NOT JUST GUARDIANSHIP: UNCOVERING THE INVISIBLE TAXONOMY OF LAWS, REGULATIONS AND DECISIONS THAT LIMIT OR DENY THE RIGHT OF LEGAL CAPACITY FOR PERSONS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES

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INTRODUCTION

Most of us enjoy and exercise the right of legal capacity every day, neither thinking about it, or naming the right as such. We rent or own our apartments or houses, shop in person or online, use cash machines, make doctor's or dentist's appointments, enjoy (most of the time, at least) our family arrangements with children and spouses: we work at a place of our choice and spend the salaries we earn; we participate in civil society as voters and jurors, and engage in the justice system as litigants and witnesses. Each of these actions depends on our right to make our own decisions, and to have those decisions legally recognized. This is the right of "legal capacity" which is presumptively afforded to all adults in our society.[2]

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[2] All adult persons are presumed to possess legal capacity unless and until a guardian is appointed for them. *See*, *e.g.*, Richard C. Boldt, *The "Voluntary" Inpatient Treatment of Adults Under Guardianship*, 60 VILL. L. REV. 1, 18 (2015).

When, however, an adult has a disability that affects her *mental* capacity, whether because of intellectual or developmental disability (I/DD), psychosocial disability (mental illness) or progressive cognitive decline, dementia, Alzheimer's, etc., the law allows for limitations on, or complete removal of legal capacity, primarily through the imposition of guardianship.[3]

Over the past decade there has been increasing focus on legal capacity as a *human* right as a result of the United Nations Convention on the Rights of Persons with Disabilities (CRPD),[4] and on guardianship as a deprivation of that right. Reform efforts around the world, aimed at bringing domestic law into compliance with the CRPD, have been directed toward abolishing, or severely limiting guardianship. Simultaneously, pilot projects and legislation have foregrounded the emerging practice of supported decision-making (SDM) as a rights-enhancing alternative to guardianship.

What has been almost entirely absent from conversations about legal capacity is a vast network of laws, entirely unrelated to guardianship, that nevertheless require some specified level of mental capacity and that, accordingly, may serve to deprive legal capacity to adults with disabilities who are not subject to guardianship. Tina Minkowitz divides the conversation about legal capacity in two ways, writing:

> A person is assigned the status of a legally incapable person (usually by . . . [guardianship]). Or, a person is denied validity in their exercise of autonomy, particularly in relation to formal legal acts or areas of life where the person's consent is ordinarily required[,] . . . [which] is sometimes rationalized as not being about legal capacity but rather as operation of the doctrine of 'mental capacity' or 'functional capacity.'[5]

She continues that this second form of legal capacity deprivation is true "whether the deprivation is pursuant to a

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[3] Most states, including New York, refer to the process of removing legal capacity from one person, often denominated the "ward," and granting another, the "guardian," the power to make binding decisions as either "guardianship" or "conservatorship." For simplicity, this article will use guardianship for all purposes.

[4] *See* G.A. Res. 61/106, annex, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

[5] Tina Minkowitz, *CRPD Article 12 and the Alternative to Functional Capacity: Preliminary Thoughts Towards Transformation*, SSRN (Dec. 25, 2013), https://ssrn.com/abstract=2371939.

court adjudication or is only the determination of a notary, banker or doctor that the person lacks capacity to make a particular decision."[6]

That is, the imposition of particular standards of "mental" or "functional" capacity[7] by courts in validating or invalidating "consent"[8] to particular transactions, or the concern by third parties that the "consent" may retroactively be invalidated[9] also violates the CRPD, as the body responsible for its interpretation reminds us.[10] Even if we were to completely abolish guardianship, laws dealing with family relationships, contract, voting, etc. based on consent and "capacity" would still stand as barriers to the full enjoyment of legal capacity for all persons, regardless of disability.[11]

This article discusses this "invisible taxonomy" of laws, often as explicated through judicial decisions, that impact legal capacity, concentrating on New York as a relatively typical example.[12] It argues that abolishing guardianship is not enough to ensure legal equality for persons with disabilities, and it urges a wider lens for thinking about what should be required in order to give decisions—by all adults—legal effect.

Part I reviews the origin, emergence and current status of the human right of legal capacity, and the related practice of SDM.

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6 *Id*. (internal quotations omitted).

7 For simplicity, hereafter I will use the term "capacity" to apply to "mental" and/or "functional" capacity as a particular statute, regulation or decision requires.

8 For a critique of the law's current formulation of "consent," *see* Jennifer A. Drobac & Oliver R. Goodenough, *Exposing the Myth of Consent,* 12 IND. HEALTH L. REV. 471 (2015).

9 In the taxonomy that follows in Part III, I refer to these third-party refusals to accept the consent of a person with an intellectual disability as "Potential Immediate Deprivations."

10 For the CRPD, that is the Committee on the Convention on the Rights of Persons with Disabilities (CRPD Committee), which, in ¶ 50(a) of its First General Comment noted the obligation of States Parties to abolish all "mechanisms that deny legal capacity and which discriminate in purpose or effect against persons with disabilities." Committee on the Rights of Persons with Disabilities, *General Comment No. 1*, 11th Session, ¶ 50(a) UN Doc. CRPD/C/GC/1 (May 19, 2014) [hereinafter *General Comment No. 1*].

11 *See*, *e.g*., G.A. Res. 61/106, *supra* note 4, at art. 12(2).

12 I use New York as the example here because this is the state in which I have practiced, taught and judged, but the points made are relevant not only to other states in the U.S., but for advocates in many countries around the world that may be seeking to comply with Article 12.

Part II briefly describes the relationship of legal capacity to guardianship, legislative efforts to limit or abolish guardianship around the world, and recent guardianship reform developments in the U.S. Part III explores, as an example, a variety of New York laws and judicial decisions, unrelated to guardianship, that establish tests of mental capacity that may deny legal capacity to persons with I/DD and cognitive impairments.[13] Part IV raises questions about the beliefs underlying our current understanding of how decisions are made, and how capacity is assessed, while Part V suggests how the use of SDM, and a corresponding re-conception of "capacity" can effectively erase the discriminatory impact of *all* laws that currently deprive, or have the ability to deprive, persons with intellectual disabilities of their right to legal capacity.[14]

PART I: LEGAL CAPACITY AND SUPPORTED DECISION-MAKING

A. Legal Capacity as a Human Right: The Meaning of Legal Capacity

Legal capacity first appears in the germinal human rights document, the Universal Declaration of Human Rights,[15] promulgated in 1948 after, and in response to, the horrors of World War II and the Holocaust. The initial language of that aspirational document was subsequently elucidated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[16] and, most recently in the CRPD. The

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[13] Issues of legal capacity have salience for at least four separate groups of persons with disabilities: people with I/DD (Down Syndrome, autism spectrum, cerebral palsy, etc.); cognitive impairment and/or progressive decline (these are primarily older persons with dementia, Alzheimer's, stroke, etc.); psychosocial disabilities ("mental illness," schizophrenia, bipolar disorder, etc.) and traumatic brain injuries (TBIs), but I concentrate primarily on those with I/DD and cognitive impairments here. When including all groups, the blanket term "people with intellectual disabilities" will be employed.

[14] The argument here is not that everyone deserves full legal capacity under all circumstances, but rather that legal capacity should not be denied "on the basis of disability." Thus, for example, persons may be deprived of legal capacity when convicted of crimes, or, arguably, to protect them and/or others from imminent danger of harm. *See*, *e.g.*, Eilionóir Flynn & Anna Arstein-Kerslake, *State Intervention in the Lives of People with Disabilities: The Case for a Disability-Neutral Framework,* 13 INT. J. OF LAW IN CONTEXT 39, 42 (2017).

[15] Under Article 6 "[e]veryone has the right to recognition everywhere as a person before the law." *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[16] *See* Convention on the Elimination of All Forms of Discrimination Against

CRPD is the most specific with regard to the meaning of legal capacity, and the obligation of States Parties who ratify the convention to provide supports necessary for its exercise. Echoing the Universal Declaration, Article 12 reads:

> (1) persons with disabilities have the right to recognition everywhere as persons before the law.
> (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life [and that]
> (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.[17]

During the drafting process, a controversy arose as to the meaning of legal capacity in subsection two.[18] Representatives from Russia, China, and some Arab states argued, in a proposed footnote to the Convention, that in their languages legal capacity meant only the ability to *bear* rights ("capacity for rights"), but not to *act* based on those rights.[19] That limiting view was rejected, and the footnote removed, with an understanding that legal capacity is "the 'capacity to act', intended as the capacity and power to engage in a particular undertaking or transaction, to maintain a particular status . . . with another individual, and

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Women, art. 15, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S.13 (entered into force Sept. 3, 1981). CEDAW was the third of what are now four U.N. human rights treaties that deal with the implementation of rights for what have been identified as "vulnerable groups": racial and ethnic minorities, children, women, persons with disabilities and older persons. Only the latter group, older persons, remains without its own convention, though work on a convention is currently underway. CEDAW provides "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals." *Id.* at art. 15(2).

17 G.A. Res. 61/106, *supra* note 4, at art. 12.

18 *See* Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future,* 34 SYRACUSE. J. INT'L. L. & COM. 429, 442 (2007).

19 Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions*, 34 SYRACUSE J. INT'L. L. & COM. 405, 411 n.25.

more in general to create, modify or extinguish legal relationships."[20]

The CRPD Committee's First General Comment has also clearly and unequivocally adopted this understanding of legal capacity as necessarily including legal *agency*. That is, everyone, regardless of disability, has the right not only to *make* decisions, but to have those decisions *legally recognized*.[21] This is why, in a subsequent Comment, the CRPD Committee noted that "[t]he right to legal capacity is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention."[22]

There is another way in which legal capacity is critically important. Because we are, in many ways, the sum total of all the decisions (both good and bad) we are able to make in our lives, that right is essential to our very personhood.[23] This critical relationship between legal capacity and personhood has been especially well stated by Gerard Quinn who wrote:

> [L]egal capacity is the epiphenomenon. It provides the legal shell through which to assert personhood in the lifeworld. Primarily, it enables persons to sculpt their own legal universe – a web of mutual rights and obligations voluntarily entered into with others. So it allows for an expression of will in the lifeworld. That is the primary positive role of legal capacity. . . . Legal capacity opens up zones of personal freedom. It facilitates uncoerced interactions. It does so primarily through contract law. . . . [It] is entirely right to focus on issues like opening and maintaining a bank account, going to the doctor without hassle, buying and selling in the open market, renting accommodation, etc. This is how we positively express our freedom. This is how we can see legal capacity as a sword to forge our own way. . . . Viewed as a shield, [legal capacity] also helps persons fend off decisions made against them or

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[20] Legal Capacity: Background Conference Document Prepared by the Office of the United Nations High Commissioner for Human Rights, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ¶ 37 (Aug. 2005), https://www.un.org/esa/socdev/enable/rights/ahc6documents.htm (click on MS Word under Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights - Legal capacity) (last visited Sept. 23, 2019).

[21] *General Comment No. 1*, *supra* note 10, at ¶ 33.

[22] Committee on the Rights of Persons with Disabilities, General Comment No. 6, 19th Session, ¶ 47 UN Doc. CRPD/C/GC/6 (Apr. 26, 2018) [hereinafter *General Comment No. 6*].

[23] *See*, *e.g.*, Kristin Booth Glen, *Piloting Personhood: Reflections on the First Year of a Supported Decision-Making Project*, 39 CARDOZO L. REV. 495, 496 (2017).

otherwise "for" them by third parties.[24]

Presciently, while the latter statement, about legal capacity as a "shield" relates to the much discussed issue of guardianship, it is the earlier portion of his remarks that is relevant to the main subject of this article, the "invisible" taxonomy that limits or denies persons with disabilities the ability to use legal capacity "to sculpt their own legal universe" as "a sword to forge [their] own way" to which we return in part III.

In addition to the explanation and definition of just what legal capacity *is*, the First General Comment explicates two other critical aspects of the right of legal capacity. First, and not without controversy,[25] *legal capacity is completely disaggregated from mental capacity*. The Committee wrote:

> Legal capacity and mental capacity are distinct concepts. [Legal capacity] is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person which naturally vary. . . . Article 12 . . . makes it clear that "unsoundness of mind" and other discriminatory labels are not legitimate reasons for the denial of legal capacity. . . . Under [A]rticle 12 of the Convention, perceived or actual deficits in mental capacity must not be used as a justification for denying legal capacity.[26]

This position is directly connected to the Committee's view of so called "functional assessments" of capacity,[27] noting that such

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[24] Gerard Quinn, *Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD*, Keynote Address at the Harvard Law School Project on Disability Conference (Feb. 20, 2010) (transcript available at https://studylib.net/doc/14559783/concept-paper--%E2%80%98personhood-andamp%3B-legal-capacity) (last visited Sept. 23, 2019).

[25] *See*, *e.g.*, Sascha Callaghan et al., *Risk of Suicide is Insufficient Warrant for Coercive Treatment of Mental Illness*, 36 INT'L. J. OF L. & PSYCHIATRY 374 (2013); John Dawson & George Szmukler, *Fusion of Mental Health and Incapacity Legislation,* 188 BRIT. J. OF PSYCHIATRY 504 (2006**).**

[26] General Comment No. 1, *supra* note 10, at ¶ 13.

[27] It is important to note, however, that this rejection is only directed to the use of such assessments to label people with I/DD and cognitive impairments for the purpose of diminishing their perceived "capacity." In fact, assessments can and should be done for the purpose of determining the supports necessary to enable a person to fully exercise her/his legal capacity. The question should not be "what can't the person do?" but rather, "what would it take to enable her/him

an approach "is flawed for two key reasons. . . . [I]t is discriminatorily applied to people with disabilities; and . . . it presumes to be able to accurately assess the inner-workings of the human mind."[28]

This rejection of functional assessment, which is the basis for the imposition of adult guardianship in New York[29] and elsewhere,[30] is related to the Committee's unequivocal rejection of all systems of substituted decision making,[31] including guardianship, as violative of Article 12.[32] This is why efforts to comply with the CRPD in most countries have been directed to abolishing or limiting guardianship. The Committee, however, not only calls on States Parties to abolish such systems, but to develop "supported decision-making alternatives,"[33] the second critical aspect of its explication of the right of legal capacity.

B. *SDM as an Essential Prerequisite for Legal Capacity*

While supported decision-making (SDM) is nowhere mentioned in Article 12 of the CRPD, it clearly derives from the obligation to "provide support" for the exercise of legal capacity in Subsection three. SDM is discussed at some length in the First General Comment, which recognizes that "[a] supported decision-making regime comprises various options which give primacy to a person's will and preference and respect human rights norms."[34] The Committee notes that "'[s]upport' is a broad term that encompasses both informal and formal support arrangements of varying types and intensities. For example, persons with

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to do it?"

[28] General Comment No. 1, *supra* note 10, at ¶ 15.

[29] *See* N.Y. MENTAL HYG. LAW § 81.03 (b)–(c) (McKinney 2009) (defining "functional level" and "functional limitations"); MENTAL HYG § 81.02 (c) (conditioning imposition of guardianship on the "functional level" and "functional limitations" of the [allegedly incapacitated] person).

[30] *See* Uniform Guardianship, Conservatorship and Other Protective Arrangements Act ("UGCOPAA") § 306(b)(1) (2018) (requiring professional evaluation of the "[r]espondent's cognitive and functional abilities and limitations").

[31] General Comment No. 1, *supra* note 10, at ¶ 27. Regardless of nomenclature, substitute decision-making regimes are characterized by: (1) removal of legal capacity, even if only for one decision; (2) appointment of an alternative decision maker which can be done against the person's will; and (3) use of a "best interests" standard by the surrogate decision-maker.

[32] *Id*. at ¶ 28.

[33] *Id*.

[34] *Id*. at ¶ 29. The Comment goes on to spell out 9 components necessary for a supported decision-making regime to comply with Article 12.

disabilities may choose one or more trusted support persons to assist them in exercising their legal capacity for certain types of decisions."[35]

This use of "supporters" is the primary form of SDM that has been piloted and employed around the world,[36] and that has been legally recognized by several states in the U.S.[37] It is also the form that is currently being piloted in New York State under a five-year grant from the New York State Developmental Disabilities Planning Council.

Supported Decision-Making New York (SDMNY) is a consortium of Hunter/CUNY, The New York Alliance for Innovation and Inclusion, and Arc of Westchester with Disability Rights New York (DRNY) as its legal partner.[38] Drawing on the expertise of its members, and on the work of advocates and pilots in other countries, SDMNY has developed a three-phase model,[39] utilizing trained facilitators who, in turn, are supported by experienced mentors. The facilitators work with people with I/DD (who are referred to as "Decision Makers," to emphasize their centrality to the process) and the trusted persons in their lives who they have chosen as their supporters. They assist the Decision Makers in identifying the areas in which they want support,[40] the kinds of support they want,[41] and the ways in

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[35] *Id*. at ¶ 17. The Comment goes on to note other forms of support including "peer support, advocacy (including self-advocacy support, or assistance with communication" and "advance planning".

