment’s prohibition against warrantless searches and seizures is made applicable to the states through the 14th Amendment to the United States Constitution. In the wake of *Lawrence v. Texas*, consenting adult sex in private is protected by the 14th Amendment. As a result, whether consent exists or not must meet federal constitutional standards. State law on consent may help inform this inquiry, but ultimately whether consent exists is now a matter of federal law. State actions that infringe on fundamental constitutional rights must be narrowly tailored to serve compelling state interests. Thus, a capacity assessment on consent to sex must be careful not to be overly broad.

"[L]egal consent presupposes an intelligence capable of understanding the act, its nature, **and possible consequences.**" (*People v. Griffin* (1897) 117 Cal. 583, 585, 49 P. 711, overruled on other grounds in *People v. Hernandez* (1964) 61 Cal.2d 529, 536, 39 Cal.Rptr. 361, 393 P.2d 673; *People v. Lewis* (1977) 75 Cal.App.3d 513, 519, 142 Cal.Rptr. 218.) This quote was cited with approval in *People v. Hillhouse* (2003) 109 Cal.App.4th 1612.

A person is unable to give legal consent if he or she is “unable to understand the act, its nature, and possible consequences.” (*People v. Miranda* (2011) 199 Cal.App.4th 1403)

Probate Code Section 810(c) states: A judicial determination that a person . . . suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a **deficit in one or more of the person's mental functions** rather than on a diagnosis of a person's mental or physical disorder.

Probate Code Section 812 states: Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following: (a) The rights, duties, and responsibilities created by, or affected by the decision. (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision. (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

Capacity to Consent to Sexual Acts: Understanding the Nature of Sexual Conduct *J Am Acad Psychiatry Law* 38:3:417-420 (September 2010) <http://www.jaapl.org/content/38/3/417.full>

In *North Dakota v. Mosbrucker*, 758 N.W.2d 663 (N.D. 2008), the Supreme Court of North Dakota affirmed a conviction of gross sexual exploitation on the grounds that the victim, due to a mental disease or defect, was incapable of understanding the nature of engaging in sexual intercourse. The court ruled that such an understanding requires not only an appreciation of the physical act but also its possible risks and consequences, including sexually transmitted diseases and pregnancy.

Comment by the Authors: “The state has competing interests to respect the privacy and sexual rights of its citizens on the one hand and to protect persons whose intellectual disabilities make them vulnerable to sexual predation on the other. As this case demonstrates, however, states and judges have yet to reach consensus on the point at which protection should override sexual freedom. **Forensic clinicians involved in these cases should therefore be mindful of local legal standards, if they exist, and of the relevant literature on this complex subject.**”

Survey of Psychologists on Essential Criteria for Capacity to Consent to Sex

In an effort to try and operationalize criteria for capacity to consent, a US study conducted by Kennedy and Niederbuhl (2001) examined the views of over 300 psychologists on the criteria required for determining capacity to consent to sexual relationships. Participants were asked to grade 56 statements from ‘most important’ (5) to ‘least important’ (1). The results demonstrated that the following abilities were judged absolutely necessary (mean rating of 4.5 or more) to demonstrate capacity:

- (1) Individual can say or demonstrate ‘no’.
- (2) Individual knows that having intercourse can result in pregnancy.
- (3) Individual can make an informed choice when given options.
- (4) Individual knows that having intercourse or other sexual relations can result in obtaining a disease.
- (5) Individual can differentiate between appropriate and inappropriate times and places to engage in intimate relations.
- (6) Individual can recognize individuals or situations which might be a threat to him or her.
- (7) Individual will stop behavior if another person tells him or her ‘no’.

Comment: Just as in other areas of capacity assessments, in the context of a conservatorship proceeding an adult is presumed to have capacity to consent to sex and lack of capacity must be shown by clear and convincing evidence. Just as capacity to make medical decisions is not an all or nothing proposition – a person may have capacity to make some medical decisions but not others – the same is true for capacity to consent to sex. For example, a person may have capacity to make decisions regarding the frequency of solitary masturbation in private, and whether to view sexually explicit photos or videos of adult sexual activity. Those are low risk activities. In contrast, a person may not have capacity to engage in sexual conduct with another adult, due to the inability to say “no” or to respect the other person’s decision to say “no.” Or the individual may lack an understanding of the potential consequences or risks of certain forms of sex. Rendering an opinion about the capacity to consent to future sexual conduct is a major undertaking with significant consequences and should be done with the utmost of care and precision.

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