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To Authorize Sex with Oneself via Proxy or Advance Directive

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Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 **Ala. L. Rev.** 1 (2016), available at SSRN.

May an individual consent to sex in advance of incapacity (or intoxication)? Can an individual consent prospectively to intercourse? Should we only recognize consent given contemporaneously with the sexual act? These are straightforward questions which reside within core human needs and autonomy, yet few have considered them in the elder law context. Consensual sex has been explicated by juries, lawmakers, and scholars with practically endless variations, but a temporal dimension to sexual consent has not.

A sexual advance directive might read: "I hereby consent to vaginal intercourse with my spouse upon and during my incapacity." Advance directives are statutorily authorized for healthcare. What about for sex? Professor Boni-Saenz makes a convincing case for answering "yes!" in *Sexual Advance Directives*. An individual facing dementia may want to continue to have sex with her partner even after dementia has diminished or destroyed her capacity. If prospective sexual consent is invalid, her partner would be guilty of rape for an act of penetration with her even if she had unambiguously extended pre-incapacity consent.

Individuals may want to grant prospective consent to sex for different reasons. As Boni-Saenz observes, "They might have an interest in enabling sexually fulfilling lives for their future disabled selves, in preserving important sexual identities or relationships, or in protecting spouses from criminal prosecution for rape." (P. 4.) An individual's right to have intimate relations with the person of her choosing is so fundamental that we should consider carefully whether the right should be suspended by dementia if the individual thoughtfully considered the possibility of incapacitated sex while she was still competent. The questions posed by Boni-Saenz get at the basic concept of self. If a present-self consents to a future-self's sexual act, has the individual consented?

This kind of abstract problem might interest some, but it can also be framed in concrete terms. It is an important practical question: Should we recognize an individual's attempt to consent prospectively to sex? If the question is framed as an individual right, it is difficult – but not impossible – to argue that the right should be denied persons with advanced dementia, traumatic brain injuries, a stroke, or senility.

These kinds of questions, though, as difficult as they are, are actually more problematic than they might initially seem. We tend to think of dementia or incapacity as a light switch, either on or off. The law treats incapacity in fairly absolute terms: one has capacity or one doesn't. In reality, a loss of capacity almost always appears in gradations of grey, not as either black or white. While an "on or off" of incapacity is legally convenient, it is biologically inaccurate. Many individuals without capacity can articulate their desires. Moreover, sexual disinhibition is often undiminished by dementia.

Hypothetically, let's say, I once had a client with a diagnosis of early onset Alzheimer's. She delivered a directive to her caregivers for the time when she would lose capacity. She wanted, she told them, to enjoy replays of her favorite television program, *Gunsmoke*. She was sure that this would give her comfort as she lost the ability to articulate her wants. Inevitably, she declined and lost capacity. Her caregivers dutifully played *Gunsmoke* for her, but the tapes were distracting, even distressing, to her. She angrily complained that the words "all ran together." I've been told that this is a common complaint for dementia patients. Closely-spaced television dialogue can become indecipherable and even terrifying to individuals with dementia. If the caregivers had been bound to continue to subject her to *Gunsmoke* reruns, my clients' former-self would have, in effect, infringed on the autonomy of her present-self.

The same kind of quandary with a sexual advance directive is even more important – and disquieting.

Next, Boni-Saenz injects another problem. Along with advance directives, healthcare proxies are among the most commonly utilized tools for elder law attorneys. A healthcare proxy is a kind of durable power of attorney which appoints a surrogate decision maker over healthcare decisions. These instruments permit an agent, such as a trusted friend or family member, to grant – or withhold – informed consent in various medical situations if the principal has lost capacity. (The "durability" of a power of attorney refers to its effectiveness notwithstanding incapacity, a statutory reversal of common law agency principles.) Not uncommonly, a healthcare agent is faced with whether to terminate artificial means of life support on account of a terminal or vegetative condition of their loved one – whether to "pull the plug."

If sexual advance directives are permitted to prospectively grant (or deny) consent to physical intimacy, then, by extension, sexual powers of attorney are also warranted. Vesting a trusted agent with the power to consent (or refuse) intimacy goes partway toward ameliorating the inherent problem of an advance directive; the difficulty of responding to unanticipated circumstances. With a healthcare proxy, an agent's determinations can take account of evolving issues in ways that a static (and perhaps stale) declaration cannot.

In most cases, the named agent under a healthcare proxy will be a spouse or partner, with a successor agent named in the event of the primary agent's unavailability; typically an adult child. Agents are named on the basis of occupying positions of trust and familiarity with the principal's wishes. Spouses and children frequently fit the bill.

Now envision a husband-agent making the decision on behalf of his incapacitated wife-principal about whether to consent to have sex with him. He will – as agents often do – wear two hats. It's the same conflict of interest scenario from numerous fiduciary cases, but of a particular kind heretofore unexplored by agency law, or criminal law, for that matter. And what if an adult child is the agent? Picture a daughter faced with the decision of sexual consent on behalf of her aged mother.

There's much more in *Sexual Advance Directives*; it is highly recommended reading.

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