[36] For a discussion of a number of those pilot programs *see*, *e.g.*, Kristin Booth Glen, *Introducing a "New" Human Right: Learning from Others, Bringing Legal Capacity Home,* 49 COLUM. HUM. RTS. L. REV. 1 (2018**).**

[37] To date, these states are Texas, Delaware, Alaska, Wisconsin, Indiana, Nevada ,Rhode Island, North Dakota and the District of Columbia. Several other states have similar bills under consideration or study.

[38] *See*, *e.g.*, NEW YORK ALLIANCE FOR INCLUSION AND INNOVATION, https://nyalliance.org/ (last visited Sept. 16, 2019) (The Alliance is a statewide association of provider agencies); THE ARC OF WEST CHESTER NEW YORK, https://www.arcwestchester.org (last visited Sept. 16, 2019) (Arc of Westchester is a major provider of services for people with I/DD located in Westchester County); DISABILITY RIGHTS NEW YORK, www.drny.org (last visited Sept. 16, 2019) (DRNY is the federally funded Protection and Advocacy agency (P&A) for New York State. The project is funded by the N.Y.S. Developmental Disabilities Planning Council).

[39] For more detail on SDMNY and the facilitation model, *see* Glen, *supra* note 23, at 510, and its website: SUPPORTED DECISION-MAKING NEW YORK, https://www.sdmny.org.

[40] *See* Glen, *supra* note 23, at 510. These may include such domains as

which that support should be given.[42] The "product" of the facilitation, which typically involves monthly meetings over a period of nine to twelve months, is a contract negotiated by the Decision Maker and her/his supporters, the Supported Decision-Making Agreement (the SDMA) that reflects their agreement. The SDMA is not just a piece of paper, but describes and memorializes a flexible *process*,[43] which the Decision Maker can use for the rest of her/his life to make her/his own decisions, with the support s/he needs and desires.

Presently in New York, the SDMA has no binding legal effect, and third parties—health care professionals, financial institutions, landlords, etc.—are under no legal obligation to honor it. Part of SDNY's remit is to create an evidentiary base to support legislation that would, as other states have done, require acceptance by third parties, and relieve those third parties from liability for good faith reliance.[44] Such legislation is imperative to ensure that the second prong of legal capacity, the right to have one's decisions legally recognized, is realized.

To the extent, however, that the effort to promote—and "legalize"—SDM is directed solely, or primarily, at providing an alternative to guardianship, it fails to address many existing laws and practices, described in Part III, that deny legal capacity in more subtle and less visible ways. Part V describes the ways in which SDMA legislation can deal with this "invisible taxonomy," and how it cannot, suggesting an additional approach that can

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health, finances, education, work, intimate relationships, access to community and supportive services, etc.

[41] *Id.* These include gathering information; presenting information in an accessible and understandable fashion; considering alternatives; weighing the consequences of a given decision—or not making the decision; communicating the decision to third parties, which is especially important for people who don't use traditional means of communication; and in implementing their decisions.

[42] *Id.* These are largely logistical issues, such as whether support will be given through in-person meetings, by Skype, email, etc., and how, when there are several supporters for a particular domain in different geographical areas, or with inconsistent schedules, etc., those supporters will communicate with the Decision Maker.

[43] *Id.* at 505 n.54. The SDMA provides that the Decision Maker can revoke or change the agreement at any time, such that, as s/he gains capability in particular area, or new areas arise, or supporters move, or become unable to serve, the SDMA can be revised to meet then existing circumstances.

[44] Currently existing SDM legislation also provides that third parties dealing with decisions made pursuant to SDMAs who believe that the decision is the result of abuse or coercion have an obligation to report that alleged abuse or coercion to the appropriate authorities, a sort of built-in monitoring function. *See*, *e.g.*, IND. CODE § 29-3-14-13 (2019); *infra* note 299 and accompanying text.

deliver on the promise of legal capacity for all persons, regardless of disability.

SECTION II: THE FOCUS ON GUARDIANSHIP

If you are concerned about legal capacity, or its denial, for persons with I/DD or cognitive decline, there is no question that guardianship would be the first object, and the focus, of your analysis and advocacy. It is the single and overarching legal vehicle by which a person's legal capacity may entirely—and potentially forever[45]—denied.

A. Guardianship-related Activity in Response to the CRPD

The CRPD Committee is charged with reviewing submissions on compliance from States Parties; by the time of the First General Comment, it had issued Concluding Observations on a significant number of those submissions. In virtually every case, the Committee noted, and expressed concern about the continued existence of substitute decision-making regimes—guardianship. The Committee wrote:

> In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that when a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity is removed. . . . Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[46]

As a result of this pervasive problem, in the Section on "Obligations of States Parties," the Committee unequivocally called on States parties to abolish guardianship and all other

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[45] Under the current NY statute dealing with guardianship for people with I/DD, there is no time limit on the plenary guardianship imposed. *See* N.Y. SURR. CT. PROC. ACT LAW § 1759 (McKinney 2019). For a critique of this, and other provisions of Article 17-A, *see* Karen Andreasian et al., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities,* 18 CUNY L. Rev. 287 (2015).

[46] *General Comment No.* 1, *supra* note 10, at ¶ 15.

substitute decision-making regimes.[47] Abolition must be total, and simultaneous with, or precedent to, a support regime:

> The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.[48]

That is, SDM without abolition of guardianship is clearly insufficient for compliance. It is no wonder that countries that ratified the Convention and were serious about compliance began by considering how—or whether—to abolish guardianship. As an example, the European Union, which, for the first time in its history ratified the Convention as an institution, in addition to ratification by most of its members, funded "DREAM" fellows to study abolition in each of its member countries.[49]

To date, none of those countries has entirely abolished guardianship, though several have placed significant limitations on its use, while also recognizing forms of supported or shared decision making. Ireland is a case in point.

Starting with a truly antiquated statute, the "Lunacy Regulation Act of 1871," the Irish Ministry of Justice worked with stakeholder groups who, after numerous consultations around the country, formulated an impressive and inclusive set of "Essential Principles [for an] Irish Capacity Law."[50] At the end of the day, the law that passed did not abolish substitute decision-making entirely, but established an "assisted decision-making" regime

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[47] *See id.* at ¶ 28.

[48] *Id.* On the other hand, both the CRPD Committee and the Special Rapporteur on the rights of persons with disabilities ("Special Rapporteur") have emphasized that abolition of substitute decision-making regimes without developing "supported decision-making arrangements of varying types and intensity" is also inadequate to meet a State's obligations under Article 12. *See* Catalina Devandas Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), Report of the Special Rapporteur on the Rights of Persons with Disabilities, U.N. Doc. A/HRC/37/56, at ¶¶ 26–27 (Dec. 12, 2017).

[49] The network of scholars, funded by the EU Marie Curie (FP7) funding scheme, is called DREAM, for Disability Rights Expanding Accessible Markets. *See* Community Research and Development Information Service, *Disability Rights Expanding Accessible Markets*, EUROPEAN COMMISSION, https://cordis.europa.eu/project/rcn/96888/factsheet/en (last visited Aug. 29, 2019).

[50] *See* CENTRE OF DISABILITY LAW AND POLICY, *Essential Principles: Irish Capacity Law*, NAT'L UNIV. IR. GALWAY (2018), https://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Essential-Principles---Irish-Capacity-Law.pdf [https://perma.cc/KA4P-Y7Q3].

with a variety of possible supports.[51] As well, despite not strictly complying with the CRPD, it replaced the traditional "best interests" standard for substitute decision-making with the criterion of "will and preference."[52]

Other European countries, most notably Bulgaria, have utilized pilot programs demonstrating the ability of persons with I/DD to make decisions with supports to advance a legislative agenda including abolition of guardianship, although thus far, because of several changes in its government, without success.[53] Israel has new legislation limiting guardianship and recognizing SDM,[54] while Australia, a federal system, has seen pilot projects in a number of states, but thus far has only proposals for legislative change.[55]

Peru is, so far, the greatest success story in the work to bring a ratifying country into compliance with Article 12. A decade long organizing effort by civil society, with cooperation from the Peruvian government, resulted in the complete abolition of guardianship based on disability in the fall of 2018.[56] Even more

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[51] For more extensive discussion of the Irish reform, see Antonio Martinez-Pujalte, *Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms,* LAWS, Feb. 2019, at 12–15, https://www.mdpi.com/2075-471X/8/1/4 [https://perma.cc/6BLS-LFSE].

[52] *Id.* at 14.

[53] For an extensive discussion of civil society's efforts in Bulgaria, sometimes allied with the Ministry of Justice, and sometimes not, *see* Glen, *supra* note 36, at 84–92.

[54] Legal Capacity and Guardianship Law 5722-1962, art. 32a (Isr.). For a discussion of the new law, *see* Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond,* 39 CARDOZO L. REV. 557, 589–594 (2017). The law also provided for the establishment of regulations and, since its passage, the Disability Rights Commission has established training courses for supporters, and the Ministry of Justice has established the position of Supervisor for Supported Decision-Making. *See Demonstrating Supported Decision-Making to Change National Guardianship Laws*, ZERO PROJECT, https://zeroproject.org/practice/pra191425isr-factsheet/ (last visited Sept 24, 2019).

[55] *See* Bigby et al., *Delivering Decision-Making Support to People with Cognitive Disability—What Has Been Learned from Pilot Programs in Australia from 2010-2015*, 52 AUST. J. SOC. ISSUES 222, 224 (2017).

[56] The Peruvian equivalent of guardianship, which results in the removal of legal capacity, called "curatorship," may still be utilized in circumstances at least allegedly unrelated to disability, including drunkenness, criminal conviction, and persistent coma. *See Legislative Decree No. 1384: Legislative Decree that Recognizes and Regulates the Legal Capacity of Persons with Disabilities on Equal Basis*, SODIS – SOCIEDAD Y DISCAPACIDAD (DISABILITY AND

important, however, and essentially unique among all legislative efforts relating to guardianship, Peru also undertook a near-global review of all its laws denying or limiting legal capacity, reforming those laws to guarantee legal capacity to all people in all aspects of their lives. The Peruvian example is discussed more fully in section V below.

While efforts to secure legal capacity continue in legislative efforts around guardianship, it is notable that six of the most recent Concluding Observations on State party reports to the Committee[57] have all included concern about of the continuation of substitute decision-making regimes, including specific reference to Bulgaria's "failure to approve the draft Natural Persons and Support Measures Act . . . in accordance with the guidelines given in general comment No.1."[58] The most recent Concluding Observations also expressed concern about pending legislation in reporting countries that purported to provide supports but that, in the case of Malta, "may deprive persons with disabilities of their legal capacity, by introducing concepts and mechanisms such as 'safeguarder', 'co-decision-making' and 'representation agreements,'"[59] and, with regard to "ongoing deliberations in Congress [in the Philippines] on the selective provision of support for decision-making and on 'legal representatives' acting virtually as substitute decision makers." [60]

SOCIETY)[hereinafter SODIS Translation], http://sodisperu.org/wp-content/uploads/2019/08/Legislative-Decree-No-1384-Peruvian-legal-capacity-reform-2.pdf (last visited Sept. 9, 2019).

[57] Committee on the Rights of Persons with Disabilities, U.N. HUM. RTS. OFF. OF THE COMMISSIONER (Sep. 24, 2018), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5 (last visited Sept. 19, 2019). State parties submit reports every six years, and after an exchange of Lists of Issues and an opportunity to reply, the Committee issues its Concluding Observations. Six of the most recent, Poland, The Former Yugoslav Republic of Macedonia, South Africa, Bulgaria, Malta, and the Philippines were received on September 24, 2018.

[58] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Bulgaria*, 20th Session, ¶ 29, 30 UN Doc. CRPD/C/BGR/CO/1 (Oct. 19, 2018).

[59] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Malta*, 20th Session, ¶ 19 UN Doc. CRPD/C/MLT/CO/1 (Oct. 17, 2018).

[60] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Philippines*, 20th Session, ¶ 24 UN Doc. CRPD/C/PHL/CO/1 (Oct. 16, 2018).

B. Guardianship-Related Activity in the U.S.

As a non-ratifier of the CRPD,[61] the U.S has no legal or international obligation to protect legal capacity through the abolition of guardianship, or to create and promote supports for persons with I/DD to exercise their legal capacity. And, as a federal system, authority over guardianship and the "protection" of "vulnerable persons" is a police power that resides in the states, not the federal government.[62]

At the same time, however, both the federal constitution (as part of substantive due process) and, arguably, federal statutes like the Americans with Disabilities Act (ADA)[63] contain a requirement that guardianship should not be employed unless it is the "least restrictive alternative" available to meet the state's protective purpose. This "least restrictive alternative" imperative exists in one form or another in many states' guardianship statutes,[64] and in judicial decisions about protective proceedings more broadly.[65]

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61 As of this writing, 180 countries have ratified the CRPD; the U.S. is one of a handful that have not. *See* Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008); Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of Persons with Disabilities*, 35 TOURO L. REV. 301 (2018) (arguing why the U.S. *should* ratify the Convention).

62 *See* Leslie Salzman, *Using Domestic Law to Move Toward a Recognition of Universal Legal Capacity for Persons with Disabilities,* 39 CARDOZO L. REV. 521, 551–52 (2017).

63 *See* 42 U.S.C. § 12101 (2009). *See also* Leslie Saltzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Inclusion Mandate of Title II of the Americans with Disabilities Act,* 81 U. COLO. L. REV. 157 (2010) (arguing that guardianship violates the "inclusion mandate" of the ADA).

64 *See* Haldan Blecher, *Least Restrictive Alternative References in State Guardianship Statutes*, A.B.A. COMM'N ON L. & AGING (Jun. 23, 2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.authcheckdam.pdf (showing a comprehensive chart on this issue in state guardianship law).

65 For example, the New York Count of Appeals has embraced this principle in finding that, "to subject a person to a greater deprivation of his personal liberty than necessary to achieve the purpose for which he is confined is a clear violation of due process." Kesselbrenner v. Anonymous, 305 N.E.2d 903, 905 (N.Y. 1973). *See also In re* Manhattan Psychiatric Ctr., 285 A.D.2d 189, (N.Y. App. Div. 2001).

Over the past several years,[66] as knowledge of, and interest in, SDM has grown in the U.S., something of a consensus has arisen that SDM is an appropriate and effective "less restrictive alternative" to guardianship. To the extent that there has been any action on, or movement toward legislative change of guardianship statutes, it has been confined to explicitly naming SDM as such and/or suggesting or requiring that it be considered before guardianship can be imposed. That position is reflected in a resolution adopted by the ABA House of Delegates in July 2017 directed to legislatures but also, pending adoption of such legislation, to judges in guardianship cases.[67]

The most far-reaching example of such legislative efforts is the recent revision by the Uniform Law Commission[68] to the Uniform Guardianship and Protective Proceedings Act (UGPPA), now the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA).[69] In a three year process, including participation by stakeholders as well as appointed Commissioners, the new version requires that guardianship may not be imposed if the use of SDM permits an otherwise incapacitated adult to make her/his own decisions,[70] and also

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66 *See* Glen, *supra* note 23, at 500–01. The first national interdisciplinary roundtable on SDM was held in New York in October 2012. It was convened by the ABA Commissions on Disability Rights and Law and Aging, with support from the U.S. Administration on Community Living (ACL) and the New York Community Trust. Shortly thereafter, ACL issued an RFP for, and subsequently funded, the National Resource Center for Supported Decision-Making.

67 *See* Robert T. Gonzales et al., *Report to the House of Delegates,* ABA COMM'N ON DISABILITY RIGHTS (Aug. 14, 2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/supported-decision-making-resolution-final.pdf (urging that SDM be considered as a basis for restoration of rights in proceedings to terminate existing guardianships).

68 The Uniform Law Commission is a highly regarded independent body "established in 1892, that provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." *See Overview,* UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview (last visited Aug. 28, 2019).

69 NAT'L CONFERENCE OF COMMISSIONERS ON UNIF. STATE LAWS, UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT (UNIF. L. COMM'N 2017) [hereinafter UGCOPPA] https://www.uniformlaws. org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=de9bae9e-0b4e-0781-12b5-f5305569bf19&forceDialog=0.

70 *Id*. at § 301(a)(1)(A) ("[T]he Court may appoint a guardian . . . [only if] the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance or supported decision making.").

requires consideration of the existence of an SDM regime in proceedings to restore rights to persons currently subject to guardianship.[71] Thus far, Maine and Washington have adopted the provisions of the UGCOPAA, and two other states have bills introduced.[72]

While this legislative guardianship reform work is surely valuable, it neither meets the requirements of Article 12, nor, more important for this Article, deals with the many other ways in which legal capacity can be, and is, denied to people with I/DD. Some leading commentators have urged that we do not "lose sight of the fact that the broader goal of supported decision making is to help people to exercise their legal capacity," and that "[t]his will entail the exploration and introduction of alternative legal mechanisms that give people legal standing and recognize their need for support to act within the framework of the law."[73] With this caution in mind, we proceed to exploring some of those other impediments to the exercise of legal capacity.

