

SENATOR CHAMBERS: Right.

SENATOR LANDIS: And I can't...I don't know what that hypothetical might be here. I can imagine a hypothetical when an intentional act for which there is serious social and personal repercussion may, in fact, not rise to the level of knowing because of the mental capacity of the actor and that one would...that would disturb me.

SENATOR CHAMBERS: Then they shouldn't be responsible for the act. If they don't know what they're doing, see, if on the one hand we're going to say that the woman did not give consent if she didn't know the nature of the act, therefore, the crime is committed, we should have the corollary where if the person doesn't know the nature of the act being committed, then there should be no liability for it.

SENATOR LANDIS: Constitutionally, mens rea is an element in criminal law and there is a level to which the law cannot ignore mens rea and be constitutional. I'm going to guess that the word "intentional" meets the mens rea minimum constitutional standard to meet the due process obligations here. And, for that reason, I would feel comfortable in leaving it where it is.

SENATOR CHAMBERS: I'm not trying to be cute with the words but you would have to say, based on your approach to this bill, it's "womens rea" because if a woman does not know the nature of the act and says yes, the crime is still committed because she is deemed unable to give consent, even if she says yes and there is no force and there is no coercion and there is no deception on the part of the actor. The actor may intend to do the act. The actor doesn't know that this person lacks capacity, or the actor could touch this clothing without knowing that this is what is being done.

SPEAKER WITHEM: One minute.

SENATOR LANDIS: Understand that all the existing defenses, including lack of capacity, still operate in this criminal setting and nothing in this measure undoes the panoply of defenses available to a defendant, including a lack of capacity.

SENATOR CHAMBERS: Since my time is almost up, I've got my light on.