PART III: UNCOVERING THE INVISIBLE TAXONOMY

Laws other than guardianship may affect the legal capacity of a person with I/DD or cognitive impairment by finding that s/he lacks the appropriate mental or cognitive capacity required by those laws. They do so in several different ways that divide into relatively discreet categories, described and denominated below.

Laws requiring a particular level of "capacity"[74] may directly and immediately preclude persons with I/DD or cognitive impairment from performing certain acts, as voting, or from

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71 *Id.* at § 319(d) (requiring a court to terminate a guardianship unless it is proven, by clear and convincing evidence, that there is a basis for imposing guardianship under Section 301, which requires consideration of SDM as an alternative).

72 *See* Map of States Where UGCOPAA has been Introduced and Enacted, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c (last visited Sept. 26, 2019).

73 Michelle Browning, *Supported Decision Making: Understanding How Its Conceptual Link to Legal Capacity is Influencing the Development of Practice,* 1 RES. & PRAC. IN INTELL. & DEVELOPMENTAL DISABILITIES 34, 42 (2014).

74 For purposes of this discussion, I employ the term "capacity" because it is used almost universally in statutes, regulations and judicial decisions, but with the understanding that it always means some level of *mental* capacity.

participating in the judicial systems, for example, serving as a witness or juror. Such laws are also prominent with respect to criminal defendants including their rights (decisions) to plead, to stand trial, and to waive counsel. Similarly, they may be used to impose involuntary medication on persons with mental illness. I refer to these laws as "Direct Immediate Deprivations."

Laws may also have the immediate effect of denying legal capacity by deterring others from engaging with the person with I/DD or cognitive impairment in particular activities, including otherwise consensual sex. This is also a problem in health care settings, where the legal requirement of "informed consent" may deny or delay treatment where the patient is perceived as lacking "capacity" to consent.[75] These are "Potential Immediate Deprivations."

Laws may require a certain defined "capacity" to permit an individual to enter into particular legal transactions, that is, to contract. These laws may result in an immediate deprivation of legal capacity by a person with I/DD, because the other party to the transaction may not be willing to deal with her/him. They may also place the long-term validity of the transaction in question, because it could subsequently be voided by a finding that the person lacked the relevant capacity at the time the transaction occurred. I refer to these as "Potential Immediate and/or Deferred Deprivations."

Other laws requiring a certain specified level of "capacity" may not preclude a person with I/DD from taking a particular legal action, for example making a will to dispose of her/his property on death but may leave that action open to challenge after the person's demise. Generally, standing to raise such challenges is limited to persons who are immediately, almost always financially, affected by the action. I refer to these as "Potential Deferred Deprivations." There is also a variation, where the law grants standing to someone *not* a party to the

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[75] We have seen several instances of this kind of deprivation at SDMNY, where, for example, a young woman with I/DD was admitted to a hospital with abdominal distress and diagnosed as requiring a procedure to remove gallstones. *See* Andreasian et al., *supra* note 45, at 332. Hospital personnel "decided" not only that she lacked capacity to give informed consent for the procedure, but also that the health care proxy she had previously executed was invalid because of her "lack of capacity" and refused to treat her unless her mother could secure guardianship. Fortunately, the intervention and persuasive legal argument of SDMNY's Project Coordinator prevailed. Personal communication with Matthew Smith (May 15, 2019).

transaction/action, or personally affected by it, for the "protection" of the person who allegedly lacked capacity. I refer to this as a "Protective Potential Deferred Deprivation."

Concerns about the capacity requirements of laws involving deferred deprivations may also serve to discourage persons with I/DD from attempting the action or may dissuade lawyers from willingness to represent them in doing so. I refer to these laws and regulations as "Potential Persuasive Deprivations."

Finally, there are numerous practices, often by regulated entities, that give private parties the power to deny legal capacity to persons with I/DD. One such example is the refusal to permit consent to sexual activities and intimate relations by residents of group homes and nursing homes. These are referred to as "Authorized Private Deprivations."

What follows is not, and not intended to be, an exhaustive list. Rather it provides a series of examples of these various categories that, even in the absence of guardianship, may limit or deprive persons with I/DD or cognitive impairment of their legal capacity.

A. Direct Immediate Deprivation

Some statutes, or statutes explicated by case law, empower a person or official to make a "capacity" determination that immediately prevents a person deemed to l*ack* capacity from engaging in a legal transaction or participating in a legal proceeding. That is, such statutes create a "gatekeeper" who may employ a capacity test contained in the statute or grafted onto it by case law. Generally, in such instances the person whose legal capacity has been deprived has no opportunity to contest the "capacity" determination.

1. Health Care Decisions

If a person with I/DD is subject to guardianship, the guardian is generally given the power to make health care decisions subject to some limitations relating to end of life decisions.[76] But even where there is no guardian, the Family Health Care Decisions Act (FHCDA)[77] permits a person with I/DD[78] to be deprived of

[76] *See* N.Y. SURR. CT. PROC. ACT LAW § 1750-b (McKinney 2019).
[77] *See* N.Y. PUB. HEALTH LAW §§ 2994-a–2994-u (McKinney 2019).

her/his legal capacity to make her/his own health care decisions in a hospital setting. The determination of whether the person possesses the requisite mental or cognitive capacity is initially made by the person's attending physician, subject to confirmation by a health care professional with "qualifications" in I/DD if the physician lacks certain prescribed "qualifications."[79]

The standard of "capacity" employed under the FHCDA is "the ability to understand and appreciate the nature and consequences of proposed health care, including the benefits and risks of and alternatives to proposed health care, and to reach an informed decision."[80] To be sure, unlike other "Immediate Deprivation" statutes, the FHCDA provides for some review of the determination of incapacity,[81] and even allows for override by the patient,[82] but with no provision for accommodations and/or support; this is a right observed more in the breach than in the likelihood that it will be utilized.

2. Civilian Participation in the Judicial System

a. Service as a Juror

On its face, the New York statute on juror qualifications does not appear to disqualify persons because of mental or cognitive disabilities.[83] The provision under which the Commissioner of Jurors "determine[s] the qualification of a prospective juror," however, specifically permits her/him to examine a prospective juror in person "as to his or her competence."[84] Although "competence" is nowhere defined, the Court of Appeals has held that "[a]t a minimum, a juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during

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78 The statute specifically refers to patients with a "history of receiving services for mental retardation or developmental disability" or where "it reasonably appears to the physician that the patient has mental retardation or a developmental disability." PUB. HEALTH § 2994-b(3).

79 *See* PUB. HEALTH § 2994-c(2), (3)(c)(ii).

80 PUB. HEALTH § 2994-a(5).

81 *See* PUB. HEALTH § 2994-c(3)(d).

82 *See* PUB. HEALTH § 2994-c(6).

83 In order to qualify as a juror a person must: (1) be a citizen of the United States, and a resident of the country; (2) be not less than 18 years or age; (3) Not have been convicted of a felony; and (4) be able to understand and communicate in the English language. N.Y. JUD. LAW § 510 (McKinney 2019).

84 N.Y. JUD. LAW § 509(a)(b) (McKinney 2019).

deliberations, and comprehend the applicable legal principles, as instructed by the court."[85] Thus, either the Commissioner of Jurors, or a trial judge on *voir dire*, has the power to deprive a person with I/DD or cognitive decline of her/his legal capacity, apparently without recourse.[86]

b. Ability to Appear as a Witness

The law pertaining to capacity to serve as a witness in a criminal proceeding is much more explicit, providing that "[a]ny person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence."[87] The Court of Appeals has defined the "capacity" necessary to serve as a witness as the person's having "sufficient intelligence to understand the nature of an oath and to give a reasonably accurate account of what he has seen and heard vis-a-vis the subject about which he is interrogated."[88] And, the Court continued, "[t]he witness must, at a minimum, have 'some conception' of the obligations of an oath and the consequences of giving false testimony."[89]

This determination, with the power to deprive a person with I/DD or cognitive impairment of her/his legal capacity, "is exclusively the responsibility of the trial court, subject to limited appellate review."[90]

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[85] People v. Guzman, 555 N.E.2d 259. 261 (N.Y. 1990). *See also* People v. Montada, 671 N.Y.S.2d 62, 63 (N.Y. App. Div. 1998).

[86] No cases were found in which a prospective juror challenged her/his disqualification on the basis of mental or cognitive capacity, and the statue provides no procedure for doing so.

[87] N.Y. CRIM. PROC. LAW § 60.20(1) (McKinney 2019).

[88] People v. Parks, 359 N.E.2d 358, 366 (N.Y. 1976) (quoting People v. Rensing, 199 N.E.2d 489, 490–491 (N.Y. 1964)).

[89] *Id.*

[90] *Id.* Such review appears to occur only at the behest of the defendant in the trial, assuming s/he is convicted. There is no provision for the prospective witness to challenge her/his disqualification for lack of capacity.

3. Criminal defendants[91]

a. The Right to Plead and/or to Stand Trial

All persons charged with crimes are afforded a presumption of innocence. They carry that presumption into a trial where the state is required to prove guilt by evidence beyond a reasonable doubt. A trial is the means by which a person criminally charged can be exonerated and go free. Criminal defendants have a right to a trial by a jury of their peers, though, of course, they may waive that right[92] by entering a guilty plea, often for an agreed-upon sentence less than what would have been imposed had they been found guilty.[93]

Because criminal proceedings implicate federal constitutional law as well as state law, the issue of mental capacity/competency first requires reference to the U.S. Supreme Court. With regard to the ability (capacity) to stand trial, *Dusky v. U.S.*, decided in 1970, set out the two-pronged "understand and appreciate" test that is still in place today.[94] Although lower federal courts have found that a different, more exacting test should be applied to the ability (capacity) to plead,[95] the Supreme Court has reaffirmed the *Dusky* standard as equally applicable to the plea situation.

New York has basically adopted the *Dusky* test for both

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91 For a discussion of the thorny issues posed for the exercise of legal capacity by the criminal law, *see* Glen*, supra* note 36, at 49–59.

92 Of course, they may also waive a jury trial and proceed to a trial by a judge. N.Y. CRIM. PROC. LAW. § 320.10 (McKinney 2019). Although "capacity" is implicated in such waiver by the requirement that it must be "knowing and voluntary." *See*, *e.g.*, People v. Brown, 681 N.Y.S.2d 616 (N.Y. App. Div. 1998).

93 There are many reasons that may cause a criminal defendant to plead guilty, including avoiding the burden a trial might place on the defendant and/or his family, admission of guilt and a wish for absolution, strong or overwhelming evidence against the defendant, as well as the promise of a lesser sentence than what would or might be imposed if he went to trial. Robert Schehr & Chelsea French, *Mental Competency Law and Plea Bargaining: A Neurophenomenological Critique,* 79.3 ALB. L. REV. 1091, 1097 (2016).

94 Dusky v. United States, 362 U.S. 402, (1970) (quoting Solicitor General Rankin that a defendant must possess "a rational as well as factual understanding of the proceedings. . . ." and have "sufficient present ability to consult with his [or her] lawyer with a reasonable degree of . . . understanding.").

95 *See*, *e.g.*, Moran v. Godinez, 972 F. 2d 263, 266 (9th Cir. 1992) (holding that the competency to waive constitutional rights is based on a higher standard than what is required for a defendant to stand trial) *rev'd,* 509 U.S. 389 (U.S. 1993).

capacity to stand trial and to enter a plea.[96] A criminal defendant who is found to be an "incapacitated person" pursuant to Article 730 of the Criminal Procedure Law is deprived of the right to trial and/or to plead, immediately depriving her/him of her/his legal capacity. The necessary finding that the defendant "as a result of mental disease or defect lacks the capacity to understand the proceedings against him or to assist in his own defense,"[97] does not result in her/his going free; rather, at the conclusion of the statutory period for custody for the purpose of observation, if the person is believed to be so mentally ill or mentally defective as to require continued care and treatment in an institution an order of certification for continued confinement may be made pursuant to section 31.33 of the New York Mental Hygiene Law.[98]

The deprivation may also be deferred where a person with I/DD proceeds to trial, is found guilty, and the conviction is subsequently reversed on appeal on the basis of "incompetence" or "incapacity" to stand trial. While this may appear to be a favorable result for the person rather than a retroactive denial of her/his legal capacity, it basically returns her/him to step one, where the process begins anew.

b. The Right to Waive Counsel or Proceed Pro Se

A somewhat different right—and standard—is implicated when a criminal defendant chooses to represent him/herself, that is, to give up the right to representation by counsel.[99] The

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96 People v. LaValle, 697 N.Y.S.2d 241, 244 (N.Y. Sup. Ct. 1999) (finding that the same standard also applies to a defendant's waiver of the opportunity to present mitigating evidence at sentencing), *aff'd in part*, *modified in part*, 817 N.E.2d 341 (N.Y. 2004).

97 N.Y. CRIM PROC. LAW § 730.10 (McKinney 2019); *But see* Schehr & French, *supra* note 93 (criticizing the use of this standard with regard to the ability to plead).

98 CRIM. PROC. § 730.70.

99 *See* People v. Stone, 6 N.E.3d 572, 575 (N.Y. 2014). Aside from characterizing the rights lost by waiving counsel differently than by pleading guilty, one might surmise that judges and the criminal justice system have an interest in guilty pleas, by which the vast majority of cases are resolved, thus encouraging findings of capacity/competency, while the burden of conducting a criminal trial with a pro se defendant militates for a stricter capacity /competency standard.

Supreme Court has held that an application to proceed pro se must be denied unless the defendant effectuates a knowing, voluntary and intelligent waiver of the right to counsel,[100] itself somewhat different from "understand and appreciate." In addition, where mental illness is involved, legal capacity may be further denied because the right to waive counsel may be denied even where the defendant is otherwise competent to stand trial.[101] New York has adopted a similar test, holding that "a mentally ill defendant, though competent to stand trial, may not have the capacity to appreciate the demands attendant to self-representation, resulting in an inability to knowingly, voluntarily and intelligently waive the right to counsel and proceed pro se."[102]

4. Voting

In theory, separate laws determine who is able to vote in state and federal elections. Federal law defers to state law by providing that a person may be "removed from the official list of eligible voters [if] as provided by State law, by reason of . . . mental incapacity."[103] Existing New York law is unclear as it excludes any person "adjudged incompetent by order of a court of competent judicial authority" from "the right to register for or vote at any election in this state."[104] Neither the New York guardianship statute for persons with I/DD, Article 17-A of Surrogate's Court Procedure Act, or the adult guardianship statute, Article 81 of the Mental Hygiene Law, employ the term "incompetence,"[105] nor does either statute "adjudicate" a person to

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100 Faretta v. California, 422 U.S. 806, 835 (1975).

101 Indiana v. Edwards, 554 U.S. 164, 175–76 (2008) (holding that, in cases involving mental illness, "an individual may well be able to satisfy Dusky's mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.")

102 People v. Stone, 6 N.E.3d at 576 (N.Y. 2014) (holding that, because mental illness had been previously included in the necessary competency (capacity) determination, "*Edwards* [did not] effectuate a substantial change in the law . . . in New York." (citing People v. Reason, 37 N.Y.2d 351, 334 (N.Y. 1975))). *Reason* was decided prior to *Edwards*, but the Court of Appeals has reaffirmed it as consistent with the Supreme Court's more recent iteration of the appropriate competency (capacity) determination. *See id.* at 577.

103 52 U.S.C. § 20507(a)(3)(B) (2017).

104 N.Y. ELEC. LAW § 5-106(6) (McKinney 2019).

105 *See* N.Y. SURR. CT. PROC. ACT LAW art. 17-A (McKinney 2019). In its present iteration, Article 17-A of New York Surrogate's Court Procedure Act makes no reference to incompetence, incapacity, lack of capacity, or any test of mental or cognitive capacity, depending instead entirely on a medical diagnosis.

be an "incompetent," or even an "incapacitated person."[106][107] However, the plenary nature of an Article 17-A guardianship, and its original purpose of essentially continuing persons with I/DD in the legal status of "children," strongly suggests the intention to deny persons subject to such guardianship of the right to vote. And although this article focuses primarily on New York law, it is worth noting that many states, in one form or another, deny the right to vote and thus to exercise legal capacity to persons with I/DD and cognitive disabilities.[108]

5. Forced or Involuntary Medication

It is well settled in New York law that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[109] This oft-cited and ringing pronouncement of bodily integrity contains within it the proposition that the same guarantee is not available to those who lack mental capacity—i.e. are not "of sound mind." The ability to override medical choices made by those lacking "capacity," most particularly to refuse anti-psychotic medication, was upheld by

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At least one of the various proposals to reform Article 17-A uses "capacity," as does current Article 81 of New York Mental Hygiene Law. N.Y. MENTAL HYG. LAW art. 81 (McKinney 2019).

106 SURR. CT. PROC. ACT § 1750-a. Article 17-A simply authorizes the appointment of a guardian if the respondent carries one of the defined diagnoses and such appointment would be in her/his "best interest." Article 81 provides that a guardian may be appointed upon, inter alia, a finding that the respondent is "incapacitated, but, because of the strong statutory preference for limited guardianships, may find that s/he is "incapacitated only with regard to particular domains, so there is no global finding-or, arguably, adjudication-of "incapacity" MENTAL HYG. §§ 81.16(c)(2), 81.15(b)(2) (disposition and specific findings of incapacity, respectively).

107 One federal court has made a distinction between "commitment proceedings" and "competency proceedings." The former often involve a finding of 'incapacity." *But see* MENTAL HYG. §29.03 (specifically providing that a commitment order "shall [not] be construed or deemed to be a determination or finding that such person is incompetent.").

108 *See* Charles Kopel, *Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy*, 17 YALE J. HEALTH POL'Y L. & ETHICS 209, 211–12 (2017) ("In the United States . . . only eleven states maintain no suffrage restrictions on the basis of intellectual disability or mental illness.").

109 Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.)

the Court of Appeals in the germinal case of *Rivers v. Katz*, where the court held that, when the patient presents a danger to himself or the community,[110]

> in situations where the state's police power is not implicated, and the patient refuses to consent to the administration of antipsychotic drugs, there must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to the proposed treatment before the drugs may be administered.[111]

Subsequent decisions have further explicated both the evidence required at a hearing[112] and the required test of capacity as, for example, "whether the [patient], who was diagnosed with schizoaffective disorder, lacked the capacity to understand the nature or severity of her medical condition, or the severe consequences that would likely result if the condition were left untreated."[113]

While the *Rivers* Court specifically held that the mere fact of involuntary hospitalization was insufficient to prove lack of capacity to refuse psychotropic medication,[114] it should be noted that New York's guardianship law specifically allows appointing courts to give a guardian to "consent to or refuse generally accepted routine or major medical . . . treatment."[115] The only appellate court to have spoken on this issue has held that, notwithstanding this provision, a person under guardianship

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110 Rivers v. Katz, 495 N.E.2d 337, 343 (N.Y. 1986).

111 *Id.* at 343–344. A finding of lack of capacity is not, however, the end of the inquiry. The court must then determine whether the proposed intervention is narrowly tailored to recognize the liberty interest of the patient, taking into account the patient's best interests, the potential benefits and adverse side effects associated with it, and any less intrusive alternative treatment regimes. *Id*. at 344.

112 *Rivers* expanded on the need for a "finding" by requiring that such finding must be made by clear and convincing evidence, after a de novo hearing where the patient is represented by counsel. *Id.* at 344. What actually suffices to meet that standard is, however, problematic given general judicial reliance on psychiatric/medical testimony in such hearings, especially when unrebutted. *See*, *e.g.*, *In re* Radcliffe M., 65 N.Y.S.3d 227, 229, 231 (N.Y. App. Div. 2017) (where the sole testimony was that of petitioner's expert psychiatrist, and the patient declined to attend).

113 *In re* Marietta Mc. (Forest Hills Hosp.), 2 N.Y.S.3d 224, 226 (N.Y. App. Div. 2015).

114 *See also In re* Simone D., 9 N.Y.3d 828 (N.Y. 2007) (applying Rivers in cases involving electroconvulsive therapy (ECT), in addition to medication).

115 N.Y. MENTAL HYG. LAW § 81.22(a) (McKinney 2019).

cannot be involuntarily medicated without the independent judicial hearing on capacity mandated by *Rivers*.[116]

It is also worth noting that, unlike other mostly "invisible" deprivations of legal capacity described in this article, the involuntary medication of psychiatric patients has been noted,[117] criticized,[118] and hotly contested.[119]

B. *Potential Immediate Deprivation*

1. Sexuality

Sexuality and intimate relations are very much part of what it means to be a person.[120] Individuals eighteen and older are free to consent to sexual activity with others, but the law of "statutory rape" creates classes of persons who are deemed "incapable of giving consent,"[121] including those who are "mentally disabled."[122] By depriving persons with I/DD of the legal capacity to consent to sex, these laws "stigmatize people with intellectual disabilities in

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116 *In re* Rhodanna C. B. v. Pamela B., 823 N.Y.S.2d 497, 502–504 (N.Y. App. Div. 2006). Unless and until the Court of Appeals speaks, however, courts in the other Departments are free to rule differently.

117 *See*, *e.g.*, ELYN R. SAKS, REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL, 237–38 (2010).

118 For example, Michael Perlin notes how what he describes as "sanism," which is largely based on "stereotype, myth, superstition and deindividualization," and heuristics, "contaminate[s] the practice of . . . mental disability law" including determinations of capacity for purpose of forced psychiatric treatment. *See* Michael L. Perlin & Naomi M. Weinstein, *Said I, "But You Have No Choice": Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even if it is not What S/He Would Have Chosen*, 15 CARDOZO PUB. POL'Y & ETHICS L.J. 73, 81–84, 86–87, 104–106 (2016).

119 *See*, *e.g.*, Minkowitz, *supra* note 5.

120 *See*, *e.g.*, Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1207 (2015) ("Sexuality is . . . important. It represents a unique source of pleasure, meaning and social connection.").

121 N.Y. PENAL LAW § 130.30(2) (McKinney 2019) (defining second degree rape, a Class D felony, as "sexual intercourse with another person who is incapable of consent by reason of being mentally disabled.").

122 PENAL § 130.00(5) ("'Mentally disabled' means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct."). The Court of Appeals has affirmed a variation of this test for persons with intellectual disabilities, requiring such a person to have the ability to understand the nature of the sexual act, including both physical and moral. People v. Easley, 364 N.E.2d 1328, 1332–1333 (N.Y. 1977).

the most personal areas and reduce them to 'children' who are also prohibited, as a matter of law, from consenting to sex."[123] They "outcast" them into statutory isolation.[124] And, more practically, statutes such as N.Y. Penal Law 130.30 are clearly intended to deter prospective sexual partners;[125] to the extent they do, such statutes constitute an Immediate Deprivation of legal capacity.[126]

C. Potential Immediate and Deferred Deprivation

1. Contracts

There are basically three separate bodies of law that determine the capacity necessary to enter into a binding contract. The vast majority of simple, non-commercial contractual transactions are governed by common, or judge made law, which is summarized in the Restatement (Second) of Contracts. Most commercial/sales contracts are governed by the Uniform Commercial Code, adopted in New York in 1962. Finally, states, including New York, may have specific statutes dealing with particular transactions and the requisite "capacity" required for them.

a. Common Law

The general rule for determining the "capacity" necessary to enter into a valid contract is set forth in the Restatement (Second) of Contracts which reads:

> (2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is
>
> . . .
>
> (c) mentally ill or defective.[127]

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123 Glen, *supra* note 36, at 58.

124 *See* Deborah D. Denno, *Sexuality, Rape and Mental Retardation*, 1997 U. ILL. L. REV. 315, 343 (1997) (coining this formulation in her germinal article on the subject).

125 Glen, *supra* note 36, at 58.

126 *See* Boni-Saenz, supra note 120, at 1205 ("by applying a test that focuses narrowly on cognitive abilities to individuals with persistent impairments, [these laws] are unnecessarily and permanently restricting the sexual expression of millions of individuals, with intensely negative social, psychological and health consequences.").

127 RESTATEMENT (SECOND) OF CONTRACTS, § 12(2)(c) (AM. LAW INST. 1981).

It goes on, in Sec. 15 to provide that:

> (1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect
>
> (a) He is unable to understand in a reasonable manner the nature and consequences of the transaction, or
>
> (b) He is unable to act in a reasonable manner in relation to the transaction and the other party has a reason to know of his condition.[128]

This is the common law standard adopted for contracts in general by the New York Court of Appeals.[129] It is thus potentially both a "Potential Immediate Deprivation" in that parties may refuse to honor the legal capacity of a person with I/DD and choosing not to enter into a contract with her/him, and a "Potential Deferred Deprivation" to the extent that contracts entered into may be found voidable because a party lacked sufficient contractual capacity.[130]

b. The Uniform Commercial Code

The Uniform Commercial Code does not, itself, define "capacity" generally, but provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to capacity to contract, . . . supplement[s] its provisions."[131]

An example of this "displacement" of the common law of capacity to contract appears in Article 8, Investment Securities, where the definition of an "appropriate person" to transfer securities provides that "the person designated . . . [lacking] capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset [constitutes an "appropriate

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128 RESTATEMENT (SECOND) OF CONTRACTS, § 15(1) (AM. LAW INST. 1981).

129 Ortelere v. Teachers' Retirement Board, 250 N.E.2d 460, 464 (N.Y. 1969).

130 *See id.* at 466 (holding that where the plaintiff had a severe mental illness that interfered with her ability to make an appropriate election of retirement benefits and, because the Retirement System was, or should have been aware of the plaintiff's condition, the election/contract was voided).

131 N.Y. U.C.C § 1-103(b) (McKinney 2019).

person"]."[132]

Accordingly, as the Appellate Division, Fourth Department, has held, when "a person lacks mental capacity but has not been adjudicated an incompetent person and does not have a designated guardian or other similar representative, then the person nevertheless is not an appropriate person to make an indorsement and the indorsement is therefore not effective"[133]

c. Specific Statutes

There are also a number of statutes relating to particular kinds of non-commercial transactions that specifically require some specified form of mental and/or cognitive capacity, or that deny legal capacity to persons with I/DD and other cognitive and/or mental disabilities.

i. Real Property

The N.Y. Real Property Law provides that "[a] person other than a minor, a mentally retarded person, or person of unsound mind, seized of or entitled to and estate or interest in real property, may transfer such estate or interest."[134]

ii. Marriage

While most people don't ordinarily think of marriage as a contract, under New York law "[m]arriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential."[135]

This reference to "capacity" ("capable in law") is apparently explicated by the provision that makes marriages "voidable"[136]

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132 U.C.C. § 8-107(a)(5).

133 Kirshtein v. AmeriCU Credit Union, 882 N.Y.S.2d 610, 614 (N.Y. App. Div. 2009).

134 N.Y. REAL PROP. LAW § 11 (McKinney 2019). *See*, *e.g.*, Jordan v. Clinton, 796 N.Y.S.2d 629, 630 (N.Y. App. Div. 2005) (setting aside a deed on grounds that unrebutted evidence in the form of hospital records that the owner of the property was "delusional" at the time of the transfer proved that he was "of unsound mind.").

135 N.Y. DOM. REL. LAW § 10 (McKinney 2019).

136 A "voidable" marriage is one that is legally recognized and binding unless and until declared void by a court of competent jurisdiction, while a "void" marriage is deemed never to have existed. Examples of the former include marriages where a party was underage, or subject to fraud, duress or force, or

when one party "is incapable of consenting to the marriage for 'want of understanding.'"[137] This "want of understanding" has, in turn, been judicially defined as "mentally incapable of understanding the nature, effect and consequences of the marriage."[138]

The marriage laws may function as an "Immediate" *and* "Potential Immediate Deprivation" not only because, at least in theory, one party might fear that the other might have a "want of understanding" that could subsequently void the marriage, but because the county clerk, who issues the marriage license, can only do so if s/he finds that the parties "are legally competent to marry."[139] It is sad, though not impossible to imagine, a clerk denying a marriage license where one or both of the parties have I/DD that is clearly visible, such as Down Syndrome, or cerebral palsy with significant speech impairment.

The Domestic Relations Law relating to marriage may also act as a "Potential Deferred Deprivation." Section 140 provides for annulling a voidable marriage on the ground that a party was "a mentally retarded person."[140] Here it appears that a person's legal capacity to marry can be removed retroactively solely on the basis of a diagnosis. Putting aside the questionable constitutionality of this particular provision,[141] an action

"incurably mentally ill for a period of five years or more." DOM. REL. § 7. Void marriages include those where the parties fall within a specified degree of consanguinity, or where one party already has a spouse and the marriage has not been judicially dissolved. DOM. REL. §§ 5, 6. Despite the provision that a marriage contracted by a party who lacked understanding is merely voidable, courts have held that, in an action for annulment brought after the death of the person, the marriage may be held void ab initio. *See*, *In re* Estate of Kaminister, 888 N.Y.S.2d 385, 389–90 (Sur. Ct. 2009).

137 DOM. REL. § 7(2).

138 *E.g.*, Weinberg v. Weinberg, 8 N.Y.S.2d 341, 345 (N.Y. App. Div. 1938).

139 DOM. REL. § 15 (2).

140 DOM. REL. § 140(c).

141 Given that marriage is a fundamental right, *see*, *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602, 2604 (2015), strict scrutiny should apply, and given the enormous range of capabilities of persons with diagnoses that formerly fell under the rubric of "mental retardation," a very strong equal protection argument can be made for the unconstitutional overbreadth of the provision. The requirement of a more functional approach has been recognized by the Court of Appeals in, *e.g.*, *In re* Grinker (Rose), 573 N.E.2d 536 (N.Y. 1991), *superseded by statute*, N.Y. MENTAL HYG. LAW § 81.02 (McKinney. 2019), *as recognized in In re* Maher, 621 N.Y.S.2d 617, 618 (N.Y. App. Div. 1994) (noting that § 81 of the Mental Hygiene Law uses a functional approach).

pursuant to section 140(c) of Domestic Relations Law, may be brought "at any time during the life time of either party to the marriage" by any relative of a person with I/DD "who has an interest to avoid the marriage,"[142] and a court can, or must, void the marriage, depriving the person of her legal capacity, simply by finding that s/he has "mental retardation."

D. *Potential Deferred/Retroactive Deprivations*

1. Testamentary Dispositions

In a regime of private property, one of the most important rights is the ability to dispose of it at death, in accordance with the owner's wishes. Where the owner does not make those wishes known through the use of legally prescribed procedures, or where the owner "lacks capacity" to do so, the state makes the (substitute) decision and distribution pursuant to the laws of intestacy. As in many other areas, the specific language of relevant statutes may be more extensively explicated by binding judicial construction.

In New York's law of wills, the determination of "capacity" (with the potential of disqualification for a person with I/DD) occurs both at the time the attempted testamentary disposition is made, and when the distribution occurs, through probate proceedings, after the person's death. In the former instance, it is a Potential Persuasive Deprivation; in the latter, a Potential Deferred Deprivation.

The substantive law of wills, the Estates, Powers and Trusts Law (EPTL) limits those able to make a will to "person[s] eighteen years of age or over, *of sound mind and memory*."[143] What constitutes "sound mind and memory" is nowhere defined in that statute, nor is there any substantial judicial explication. Such expanded explication appears, however, in connection with the procedural law of wills, the Surrogate's Court Procedure Act (SCPA).

That law provides that, in order to probate a will "the court must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its

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142 N.Y. DOM. REL. LAW § 140 (c) (McKinney 2019).

143 N.Y. EST. POWERS & TRUSTS LAW § 3-1.1 (McKinney 2019) (emphasis added).

execution."[144]

The validity of the will's execution, in turn, depends on the "capacity" of the testator at the time of execution[145]—i.e. whether s/he was "of sound mind and memory." A long body of case law has considered the elements of "testamentary capacity" resulting in an oft-cited definition from the New York Court of Appeals in *In re Estate of Kumstar* where the Court wrote that, in order to probate a will, the proponent must prove that the testator:

> (1) understood the nature and consequences of executing a will;
> (2) . . . knew the nature and extent of the property she was disposing of; and
> (3) . . . knew those who would be considered the natural objects of her bounty and her relations with them.[146]

Significantly, it is often stated that the capacity to make a will, with the specific requirements of the *Kumstar* test, is less than that required to make an ordinary contract.[147]

2. Advance Directives

Although they are commonly touted as alternatives to guardianship, two well-intentioned and oft-employed advance directives, Powers of Attorney (PoAs) and Health Care Proxies pose a significant risk of Potential Deferred Deprivation of legal capacity. Ironically, both require functional mental capacity, and so are subject to being disregarded precisely in those situations they were supposed to protect against—a lack of legal recognition for the decisions of persons with I/DD and cognitive impairment.

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144 N.Y. SURR. CT. PROC. ACT LAW § 1408 (1) (McKinney 2019).

145 In addition to abundant case law under § 1408 determining "capacity," *see*, *e.g.*, *In re* Estate of Stern, 284 N.Y.S.2d 286, 287 (N.Y. App. Div. 1967) (citing the statutory provision in SURR. CT. PROC. ACT § 1406(1) (Consol. 2019) that provides that permitting proof of the elements necessary for probate by affidavit specifically includes "that the testator at the time of execution was in all respects competent to make a will").

146 *In re* Estate of Kumstar, 487 N.E.2d 271, 272 (N.Y. 1985).

147 *See*, *e.g.*, JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 270 (9th ed. 2013) **(**This is presumably because, unlike the ordinary bilateral contract there is no "adversary" involved when a will is executed, and because the will can be unilaterally revoked at any time during the testator's life).

As an example, the Appellate Division upheld the retroactive invalidation of both "[a] durable power of attorney and health care proxy since they were executed by respondent during a time that she was suffering from extreme dementia."[148]

a. Health Care Proxies

The Public Health Law provides that "[a] *competent* adult may appoint a health care agent in accordance with the terms of this article"[149] (emphasis added), thus clearly imposing a test of mental competence. While there is a presumption of competency, the Appellate Division has held that "where there is medical evidence of mental illness or a mental defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document possessed the requisite mental capacity."[150]

In addition, the statute specifically authorizes a special proceeding by which any one of a large group of potential petitioners can challenge "the validity of the health care proxy" including, of course, the mental capacity of the person who executed it, thus retroactively denying her/his legal capacity.[151]

b. Powers of Attorney

Powers of attorney permit an adult to designate an agent of her/his choice to act for her/him in certain specified situations or on specified legal matters. A Power of Attorney (PoA) may be general/durable, immediately empowering the agent even as the principal retains the ability to act for her/himself, or it may be a springing PoA, which becomes operative on the occurrence of some specified event, such as the incapacitation of the principal.

New York's PoA legislation is replete with references to the mental capacity necessary for the principal's direction to be valid. In the "Application and Definitions" section of the statute, a PoA

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148 *In re* Mary "J", 736 N.Y.S.2d 542, 545 (N.Y. App. Div. 2002).

149 N.Y. PUB. HEALTH LAW § 2981(1) (McKinney 2019) (emphasis added) (the statute goes on to specifically excluded persons "adjudged incompetent" or for whom a guardian has been appointed).

150 *In re* John T. (Hanson), 989 N.Y.S.2d 903, 904 (N.Y. App. Div. 2014) (quoting, *In re* Rose S. (Anonymous), 741 N.Y.S.2d 84, 85 (N.Y. App. Div. 2002)).

151 These include the health care provider who is being asked to honor the health care proxy, "members of the principal's family, a close friend of the principal [as elsewhere defined] or the commissioner of health, mental health, or developmental disabilities." PUB. HEALTH § 2992.

is defined as "a written document . . . by which a principal *with capacity* designates an Agent to act on his or her behalf."[152]

Third Parties are required to honor statutory short form PoAs, unless they have "actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed[.]"[153]

And, as with a health care proxy, the statute provides that a special proceeding may be commenced "to determine whether the principal had capacity at the time the power of attorney was executed."[154] Statutory standing is granted to "'the agent,' the spouse, child or parent of the principal[,] . . . any third party who may be required to accept a power of attorney . . . ,"[155] and by reference to a previous section, numerous individuals in a protective capacity including "a government entity, or official thereof, investigating a report that the principal may be in need of protective or other services, or investigating a report of abuse or neglect[.]"[156]

While the statute nowhere defines the "capacity" necessary for a valid PoA, it is reasonable to assume that it is the common law "understand and appreciate the transaction" applicable to contracts. For the sake of reference, the Uniform Power of Attorney Act defines "incapacity" as the "inability of an individual to manage property or business affairs because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of technological assistance."[157]

E. *Potential Persuasive Deprivation*

In addition to laws that require mental capacity for persons to enter into valid legal transactions, lawyers may also serve as

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152 N.Y. GEN. OBLIG. LAW § 5-1501(2)(j) (McKinney 2019) (emphasis added).

153 GEN. OBLIG. § 5-1504(6).

154 GEN. OBLIG. § 5-1510(2)(b).

155 GEN. OBLIG. § 5-1510(3).

156 GEN. OBLIG. § 5-1505(a)(3)(iii)–(vi) (mentioning that this also includes court evaluators in Article 81 proceedings, guardians ad litem in Article 7-A proceedings; guardians, and monitors under the Uniform Power of Attorney Act).

157 UNIFORM POWER OF ATTORNEY ACT § 102(5) (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2006).

"gatekeepers" for the exercise of legal capacity. While their power is not statutory, it derives from the codified Rules of Professional Conduct, and from generally recognized practice norms.[158]

The Rules of Professional Conduct, promulgated by the American Bar Association, and adopted, in whole or part, by many states, including New York, provide little practical guidance for lawyers dealing with clients about whose capacity they have serious concerns. While encouraging lawyers who have a prior relationship with a client whose capacity appears diminished to " . . . maintain a normal lawyer-client relationship" "as far as reasonably possible,"[159] the Rules give no guidance to the lawyer who is approached by a potential new client who seeks her/his assistance to, for example, write a will, or make any of a series of advance directives.[160] The rules do, however, give an attorney leave to "take reasonably necessary protective action" where the attorney believes that "the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[161]

A lawyer may, therefore, actually be authorized to commence a guardianship proceeding[162] that can entirely remove the client's legal capacity. Short of that draconian result he or she can (and, anecdotally, often does) simply refuse to provide representation. While there are no reported cases arising under the New York Rule, the prestigious American College of Trusts and Estates Counsel (ACTEC) publishes extensive and often authoritative comments to the Rules, including Rule 1.14. Its comment on "Testamentary Capacity" provides:

> If the testamentary capacity of a client is uncertain, the lawyer

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158 For an extensive discussion of the ways in which "capacity" and "capacity determinations" may play out for practicing lawyers, *see* Barry Kozak, *The Forgotten Rule of Professional Conduct-Representing a Client with Diminished Capacity,* 49 CREIGHTON L. REV. 827 (2016).

159 N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0(1.14a) (McKinney 2019).

160 To be sure, various on line sites allow non-lawyers to create and execute an enormous variety of legal documents, including wills, trusts, health care proxies, etc., but people with I/DD may believe that a lawyer is necessary, or may be unable to, or discouraged from, using such resources.

161 § 1200.0(1.14b).

162 *See*, *e.g.*, Cheney v. Wells, 877 N.Y.S.2d 605, 612–613 (Sur. Ct. N.Y. 2008) (authorizing a lawyer to withdraw from representation of an allegedly incapacitated person conditioned on her commencing an Article 81 proceeding).

> should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity.[163]

Without the assistance of an attorney, a person with I/DD or cognitive impairment may thus be persuaded/deterred from exercising her/his legal capacity with regard to making a will or "other dispositive transfer."

F. *Protective Potential Deferred Deprivation*

This category refers not to the domains in which legal capacity can be denied, but rather to the standing which the law gives to particular individuals, or classes of individuals, to retroactively invalidate transactions by a person believed to have lacked the requisite capacity at the time those transactions were entered into. Such standing is legislatively conferred not because of the economic interest of the party seeking to invalidate the transaction, but for the "protection" of the allegedly incapacitated person who engaged in it.

Existing guardianship law is the most expansive example of Protective Deferred Deprivation, as a transaction or act in which a person engaged while "presumed to be fully competent"[164] and in the exercise of her/his legal capacity may later be invalidated by an Article 81 guardian. The adult guardianship statute provides that, upon appointing a guardian, the court may invalidate a PoA, a health care proxy,[165] "or any contract, conveyance, or disposition during lifetime or to take effect upon death [that] was made while the person was incapacitated."[166]

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163 AM. COLL. TR. & ESTATE COUNCIL, COMMENTARIES ON THE RULES OF PROFESSIONAL CONDUCT, 162 (5th ed. 2016).

164 A person is assumed fully competent until adjudicated otherwise by a court of competent jurisdiction. *See, e. g.*, *supra* note 2 and accompanying text. This is the case in New York where, even when adjudicated, an "incapacitated" person retains all the rights that are not specifically removed by the court. N.Y. MENTAL HYG. LAW § 81.29(a) (McKinney 2019).

165 *See In re* Rose S. (Anonymous)*, supra* note 150 for an example of this retroactive invalidation of both advance directives.

166 MENTAL HYG. § 81.29(d). Wills and codicils to wills are, however, explicitly omitted from such scrutiny in a guardianship proceeding, leaving the

Even if guardianship were abolished, laws conferring "protective" standing allow for third parties to retroactively deprive persons with I/DD of their legal capacity in the name of "protection". Two such examples,[167] briefly noted, as the substantive law for which each group has been given "protective" standing have already been discussed.

1. Marriage

In addition to family members, whose interests might be either financial, or protective, or both, the annulment statute gives standing to un-named others, presumably approved by the court for alleged protective purposes.

> Where no relative of the mentally retarded person . . . brings an action to annul the marriage . . . the court may allow an action for that purpose to be maintained at any time during the life-time of both the parties to the marriage, by any person as the next friend of the mentally retarded person.[168]

2. Power of Attorney

As already noted, the statute gives standing to numerous persons and/or representatives of entities involved in the protection of vulnerable adults, *supra* notes 156–157 and accompanying text.

G. "Private" Deprivations by Regulated Entities

Thus far we have considered deprivations, or potential deprivations, based on statutory or regulatory requirements of some specified "capacity", whether the definition of capacity is included in the statute, or grafted on through judicial decisions. While private parties may cause the deprivation through, for example, refusal to enter into a transaction where they have concerns as to whether the other party, the person with I/DD or cognitive impairment, has the requisite capacity under the relevant statute or common law, that private refusal is always

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retroactive inquiry into testamentary capacity to the Surrogate's Court. *See* MENTAL HYG. § 81.29(d).

167 Please note again that these are only a representative sampling and not an exhaustive compilation of all such laws.

168 N.Y. DOM. REL. LAW § 140(c) (McKinney 2019).

pursuant to, or premised on, existing law.

A different, but no less rights-depriving situation occurs when "private" entities perform quasi-governmental functions, or operate under state and/or federal regulations, and utilize their power over individuals who rely on them for services to prevent those individuals from entering into transactions based on their alleged lack of capacity. A particularly poignant example of this "private" deprivation of legal capacity is the power exercised by adult group homes over the sexuality and intimate relations of their residents.

In New York, an adult group home is:

> . . . a type of privately owned, for profit care facility licensed by the State of New York and authorized to provide long-term residential care . . . and supervision to five or more adults unrelated to the operator . . . who do not need the level of care provided by a hospital or nursing home but who are nonetheless 'unable or substantially unable to live independently' due to disability. N. Y. Soc. Serv. Law Sec 2(21).[169]

In addition to extensive state regulation,[170] adult group homes are funded through the federal Medicaid Home and Community Based Services (HCBS) waiver program,[171] which requires providers to ensure their residents a "right of privacy, dignity and respect, and freedom from coercion and restraint."[172]

Some group homes, however, have and enforce "overprotective policies that limit or restrict sexuality, which are driven by a presumption of incapacity based on ableist or paternalistic notions that individuals with intellectual disabilities are innately incapable of engaging in sex and intimacy and, thus, must be protected against themselves."[173] Control, including denial, of

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169 Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149 n.9 (2d Cir. 2012).

170 Both the N.Y.S. Office of Mental Health (OMH), and the N.Y.S. Department of Health (DOH) are charged with the supervision, including monitoring and inspection, of adult group homes. Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289, 313–16 (E.D.N.Y. 2009).

171 *See* Natalie Chin, *Group Homes as Sex Police and the Role of the Olmstead Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 406–409 (2018) (describing the HCBS waiver program and regulations).

172 42 C.F.R. § 441.301(c)(4)(iii) (2014).

173 Chin, *supra* note 171, at 415. The operators of group homes imposing

residents' legal capacity to engage in sexual activity or other intimate relations may be "policed" by the use of "sexual consent evaluations" administered by group home employees.

Professor Natalie Chin describes the facts of an unreported case in which two adults fell in love after meeting at their day habilitation program. After dating for several years, they wanted to live together in their group home. The home denied their request after requiring them to undergo sexual consent evaluations conducted by its Clinical Director.[174] The home argued its position, ultimately upheld by the Second Circuit, that the idea of two intellectually disabled adults living together in a group home was "unprecedented, impossible and fraught with difficulties."[175]

What a leading scholar has named (and criticized) "Privatization as Delegation,"[176] allows private entities who "effectively step[] into the government's shoes" to have "access to powers that are distinctly governmental" including "the ability to exert coercive powers on a nonconsensual basis"[177] She continues:

> Particularly when privatization occurs in contexts where program participants or applicants have a great need for the government benefits and services at issue, private entities' roles in implementing government programs may significantly augment their powers over others and enhance their ability to cause harm.[178]

Or, it seems, to deprive persons with I/DD of the exercise of their legal capacity with neither judicial nor legislative authority. Writing about the analogous situation of denial of access to sexuality to persons with psychosocial disabilities in a hospital setting, Professor Michael Perlin asks:

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sexual consent policies may also be more concerned with possible liability than with residents' privacy, dignity and respect. *See* A. Noonan & M. Taylor Gomez, *Who's Missing? Awareness of Lesbian, Gay, Bisexual and Transgender People with Intellectual Disability,* 29 SEXUALITY AND DISABILITY 175, 177 (2011).

174 Chin, *supra* note 171, at 416–18. (observing that "[a] later independent evaluation, which included 'specialized educational materials' to assist [the parties] in taking the evaluation, however, determined that both [parties] were able to give verbal informed sexual consent").

175 *Id.* at 417.

176 Gillian A. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

177 *Id.* at 1462.

178 *Id.*

> For if a patient is competent to engage in autonomous decision making about questions of sex, how can any institutional caretaker preempt those decisions any more than the State can preempt decisions we make about all of this in our own lives?[179]

This is yet another example of how problematic legal capacity is, and would continue to be, in our current system, even if guardianship were completely abolished.

PART IV: RETHINKING CAPACITY AND DECISION-MAKING

When discussing legal capacity, the phrase "paradigm shift" is frequently, and appropriately, used. When I began writing about legal capacity, I was inspired to return to the origin of that term,[180] Thomas Kuhn's remarkable book, The Structure of Scientific Revolutions. He described paradigms there as "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners."[181] Although Kuhn was writing about scientific discoveries, his insights are equally applicable in numerous other domains, including the way we think about people with disabilities, and about mental and legal capacity.

Kuhn advised looking at "the role of . . . external social, economic, and intellectual conditions" which create a "change in the perception and evaluation of familiar data" that reorient our vision and understanding, creating a paradigm shift that "alters the historical perspective of the community that experiences it."[182] Those external conditions, and the brave and tireless work of disability rights activists, have already led to a major paradigm shift in the way in which we view disability.

From a "medical model" in which disability was viewed as a

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179 Michael I. Perlin et al., *"Some Things are Too Hot to Touch": Competency, the Right to Sexual Autonomy, and the Role of Lawyers and Expert Witnesses*, 35 TOURO L. REV. 405, 414 (2019).

180 *See* Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond,* 44 COLUM. HUM. RTS. L. REV. 93, 96–98 (2012).

181 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS x (3d ed. 1996).

182 *Id.* at x–xii.

deficit, personal to the individual who "suffered" from it, to be "cured" if possible, and pitied if not,[183] we have moved to a "social model" that sees disability not in an individual impairment, but in the disconnect between the way in which society is built and organized, such that the individual is "dis"-abled by social conditions.[184] Legislation such as the Americans with Disabilities Act (ADA)[185] reflects and embraces the social model by providing for "accommodations" that create a better, less "'dis'-abling" fit between the individual with an impairment and the "built environment."[186] Like the CRPD, it acts to "normalize" disability as "part of the human condition" rather than as something that separates one group of people, those with disabilities, from the rest of "us."[187]

For many reasons, the social model has had far less salience for I/DD and cognitive impairments, and stigma and discrimination against persons with "mental" disabilities persists, so there has not been a corresponding paradigm shift in how people with such disabilities are seen and understood.[188] This failure is undergirded by the deep and enduring way in which the idea of mental capacity, and its twin, the autonomous "rational man," permeates the entire legal system.[189]

Actualizing Article 12's paradigm shift to legal capacity for all

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[183] The deficit model utilizes welfare and charity to cushion the absence of people with disabilities from the mainstream and justifies segregation as somehow "natural." This is why "normalization" is so important.

[184] *See*, *e.g.*, LICIA CARLSON, THE FACES OF INTELLECTUAL DISABILITY: PHILOSOPHICAL REFLECTIONS 10 (2010).

[185] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1990).

[186] We are, by now, all familiar of many of these accommodations in the physical, "built" world—curb cuts and ramps for the mobility impaired, closed captioning for deaf and hearing-impaired persons, Braille signage and audio prompts for blind and visually impaired persons.

[187] Each of "us", if we don't currently have a disability, is only a heartbeat, or an accident, away from joining "them", but one way of avoiding the anxiety connected with that fact is to artificially separate persons with disabilities from those who are "temporarily abled."

[188] One response has been that of an emerging neurodiversity movement which raises a new "equality claim" based on "brain attributes" and "demands an end to the exclusion of people with cognitive diversities." Andrea Lollini, *Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective,* 51 N.Y.U. J. INT'L L. & POL. 70, 72 (2018).

[189] For an interesting discussion of how and why the Enlightenment view of reason is foundational for our legal system, and the "rule of law" *see* Daniel Z. Epstein, *Rationality, Legitimacy, & the Law*, 7 WASH. U. JURIS. REV. 1, 5–8 (2014).

thus requires interrogating what Gerard Quinn calls "the enthronement of rationality as the touchstone of humanity,"[190] further described as liberal democracy's "foundational" assumption that citizens have "a capacity to rationally process information, to rationally choose among several options, to rationally apprehend the consequences of choices and to weigh them up so as to arrive at a rational outcome, and it assumes a capacity to express our choices in the shape of informed decisions."[191]

In fact, this interrogation—and potential paradigm shift—is already well underway, if generally unnoticed, as Kuhn's direction to observe the "external social, economic and intellectual conditions" suggests. While it is beyond the scope of this article to seriously engage with these changes that may cause us to "reorient" our—and the law's—vision of capacity, and how decisions are actually made, it is useful to name at least a few. I consider here trends in economics and psychology (behavioral economics), neuroscience and philosophy as challenging the idea of the "rational optimizer," conscious decision-making, and the liberal autonomous individual as decision-maker. By looking differently at how people actually think and make decisions, with all the *ir*-rationality those processes entail, it becomes more possible to "deconstruct[] the taken-for-granted"[192] about rationality, and imagine a new paradigm for capacity.

A. Behavioral Economics

Probably the best-known use of the idea of a "rational man" outside of the law[193] is the concept of *homo economicus* that has dominated neoclassical economics since the late nineteenth

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190 Quinn, *supra* note 24 at 21.

191 *Id.* at 7, 9 (opining that "the most powerful impulse behind the image of a rationally functioning civil society comes from commerce . . . [which] needs stability, predictability, reliability. Actions and inactions generate 'reliance interests.' It is these needs- the needs of third parties- that cements in place our grudging commitment to rationality as a touchstone of personhood.").

192 Schehr & French, *supra* note 93, at 1114 (citing and paraphrasing C. WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION 78–79 (3d prtg 1979)).

193 *Id.* at 1165–66 (utilizing the economic concept of *homo economicus* in the law, becoming the framing for *homo juridique*).

century. In a well-known work, Gary Becker describes the "pillars of rational choice theory" which assume that human actors are rational, self-interested, benefits-maximizing and costs-minimizing individuals with stable preferences.[194]

Behavioral economics challenges this view head-on and has gained enormous currency through the award of Nobel Prizes in economics to three of its proponents.[195] Using methods from psychology and sociology, behavioral economists demonstrate that people often do not behave "rationally." Rather, their behavior can be characterized as limited by three traits: bounded rationality; bounded willpower and bounded self-interest.[196]

A basic lesson of behavioral psychology over the past several decades has been that, rather than fully "rational" consideration, people adopt simple ways of thinking about complex problems through what are called "heuristics."[197] These are "mental shortcuts" that guide—and misguide[198]—decision-making in several different ways,[199] described as "cognitive illusions."[200]

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194 GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976). Rational choice theory has also been basic to the law and economics movement, although as critics have noted "the rationality assumption severely limits its continued scholarly development." Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Economics: Removing the Rationality Assumption from Law and Economics,* 88 CALIF. L. REV. 1051, 1055 (2000).

195 They are Daniel Kahneman (2002), Robert J Shiller (2013) and Richard Thaler (2017), the latter having been chosen because of "his contributions to behavioral economics and his pioneering work in establishing that people are predictably *irrational* in ways that defy economic theory." Binyamin Applebaum, *Nobel in Economics Is Awarded to Richard Thaler*, N.Y. Times (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/business/nobel-economics-richard-thaler.html?login=email&auth=login-email (emphasis added).

196 For a description of these three "boundaries" *see*, *e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics,* 50 STAN. L. REV. 1471, 1477–79 (1998).

197 *See* Jeffrey J. Rachlinski, *Selling Heuristics*, 64 ALA. L. REV. 389, 390 (2012).

198 There is considerable scholarly dispute between the advocates of "heuristics and biases" and "ecological rationality" as to whether, on balance, heuristics leads to more errors, or is an adaptive mechanism that produces more good results. *See id.* at 395.

199 Five common "cognitive illusions," described in an empirical study of judicial decision-making are: anchoring (making estimates based irrelevant starting points); framing (treating [in particular kinds of cases] economically equivalent gains and losses differently); hindsight bias (perceiving past events to have been more predictable than they actually were); representativeness (ignoring important background . . . information in favor of individuating information); and egocentric biases (overestimating one's own abilities). Chris Guthrie, Jeffrey J. Rachlinski & Andrew J Wistrich, *Inside the Judicial Mind,* 86 CORNELL L. REV. 777, 784 (2001).

Heuristics has become a prominent topic in the legal academy, challenging underlying beliefs about how decisions are made in the law. One commentator notes that "[l]egal scholars have applied insights about heuristics to basic assumptions in a wide variety of doctrinal fields, such as criminal law, contracts, environmental law, securities regulation, constitutional law and evidence . . . " as well as "criticize[d] assumptions underlying the rational choice model in law and economics."[201]

Schehr and French usefully summarize the "[robust] scholarship addressing the relevance of heuristics as dialectically opposed to rational actor models,"[202] including the observation by two leading commentators that "[t]here is simply too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory."[203]

In addition to being a "staple in graduate economics programs, business schools, and increasingly in law schools," behavioral economics' "attack" on "the rationality assumption" has "led to subspecialties" in areas as diverse as criminal justice, sports, health care, behavioral industrial organization, marketing and media.[204] Recall Kuhn's description of paradigm shift in this quote from one of the fathers of behavioral economics, Daniel Kahneman:

> Historians of science have often noted that at any given time scholars in a particular field tend to share basic assumptions about their subject. Social scientists are no exception; they rely on a view of human nature . . . that is rarely questioned . . . [including] ideas about human nature . . . that people are generally rational and their thinking is normally sound [and] . . . emotions . . . explain most of the occasions on which people depart from rationality.[205]

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[200] *See*, *e.g.*, Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions,* 103 PSYCHOL. REV. 582, 583 (1996).

[201] Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 392–93 (2006).

[202] Schehr & French, *supra* note 93, at 1133.

[203] Korobkin & Ulen, *supra* note 194, at 1055.

[204] Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L. J. 1527, 1528–30 nn.12–22 (2011).

[205] DANIEL KAHNEMAN, THINKING FAST AND SLOW 8 (2011). Another variation on paradigm shift conceptualization comes from William Hubbard who notes "just as quantum mechanics challenged the nano-foundations for Newtonian

Kahneman goes on to explain that the germinal experiments he conducted with Amos Tversky "documented systematic errors in the thinking of normal people . . . [tracing] these errors to the design of the machinery of cognition rather than to the corruption of thought by emotion."[206] This reference to the "machinery of cognition" provides the segue way to another of the changes in "external forces" that can lead to a paradigm shift.

B. *Neuroscience*

Put most (and undoubtedly too) simply, neuroscience is the biological study of the brain, utilizing structural and functional neuroimaging.[207] It involves a number of techniques, including magnetic resonance imaging (MRI), computed tomography (CT) scans, positron emission tomography (PET) scans, single photon emission computed tomography (SPECT) scans, and functional magnetic resonance imaging (fMRI).[208] Like behavioral economics, and providing some basis for it, neuroscience poses challenges to Enlightenment views of rationality[209] through its exposure of the complex interplay of, and different parts of the

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mechanics, behavioral economics challenges the nano-foundations [the rational actor] for neoclassical economics." William H.J. Hubbard, *Quantum Mechanics, Newtonian Economics, and Law,* 2017 Mich. St. L. Rev. 425, 444 (2017). To the long list of areas affected by behavioral economics noted by Reeves and Stucke, *supra* note 207, we can also add Kahneman's observation that it, and heuristics (mental shortcuts), "have been used productively in many fields, including medical diagnosis, legal judgment, intelligence analysis, philosophy, finance, statistics, and military strategy." KAHNEMAN, at 8.

206 KAHNEMAN, *supra* note 205, at 8.

207 In an important book on the subject, the authors observe that "empirical issues on the relationship of mind and brain have been aided by an explosion of work in cognitive neuroscience over the past couple of decades, itself aided by an explosion of technology providing detailed information about brain structure and functioning (most important, types of brain imaging.)" MICHAEL S. PARDO & DENNIS PATTERSON, MINDS, BRAINS, AND LAW: THE CONCEPTUAL FOUNDATIONS OF LAW AND NEUROSCIENCE xiv (2013).

208 *See* Jean Macchiaroli Eggen, *Mental Disabilities and Duty in Negligence Law: Will Neuroscience Reform Tort Doctrine?*, 12 IND. HEALTH L. REV. 591, 618–19, nn.104–108 (2015) (explaining these technologies).

209 "The backdrop behind the American brand of the rule of law is the Enlightenment. . . . The Enlightenment view of reason understood the human mind as a filter of sorts—one that was capable of applying an abstract quality of 'reason' to facts in order to filter out the pure from the contaminated and to hone in upon those clear and distinct ideas that could be properly called knowledge. Reason, in this view, was a power of the mind, and one that could uniquely filter out the relevant from the irrelevant." Epstein, *supra* note 189, at 6–7.

"thinking" and "emotional" brains.

An explanation of these processes, involving the role of the neocortex in reasoning, morality and self-control, and the amygdala and hippocampus in the "emotional brain,"[210] with the ability to cause an "emotional hijacking" of the brain, disrupting rationality,[211] is beyond the scope of this article—and this author. But, however much debate currently exists between neurological reductionism and skepticism,[212] it seems clear that "cognitive neuroscience tells us some new things that challenge the picture of the mind presented to us by Enlightenment-era Rationalist philosophy. The mind is not capable of separating reason from emotion to derive clear and distinct truths."[213]

Not only does neuroscience tell us that our decisions are not rational because they are influenced by emotions and the more "primitive" areas of the brain,[214] research also demonstrates that "decision-making is largely an unconscious activity,"[215] "taking place well in advance of conscious reasoned comprehension of

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[210] Jaak Panksepp, the "father of affective neuroscience," writes of an "ancestral mammalian mind implemented in sub-cortical processes" that is "constituted by relatively primitive affective capacities . . . endogenous and autonomous." Paul S. Davies & Peter A. Alces, *Book Review: Neuroscience Changes More Than You Can Think*, 2017 U. ILL. J. L. TECH. & POL'Y 141, 163 nn.104–106 (quoting Panksepp and citing numerous of his publications).

[211] This is well described in Daniel Goleman's germinal book, *see* DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ 139 (1996). For a more technical description of the impact of the entire limbic system, including not only the amygdala, but also the cingulate gyrus, temporal pole, the medial orbitofrontal cortex, and the medial prefrontal cortex that are implicated in cognitive processing of emotional stimuli, *see* Lily A. Gutnik et al., *The Role of Emotion in Decision-Making: A Cognitive Neuroeconomic Approach Towards Understanding Sexual Risk Behavior,* 39 J. BIOMEDICAL INFORMATICS 720 (2006).

[212] *See* discussion and examples in OWEN D. JONES ET AL, LAW AND NEUROSCIENCE (2014) (exploring the dichotomy between positions taken by Francis Crick, Nobel Laureate in Medicine and Physiology, and Stephen Morse, Professor of Law and Medicine at the University of Pennsylvania).

[213] Epstein, *supra* note 189, at 15.

[214] *See*, *e.g.*, Drobac & Goodenough, *supra* note 8, at 504–518 (summarizing neuroscience and psychology studies that "provide significant evidence for a more nuanced model of cognitive capacity than that produced by the simple assumptions of neoclassical economics.").

[215] Schehr & French, *supra* note 93, at 1150 (citing Max Planck-Gesellschaft, *Decision-Making May Be Surprisingly Unconscious Activity*, SCI. DAILY (April 15, 2008), http://www.sciencedaily.com/releases/2008/04/080414145705.htm).

it."[216]

Neuroscience is being utilized in, and raising questions about, a number of areas of law, most notably criminal law, tort and contract, because of its "relevance . . . to our understanding of human agency—of rationality, of decision making and action, of moral and legal responsibility."[217] As such, it is often cited as a major contributor to a paradigm shift in the way we think about law,[218] and, for our purposes, for questioning the foundational issues of reason and decision-making.

This may not, however, be entirely benevolent, and a word of caution, or at least what Stephen Morse has named "neuromodesty,"[219] is in order. For example, a recent article directly relating neuroscience to guardianship and the denial of legal capacity suggests that "biomarker diagnostics[220] have the potential to spark a paradigm shift in the way we look at competency determination."[221] The author writes that

> As use of biomarker diagnostics of dementia becomes generally accepted in the medical community, and the medical community becomes more sensitive to the view of AD as a spectrum, the ability to detect changes in brain states may argue in favor of *a guardianship model that includes legal protections for those who do*

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[216] *Id*. at 1152 (citing William M. Hedgcock et al., *A Magnetoencephalography Study of Choice Bias*, 202 EXPERIMENTAL BRAIN RES. 121, 126 (2010)).

[217] Davies & Alces, *supra* note 210, at 158. This is, however, still mostly theoretical. One commentator notes that "scholars are just beginning to catalogue the ways in which neuroscience has been used in courtrooms. . . . [And] little published literature speaks to the extent to which neuroscience is already used in the competency domain." John B. Meixner, Jr., *Neuroscience and Mental Competency: Current Uses and Future Potential*, 81 ALB. L. REV. 995, 1006–07 (2017/2018).

[218] *See* Davies & Alces, *supra* note 210, at 143 n.6 (citing and summarizing Kuhn's construction of paradigm shift).

[219] *See*, *e.g.*, Stephen J. Morse, *Avoiding Irrational Neurolaw Exuberance: A Plea for Neuromodesty,* 62 MERCER L. REV. 837, 849 (2011) (arguing against overvaluing the apparent objectivity of biomarkers in criminal law) ("Assessing criminal responsibility involves a retrospective evaluation of the defendant's mental states at the time of the crime. No criminal wears a portable scanner or other neurodetection device that provides a measurement at the time of the crime, at least not yet.").

[220] By this he means the use of the tools of neuroscience to map the brain atrophy that occurs in Alzheimer's Disease (AD), describing them as "discrete and quantifiable biological parameters that can . . . help diagnose and monitor the progression of the disease." Betsy J. Gray, *Aging in the 21st Century: Using Neuroscience to Assess Competency in Guardianships*, 18 WIS. L. REV. 736, 754 (2018).

[221] *Id*. at 772.

not yet meet the legal threshold for incompetence.[222]

What can be used, on one hand, to show that none of us are actually rational decision makers may, also, if utilized in a reductionist fashion, justify even greater, and earlier, deprivations of legal capacity for people with cognitive impairment. The rise of neuroscience signals a possible paradigm shift, but the normative result of such shift is still unclear.

C. Relational Autonomy

Autonomy is generally understood as the capacity for self-determination and self-government, a person's ability to make her/his own choices in a manner that guides her/his life in a manner that s/he deems meaningful.[223] The liberal tradition that so highly values rationality is premised on a particular notion of autonomy in which decisions are made individually and independently, free from the constraints and influences of others[224]—by the "masterless man" of whom Quinn speaks.[225] This is the liberal vision of autonomy reflected in the negative rights of our eighteenth century Constitution.

In the same way that behavioral economics and neuroscience are questioning the liberal view of rationality, that is, "*how*" we make decisions, feminists,[226] communitarians,[227] bioethicists,[228]

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[222] *Id*. (emphasis added) (also citing Jalayne J. Arias, *A Time to Step In: Legal Mechanisms for Protecting Those with Declining Capacity,* 39 AM. J. L. & MED. 134, 151–155 (2013)).

[223] *See*, *e.g.*, Laura Davy, *Philosophical Inclusive Design: Intellectual Disability and the Limits of Individual Autonomy in Moral and Political Theory,* 30 HYPATIA 132, 133 (2015).

[224] Drobac and Goodenough refer to this as "the [mistaken] idea that radical ideas of capacity and consent are necessary correlates of principles of human autonomy." Drobac & Goodenough, *supra* note 8, at 502.

[225] Quinn, *supra* note 24, at 7. *But see* Anne Donchin, *Reworking Autonomy: Toward a Feminist Perspective,* 4 CAMBRIDGE Q. OF HEALTHCARE ETHICS 44, 45 (1995) (criticizing this model as a "false conceptualization of individuals as capable of existing apart from *any* social relationships, as linked together only by voluntaristic social ties.").

[226] Many feminist theorists have advanced the idea of relational autonomy, but the origin of the term is generally credited to Jennifer Nedelsky, whose many writings on the subject include, Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEMINISM 7 (1989).

philosophers,[229] and others have questioned the liberal view of autonomy, that is, "*who*" is the person that makes decisions. As one of the leading proponents of relational autonomy has written:

> The now familiar critique by feminists and communitarians is that liberalism takes atomistic individuals as the basic units of political and legal theory and thus fails to recognize the inherently social nature of human beings.[230]

Instead, relational autonomy theorists posit that autonomy is a "capacity" that is developed in a web of social relationships and "intersecting social determinants such as race, class, gender and ethnicity."[231] Autonomy "is the product of supportive relational forces rather than an innate human attribute."[232] Rather than being "*in*-dependent" everyone depends on personal and material supports, with the myth of the independent and autonomous actor maintained by rendering many of those supports invisible. A leading bioethicist points out:

> The chief executive officer who boasts of being dependent on no one would be unable to lead the life she does without a thick network of practical and less tangible supports in the background. They range from the family relationships in which she developed the psychic resources to function as an adult, the social policies that gave her access to schooling, higher education, and health care, to the infrastructures and services like rubbish collection that her local community provides, the builders of motorways she uses to drive to work, and the makers of planes and trains that trans-port her to her meetings.[233]

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[227] *See*, *e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 255 (1993).

[228] *See*, *e.g.*, NANCY BERLINGER ET AL., THE HASTINGS CENTER GUIDELINES FOR DECISIONS ON LIFE-SUSTAINING TREATMENT AND CARE NEAR THE END OF LIFE 15 (2d ed. 2013) ("Autonomy means 'self-rule,' not 'self-isolation.'").

[229] *See*, *e.g.*, John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUDIES 143 (2004).

[230] Nedelsky, *supra* note 226, at 8.

[231] Catriona MacKenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, *in* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 4 (Catriona MacKenzie & Natalie Stoljar eds., 2000).

[232] Davy *supra* note 223, at 132, 140.

[233] Jackie Leach Scully, *Disability and Vulnerability: On Bodies, Dependence and Power*, *in* VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 204, 216 (Catriona MacKenzie et al eds., 2014).

And, we might add, the personal assistant who arranges those meetings and, doubtless, a whole host of others whose contributions to the executive's "independence" routinely go unnoticed.

This re-thinking of autonomy as enabled by, and existing within, the context of relationships has gained salience in a number of fields, most notably health care, where relational autonomy is offered as more effective than traditional models in providing person-centered care,[234] and in end-of life decision-making.[235] It has been extended, as well, to other areas such as professionalism, where it has been applied to re-think professional ethics.[236] The concept of relational autonomy has also been extended to persons with disabilities,[237] where it advances the idea that autonomy is grounded in "relations between persons where support, advocacy and enablement of autonomy capacities are seen as key elements of personal autonomy."[238]

We should, however, be mindful that:

> [R]elational autonomy . . . does not refer to a single unified conception of autonomy but is rather an umbrella term, designating a range of related perspective[s], all of which share the idea that the social context in which an individual is embedded has a dramatic impact upon the chances of a full realization of autonomy.[239]

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[234] *See*, *e.g.*, Carolyn Ells et al., *Relational Autonomy as an Essential Component of Patient-Centered Care*, 4 INT'L J. OF FEMINIST APPROACHES TO BIOETHICS, no. 2, 2011 at 79.

[235] *See*, *e.g.*, Megan S. Wright, *End of Life and Autonomy: The Case for Relational Nudges in End-of-Life Decision-Making Law and Policy*, 77 MD. L. REV. 1062 (2018) (arguing that the traditional principle of autonomy "requires" revision in the case of end-of-life decision-making to accommodate the relational nature of autonomy).

[236] *See* Chris MacDonald, *Relational Professional Autonomy*, 11 CAMBRIDGE Q. OF HEALTHCARE ETHICS 282, 282 (2002).

[237] *See*, *e.g.*, Davy, *supra* note 223.

[238] Guðrún Stefánsdóttir et al., *Autonomy and People with Intellectual Disabilities Who Require More Intensive Support*, 20 SCANDINAVIAN J. OF DISABILITY RES. 162, 163 (2018) (emphasis omitted).

[239] Stuart Hargreaves, *'Relational Privacy' & Tort*, 23 WM. & MARY J. OF WOMEN & L. 433, 458-59 (2017) (internal quotations removed) (quoting Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Reconfigured, in* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE

The lens of relational autonomy is one more factor moving us toward a paradigm shift by posing a basic challenge to the current narrative that attributes legal capacity only to "autonomous" decisions made by "independent" individuals acting entirely on their own, but not to decisions made by individuals who need and utilize support.[240] Relational autonomy asks us, instead, to "notice" that *everyone* uses support.[241]

PART V: ENSURING LEGAL CAPACITY

As we have seen, numerous laws and practices serve to restrict or deny legal capacity to persons with I/DD and cognitive impairments, or to create the opportunity for third parties to do so, entirely unrelated to guardianship. So, even if we were to totally abolish guardianship, persons with disabilities would still be at risk of losing their legal agency around specific decisions, that is, by the failure to have those decisions legally recognized. How, then, are we to go about ensuring their legal capacity in all aspects of life, "on an equal basis with all others"?

One obvious, but extremely difficult way would be to literally identify every law that does or could deprive persons with intellectual disabilities of legal capacity, and repeal or amend it to avoid that possible consequence. Thus far, only one country, Peru, has undertaken, and successfully completed, such a process.

A. Complete Statutory Overhaul: The Case of Peru

Peru ratified the CRPD and the Optional Protocol[242] on

SOCIAL SELF 4 (Catriona Mackenzie & Natalie Stoljar eds., 2000)).

240 *See*, *e.g.*, PIERS GOODING, A NEW ERA FOR MENTAL HEALTH LAW AND POLICY: SUPPORTED DECISION-MAKING AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 15 (2017) (arguing that the liberal model of autonomy creates a major conceptual impediment to equality for people with intellectual disabilities, advocating instead for a "relational emphasis" that "places a high priority on the constitutive relationships through which people exercise rights.").

241 Another version of this perspective comes from Tim Rapley, who writes, "decisions can and are 'thought about' in and through interactions. . . . [I]t is a routine feature of everyday life that we talk to, listen to and ask advice from others. In this way, our decision making is deeply embedded in, shapes and is shaped by, interactions with others." Tim Rapley, *Distributed Decision Making: The Anatomy of Decisions-in-Action,* 30 SOC. HEALTH & ILLNESS 429, 434 (2008).

242 The CRPD requires the ratifying state to complete periodic compliance reports, G.A. Res. 61/106, *supra* note 4, at art. 35, and the Optional Protocol

January 30, 2008.[243] Also in 2008, civil society drafted and submitted a citizen's initiative for a new "General Law on Persons with Disabilities" that would declare the right of legal capacity for all persons regardless of disability. That law was passed in 2012,[244] but required and awaited implementation by amendment to Peru's Civil Code.

On September 4, 2018, after eight years of work by a broad coalition of disability rights organizations, led by SODIS (Sociedad y Discapacidad),[245] academia, legislators, the Ombudsman, human rights experts and the main disability platform in the country, Peru's President signed Legislative Decree No. 1384,[246] an extensive revision of the Civil Code[247] that recognizes and regulates the legal capacity of persons with disabilities "on an equal basis."[248]

The Inter-American Commission on Human Rights (IACHR)

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permits the CRPD Committee to review individual and/or group complaints regarding alleged non-compliance. G.A. Res. 61/106, Optional Protocol to the Convention on the Rights of Persons with Disabilities, art. 1 (Dec. 13, 2006), https://treaties.un.org/doc/Publication/CTC/Ch-15-a.pdf.

243 For a summary of the new law's provisions in English, *see* Tina Minkowitz, *Peruvian Legal Capacity Reform – Celebration and Analysis*, MAD IN AMERICA (Oct. 19, 2018), https://www.madinamerica.com/2018/10/peruvian-legal-capacity-reform-celebration-and-analysis/. For a non-official translation, *see* SODIS Translation, *supra* note 56.

244 Ley General de la Persona con Discapacidad, Ley No. 29973 (2012) (General Law on Persons with Disabilities, Law No. 29973). That law resulted in the creation of a Special Committee for the reform of the Civil Code within Peru's Congress which produced a draft bill which was not subsequently adopted. The draft bill did, however, serve as the basis for the multi-party bill written by civil society, filed in 2016, which became the basis for the 2018 Executive's Legislative decree described here.

245 *See* SODIS Translation, *supra* note 56. For information about SODIS and its work for the rights of people with disabilities, visit sodisperu.org.

246 *See id.* The Executive Decree was issued pursuant to the delegation of legislative powers granted by Congress in Law. No. 30823. *See* TCI Asia Pacific*, Peruvian Law – Recognises Full Legal Capacity and Abolishes Guardianship*, (Oct. 18, 2018), https:tciasiapacific.blogspot.com/2018/10/Peruvian-law-recognizes-full-legal.html [https://perma.cc/RP4T-BTCC].

247 To appreciate what a Herculean task this involved, note that the Legislative Decree amends Articles 3, 42, 44, 45, 140, 141, 221, 226, 241,243, 389, 466, 564, 566, 583, 585, 589, 606, 613, 686, 696, 697, 808, 987, 1252, 1358, 1994, and 2030 of the Civil Code, *see* SODIS Translation, *supra* note 56.

248 For an excellent discussion of the Peruvian reform, *see* Antonio Martinez-Pujalte, *supra* note 51. For a delightful video celebrating the reform (with English translation), *see* Sociedad y Discapacidad – Sodis, *Goodbye Guardianship!*, YOUTUBE (Sept. 4, 2018), https://youtu.be/53Lu4swxaQA.

welcomed "the measures taken by the State of Peru to acknowledge the legal capacity of all people with disabilities and implement the legal concept of support," noting that "[t]hrough these modifications, people with disabilities will be able to decide on fundamental aspects of their lives, such as whether or not to undergo medical treatments, get married, or have children."[249]

Two provisions set out the main principles of the Legislative Decree. Article 3 provides, that "[e]veryone has the legal capacity to enjoy and exercise their rights," and that "capacity to act can only be restricted by law,"[250] and also, that "[p]ersons with disabilities have capacity to act on an equal basis in all aspects of life,"[251] while Article 42, which expands the principle further, including recognition of the use of supports and declaring that: "[e]veryone over eighteen has full capacity to act. This includes all persons with disabilities, on an equal basis with others in all aspects of life, regardless of whether they use or require reasonable accommodation or support for the expression of their will."[252]

Although there are several categories of persons who have "restricted capacity to act", these are intended and understood as unrelated to disability;[253] and even persons with "restricted capacity" are entitled to "enter into contracts related to the ordinary needs of their daily lives."[254]

The Legislative Decree goes on to specifically repeal earlier laws that limited or denied legal capacity in areas like marriage, parental rights, serving as a witness, financial transactions,

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249 Press Release, María Isabel Rivero, Press and Commc'n Office, Inter-American Comm'n on Human Rights, IACHR Welcomes Measures Recognizing the Legal Capacity of People with Disabilities in Peru (Oct. 2, 2018), https://www.oas.org/en/iachr/media_center/Preleases/2018/216.asp.

250 This means both that private parties cannot restrict capacity to act, but also that, while capacity to act *may* be restricted, that restriction cannot be on the basis of disability. *See* SODIS Translation, *supra* note 56.

251 *Id.*

252 *Id.*

253 These are: persons between sixteen and eighteen years of age (persons under sixteen—minors—have an absolute "incapacity to act"); habitual drunkards and drug addicts; "bad administrators" and "prodigals" (defined as persons with a spouse and/or dependents who squander more than half of their inheritances); persons convicted of crimes, and persons in comas. *See id*. The "unrelated to disability" restrictions are demonstrated by the qualification that persons who are addicted to alcohol or drugs can designate supports with which they can exercise legal capacity if they have a "disability certificate." *See* Tina Minkowitz, *supra* note 243.

254 SODIS Translation, *supra* note 56.

powers of attorney and making a will.[255] As an example, the last mentioned demonstrates the dramatically different approach taken by a regime that *guarantees* legal capacity, to one such as New York's, that defines and limits "testamentary capacity."[256] In Article 696, "[f]ormalities of the will by public deed," the Legislative Decree affirms, "in the case of a person with a disability," the ability to make a binding disposition of property "with the provision of reasonable accommodation or supports for the expression of will, in the case that they require it."[257]

In a direction to all agencies and third parties who have relied or insisted on the appointment of a guardian (referred to as "interdiction") in order to provide services or enter into a transaction, the Legislative Decree provides that within 120 days from its publication, "[a]ll public and/or private entities [shall] adapt their administrative procedures, under their responsibility" to "eliminat[e] the requirement of interdiction."[258]

Human Rights Watch (HRW) describes the Legislative Decree as "a bold step to end th[e] legal exclusion of people with disabilities," and "a comprehensive bill that unequivocally recognizes every individual, regardless of disability or supposed "mental capacity" as equal and holding the same rights as every other person."[259] And, HRW continues:

> Peru's reforms also include a system of supports for people making important decisions, if they would like such assistance. This can be help in understanding legal decisions and their consequences. Importantly, support in decision-making does not mean legal representation, or that someone else gets to make their decisions. The person requesting support defines the scope, duration, and purpose that assistance will have. . . . Significantly, the reform moves away entirely from infantilizing and patronizing perspectives that consider people with disabilities as people who

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255 *See* Minkowitz, *supra* note 243.

256 *See supra* notes 145–146 and accompanying text.

257 SODIS Translation, *supra* note 56. The next Article, 697, makes provisions for persons who are illiterate, or unable to sign the will. *Id*.

258 *Id*. at 15.

259 Carlos Ríos Espinosa, *Peru's Groundbreaking Legislation Gives Equality of Choices to People with Disabilities*, HUMAN RIGHTS WATCH (Oct. 1, 2018, 12:01 AM), https://www.hrw.org/news/2018/10/01/perus-groundbreaking-legislation-gives-equality-choices-people-disabilities.

must always be cared for. [260]

This is the task of realizing legal capacity for those who are currently so easily and often denied it. For New York—or any other state—to engage in a process similar to what Peru has done seems, at best, improbable, and, more likely, virtually impossible. From a technical standpoint, the very number of laws, binding judicial decisions, and regulations that would first have to be identified, and then repealed, over-ruled or re-written is daunting.[261]

In addition, there is no existing consensus that people with I/DD are able, much less should be legally empowered, to make all of their own decisions.[262] Because the U. S. has not ratified the CRPD, there is no legal argument or obligation from international law. And, unfortunately, there appears to be no disability rights organization or movement in the U.S. with the influence or capacity of SODIS.

How, then, might people with I/DD who are currently at risk of denial of legal capacity through the "invisible taxonomy", their advocates, or human rights activists think about challenging or changing the laws, decisions, and regulations that comprise it?

B. *SDMA Statutes*

SDM is intended to enable people with I/DD to exercise their legal capacity, but, as noted, the reality of having one's decisions legally recognized largely depends on the willingness of third parties, both public and private, to accept and honor those

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[260] *Id.*

[261] For jurisdictions that have ratified the Convention, however, this is precisely what is required. The most recent report of the Special Rapporteur provides that "States should identify all legislation to be abolished, amended or adopted to render their normative framework compliant with article 12," that this process must be "comprehensive" and "all-encompassing and exhaustive, going beyond the traditional areas of law related to legal capacity (civil, family and mental health) to include legislation based on political participation, privacy, health, employment, social protection, immigration, criminal law and access to justice, among other things." *See* U.N. Doc. A/HRC/37/56, *supra* note 48, at ¶ 36.

[262] Even efforts to reform New York's guardianship statute for persons with I/DD, Surrogates Court Procedure Act Article 17-A (SCPA 17-A) which were mandated in 1990, are still mired in disagreements about just how much, or whether, due process and procedural protections should be afforded to the subjects of guardianship proceedings. *See* N.Y. SURR. CT. PROC. ACT LAW § 1750-a (McKinney 2019); Andreasian et al., *supra* note 45, at 288–89.

decisions. This, in turn, depends on legislation that recognizes SDM, requires third parties to accept decisions made pursuant to SDM (which, in every case to date has meant written SDMAs)[263] and which provides immunity from liability for third parties who do so in good faith.

As of the date of writing this article, eight states and the District of Columbia have passed SDMA legislation,[264] each slightly different than the others. None of those states, and no other jurisdiction in the U.S., has abolished guardianship. Thus, while legal capacity can still be restricted or removed everywhere through guardianship, persons with I/DD, not currently subject to guardianship, who have SDMAs, at least theoretically, now have legal capacity "on an equal basis with all others." If true, it would be a much more viable task to pursue legal capacity on a state by state basis, especially as interest in SDM seems high, and a number of additional states are already considering SDM or SDMA statutes. But is it reasonable or fair to assume that these statutes will do the work of ensuring legal capacity for all, as the Peruvian legislative reform has done?

1. "Capacity" to Enter into the SDMA

One of the biggest issues about SDMA legislation is the largely unaddressed or unanswered question of the traditionally tested, *mental* capacity necessary to validly enter into the agreement. Each of the current statutes potentially leaves the issue open with Texas, the first SDMA statute enacted in the U.S., providing

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263 A survey of the recommendations of law reform agencies around the world demonstrates that many have suggested legal recognition of supported decision-making as an alternative to guardianship. *See*, *e.g.*, Shih-Ning Then et al., *Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of Law Reform Agencies – Recommendations, Rationales and Influence*, 61 INT'L J. OF L. & PSYCHIATRY 64, 69 (2018).

264 They are, to date, in the order in which they were passed: TEX. EST. CODE ANN. §§ 1357.001–102 (West 2015) (effective Sept. 1, 2015); DEL. CODE ANN. tit. 16, § 9401A–9410A (2016) (effective Sept. 15, 2016); ALASKA STAT. § 13.56.010–13.56.195 (2018) (effective Dec. 26, 2018); D.C. CODE §§ 7-2133, 7-2134 (2018); WIS. STAT. §§ 52.01–52.32 (2018); IND. CODE §§ 29-3-14-1–29-3-14-13 (2019) (effective July 1, 2019); A.B. 480, 80th Leg. (NEV. 2019) (amending NEV. REV. STAT. ch. 162A by adding sections 2–18, to be known as the Supported Decision-Making Act) (enacted); H.B. 1378, 66th Leg., Reg. Sess. (N.D.2019) (signed by Governor Mar. 19, 2019; H.B. 5909, 2017 Leg., Reg. Sess. (R.I. 2019) (signed by Governor July 8, 2019).

a good example.

First, like Delaware, Wisconsin, Indiana, the District of Columbia, and Nevada, the Texas statute is confined to persons with disabilities.[265] It describes SDM as:

> [A] process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.[266]

Similarly to the other statutes, the Texas statute describes the kinds of supports that may be requested and given,[267] the authority of supporters,[268] addresses termination of the agreement,[269] and the formalities necessary for its validity.[270] Nowhere, however, does it expressly define the level of "capacity" that the person with a disability needs in order to make the agreement, potentially leaving the issue open to litigation down the road. It does, however, suggest that the statute is something far less than a ringing declaration of, and protection for legal capacity for all people with I/DD and cognitive decline. The very "Purpose" section of the statute states that it is:

> [T]o recognize a less restrictive substitute to guardianship for adults with disabilities who need assistance with decisions regarding daily living but who *are not considered incapacitated persons* for purposes of establishing a guardianship under this title.[271]

What does this mean? And considered by whom? While a favorable reading might suggest that it covers all persons with

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265 The Texas statute defines "disability" as meaning "with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities." TEX. EST. CODE ANN. § 1357.002(2) (West 2019).

266 EST. § 1357.002(3).

267 EST. § 1357.051 (1)–(4).

268 EST. § 1357.052.

269 EST. § 1357.053.

270 TEX. EST. Code § 1357.055 (West 2019).

271 EST. § 1357.003 (emphasis added). An incapacitated person is defined as "an adult who, because of a physical or mental condition is substantially unable to: (A) provide food, clothing, or shelter for himself or herself; (B) care for the person's own physical health; or (C) manage the person's own financial affairs." EST. § 1002.017.

disabilities for whom guardianship has not been sought, the legislative history suggests otherwise.[272]

Not surprisingly, the Texas SDMA legislation was not driven by the CRPD or a commitment to human rights, but instead:

> [C]oncern about the ability of state courts to process and monitor the enormous influx of guardianship cases predicted to accompany the aging of the population, making supported decision-making an attractive policy to pursue for stakeholders like state legislators, judges, and court administrators. . . . [and] to conservatives who favor small government.[273]

A coalition of disability rights activists and groups who were also pursuing guardianship reform, GRSDM,[274] worked with those stakeholders on a package of bills, including the SDMA Act.[275] Building consensus necessarily involved compromises, including the adoption of a "moderate position on supported decision-making[276] and willingness to work with REPTL,"[277] that "staved off serious opposition during the 84th Legislative Session."[278]

Among these "moderate" positions was an apparent concession that a more traditional standard of mental capacity would be necessary for a valid SDMA.[279] This view seems to have been amplified by Chief Justice Nathan Hecht who described SDM as

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272 I am indebted to the excellent, extensive, and exhaustive work done by Eliana Theodorou in tracking down all the players and bringing this history to life. *See* Eliana Theodorou, *Supported Decision-Making in the Lone Star State*, 93 N.Y.U. L. REV. 973 (2018).

273 *Id.* at 979-80.

274 The Guardianship Reform and Supported Decision-Making Workgroup.

275 *See* Theodorou, *supra* note 272, at 995.

276 Here, because of willingness to support continuing, albeit "improving" guardianship, the contrast with the CRPD, which requires abolition of all substitute decision-making regimes is particularly clear. *Id.* at 1003.

277 The Real Estate, Probate, and Trust section of the Texas Bar Association.

278 Theodorou, *supra* note 272, at 1003. This was the session during which the SDMA Act was passed.

279 Richard LoVallo, the Director of Disability Rights Texas, the States's Protection and Advocacy Agency, described as the "legal mind" behind the bill, testified that "[s]upported decision-making isn't for all people with disabilities. The person has to have the capacity to understand what they're entering into. So, it's not for people with significant disabilities who can't consent." *Id.* at 999, 1003 n.193.

"a 'kind of power of attorney lite.'"[280] Since a power of attorney requires a fairly high degree of mental capacity,[281] it is unlikely that the Texas SDMA Act was intended to apply to persons with I/DD and cognitive impairment who fall much below that standard.

The only reported decision to date seems to confirm conflation of the capacity standard for an SDMA with that required to create a power of attorney under Texas law.[282] The trial/probate court denied guardianship, finding, *inter alia*, that the parent petitioners failed to meet their burden of showing that the less restrictive alternative of SDM was not feasible.[283] Reversing that decision, the appellate court held that SDM could not serve as an alternative because the Respondent "[was] incapacitated and cannot make important life decisions for herself."[284]

The second state to adopt an SDMA statute, Delaware, at least arguably appears to have the same view. One if its purposes is to "provide assistance in gathering and assessing information, making informed decisions, and communicating decisions to *adults who do not need a guardian* or other substitute decision-making for such activities, but who would benefit from decision making assistance."[285] Further, the statute provides that it is to be administered and interpreted in accordance with principles including that "[a]ll adults should be able to live in the manner they wish and to accept or refuse support, assistance, or protection as long as they do not harm others and *are capable of making decisions* about those matters."[286] On the other hand, the statute explicitly includes a section on "Presumption of capability," stating that "all adults are presumed to be capable of managing their affairs and to have capacity unless otherwise determined by the Court of Chancery."[287]

Nevertheless, the likelihood that a standard "understand and appreciate" test is intended is buttressed by a subsequent

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[280] *Id.* at 1006.

[281] *See supra* notes 150–160 and accompanying text.

[282] *In re* Guardianship of A.E., 552 S.W.3d 873, 889 (Tex. App. 2018) (utilizing the same definition of "mental capacity" for both).

[283] *See id.* at 891, 892. This is now a required finding under the Texas guardianship law, TEX. EST. CODE § 1101.101(a)(1)(E) (West 2019).

[284] *See In re* Guardianship of A.E., 552 S.W.3d at 879, 880 (relying on testimony of the Respondent's mother and doctor that she could not "enter into" or "understand" an SDMA).

[285] *See* DEL. CODE ANN. tit. 16, § 9402A(a)(1) (2019) (emphasis added).

[286] tit. 16, § 9402A(b)(1) (emphasis added).

[287] tit. 16 § 9404A(a).

provision that reads:

> An authorization in a supported decision-making agreement may be prospectively limited or abrogated, in whole or part, by a judicial determination that the principal lacks the capacity to engage in the making of specific decisions covered by the agreement despite the assistance of a supporter.[288]

This provision would appear to be a classic example of Potential Retroactive Deprivation of legal capacity, although it varies importantly from the capacity—denying laws discussed earlier, in that it requires that the "capacity" to be determined includes "capacity *with support*."

A more recent SDMA statute, Indiana, clearly applies an "understand and appreciate" test,[289] while Wisconsin[290] and the District of Columbia[291] require only that the principal enter into the agreement "voluntarily." North Dakota includes a presumption of capacity to enter into the agreement which can, however, be rebutted "only by clear and convincing evidence."[292] The Alaska statute is unique in not confining SDMAs to persons with disabilities,[293] but requires that anyone entering into such an agreement must do so "voluntarily and without coercion or undue influence" and "understand[ing] the nature and effect of the agreement."[294] Importantly, however, Alaska specifically provides that "a principal is considered to have capacity even if the capacity is achieved by the individual receiving decision-making assistance."[295]

This review suggests that, with the exception of Alaska, the standard of capacity required to enter into an SDMA may be similar to that required for an ordinary contract, such that the

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288 tit. 16 § 9405A(i).

289 IND. CODE § 29-3-14-4(a)(2) (2019).

290 Assemb. B. 655, 2017-2018 Wis. Leg. (Wis. 2018) (codified at WIS. STAT. ch. 53–54 (2018)).

291 D.C. CODE § 7-2133(a) (2018).

292 H.B. 1378, 66th Leg., Reg. Sess., § 1(Formalities-Effects)(1) (N.D.2019) (signed by Governor Mar. 19, 2019).

293 This "normalization" is not only useful but commendable as it locates SDM in ordinary human practice, rather than confining it as a "special" accommodation for people with disabilities.

294 ALASKA STAT. § 13.56.010(b)(1), (2) (2018).

295 § 13.56.150(d).

existence of an SDMA is inadequate to avoid the capacity determinations in other statutes in a variety of domains. The SDMA itself is subject to "Potential Retroactive Deprivation" based on an assessment of "mental capacity." Alaska's clear recognition and acceptance of support in exercising capacity is, importantly, a significant break from this more traditional view and incorporates a newer, more relational way of thinking about how decisions are actually made.

2. Standing to Challenge "Capacity"

If "Potential Retroactive Deprivation" is an important factor in determining how well SDMA statutes can protect legal capacity, the standing to raise capacity is a major issue. That is, if there is no one who can challenge the capacity of the principal who utilized an SDMA, her/his legal capacity to enter into that transaction is secure.

A primary reason for enacting SDMA statutes is to ensure that private and public third parties can and must recognize such agreements and decisions made pursuant to them without inquiring into the SDMA principal's capacity. Under certain specified circumstances Delaware, and Alaska permit third parties to accept or reject an SDMA;[296] Indiana provides for a presumption of validity for an SDMA that permits a third party to rely on the presumption "unless the party has actual knowledge that the supported decision making agreement was not validly executed."[297] The other five statutes (D.C, Texas, Wisconsin, Nevada and Rhode Island) require third party acceptance, much as would be the case with a power of attorney: all but Rhode Island explicitly relieve third parties from civil or

[296] DEL. CODE ANN. § 9408A(1), (2) (2018). A third party *accepting* and acting upon an SDMA is relieved from liability based on good faith and "an *assumption* that the underlying supported decision-making agreement was valid when made", while a third party is also relieved from liability if s/he *declines* to honor the agreement "based on *actual knowledge* that the agreement is invalid, or has been revoked or arrogated." Utilizing similar language, ALASKA STAT. §§ 13.56.130, 13.56.140 (2018) (obligation to recognize and limitation of liability, respectively).

[297] IND. CODE § 29-3-14-10 (2019). Similarly, North Dakota relieves a third party of the obligation of recognition where the third party "has actual knowledge or notice the . . . agreement is invalid." H.B. 1378, 66th Leg., Reg. Sess., § 1(Reliance on Agreement-Limitation of Liability)(1)(b) (N.D.2019) (signed by Governor Mar. 19, 2019).

criminal liability or penalties for professional misconduct[298] where there has been good faith reliance.[299]

Generally speaking, then, we should expect that a party who relies in good faith on an SDMA[300] can expect to be free of subsequent legal action to set aside the parties' transaction, thus foreclosing the possibility of Potential Immediate Deprivation, even as the statutes specifically provide. It seems clear that the SDMA principal would have no ability to raise the issue of her/his capacity after the fact. But what of others, who are neither parties to the transaction or to the SDMA?[301]

What of the parents of a young adult with I/DD who has contracted for expensive goods or services they cannot afford? Would they be able to sue, or would they still have the right to set aside the transaction by petitioning for guardianship and utilizing section 81.29 of the New York Mental Health Law? Or what about marriage between an SDMA principal and another? Would her/his parents be able bring an annulment action? Or a "next friend" if no relatives were willing or available? What of the disinherited child of a decedent with an SDMA who wishes to challenge her/his parent's will on the ground of incapacity? In some or all of these cases, even though the other party to the transaction is required to accept the SDMA, the statute might not prevent a Potential Deferred Deprivation.

These cases are all troubling, especially where the SDMA principal utilized the support or supports described in the agreement. But there is a different problem where the principal did not. What of the other party to the transaction when s/he

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298 IND. CODE § 29-3-14-11(a); D.C. CODE §7-2133(d) (2018) (third party "shall rely" on the SDMA) and (e) (relief from liability); TEXAS EST. CODE ANN. §1357.101(a), (b) (West 2015) ("shall rely," and relief from liability, respectively); WISC. STAT. § 53.30(1), (2) (2018) ("shall rely," and relief from liability, respectively); NEV. REV. STAT. § 162.220(3) (1959).

299 With the exception of Alaska and Delaware, the statutes provide an exception where, in roughly similar language, the third party has cause to believe that the principal is subject to abuse, exploitation, neglect and/or undue influence or require the third party to report the alleged misconduct to the appropriate protective services agency. IND. CODE § 29-3-14-13 (2019); H.B. 5909, 2017 Leg., Reg. Sess., § 33-15.3-10 (R.I. 2019) (signed by Governor July 8, 2019).

300 *But see infra* discussion of the use, or non-use, of support.

301 I am assuming here that a person who is a supporter, and who has signed the SDMA, would be estopped from challenging the principal's capacity.

later learns that the SDMA principal did not actually use the support described in the SDMA, but made the decision to contract entirely on her/his own, without support? Can s/he sue to set it aside? Uncertainty as to whether support was actually employed as provided in the agreement is a major lacuna of current SDMA statutes.

Some statutes attempt to avoid stigma and discrimination,[302] and to promote autonomy[303] by provisions such as that in the Delaware SDMA law which provides that the "[e]xecution of a supported decision-making agreement may not be used as evidence of incapacity and does not preclude the ability of the adult who has entered into such an agreement to act independently of the agreement."[304] But if the basis for reliance on what might otherwise be the problematic "capacity" of the SDMA principal is the support that ensures her/his legal capacity, and s/he is free to disregard that support, what is the consequence for reliance?

One potential solution to this issue is an optional addendum to the SDMA utilized by S.D.M.N.Y., the SDM pilot project in New York. It provides a form that can be requested by the other party to a transaction by which the Decision Maker (principal) attests that he or she has utilized the support described in the SDMA with regard to the particular transaction at issue.[305]

There is still another unanswered question that may limit the ability of SDMA laws to address the denial of legal capacity in the "invisible taxonomy." So far, none have addressed the process by which the SDMA is generated or through which it is entered into. While most SDMA statutes[306] provide forms that may be used, none require any education of either the principal or the

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302 There is an understandable concern that a person with an SDMA will be seen as a "disabled person," with the often negative connotations and potential discrimination that may result from that characterization.

303 There is concern that a requirement that a person with an SDMA must make certain decisions only with support would undermine that capacity and the person's autonomy and self-determination.

304 DEL. CODE ANN. tit. 16, § 9404A(c) (2016).

305 *Supported Decision Making Agreement*, S.D.M.N.Y., https://sdmny.org/wp-content/uploads/2019/08/SDMA-draft-3.5.pdf (last visited Sept. 13, 2019).

306 With the exception of Delaware, which provides that the Department of Health and Social Services "shall develop the forms necessary to implement this chapter," and Indiana and Nevada, where the necessary provisions are set out but there is no form, the other statutes all include form agreements for parties to utilize. *See* DEL. CODE ANN. tit. 16, § 9410A (2016); IND. CODE § 29-3-14-7 (2019); NEV. REV. STAT. § 162A.620 (2019).

supporters as to their respective roles, other than language in the agreements themselves.[307] So how, for example, do we know that an SDMA principal with I/DD has been given information, in an accessible form, on just what support is, and how it may be used?

It should not be surprising that virtually all of the SDM pilot projects around the world, as well as in the U.S., rely on a carefully thought out facilitation process for ensuring the integrity of the SDMA that is the culmination of that process. Most, if not all, rely on trained facilitators, and involve multiple meetings. Most pilots estimate the process to take six months to a year. To the contrary, none of the currently existing SDMA statutes require anything other than that the agreement be signed with some minor degree of formality, potentially raising questions about the ultimate validity for anyone who would not otherwise pass the "capacity" tests in laws constituting the "invisible taxonomy."

Because these SDMA laws are still so new, there is no case law that can help to answer these, or other possible questions arising out of the use of SDMAs. What seems clear, however, is that while SDMA statutes may go a long way toward advancing legal capacity for persons with I/DD or cognitive impairments, they are far from an absolute guarantee that the ability to have one's decision legally recognized may not be retroactively denied by the imposition of some test of "mental" capacity.

C. Recasting "Capacity"

1. Changing Paradigms

In Part IV, I have discussed some of the trends in psychology and sociology (behavioral economics), neuroscience, and philosophy and bioethics (relational autonomy) that cast doubt on

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307 A review of pilot programs in Australia foregrounded the importance of such education, noting "the value of training for supporters, oversight of their role, and provision of support and advice by [pilot] program staff" suggesting "the need for longevity of decision maker/supporter relationships and programs that can recruit, train and support supporters" as well as the work necessary to remedy the "lack of decision making experience" found in so many decision makers. Christine Bigby et al., *Delivering Decision Making Support to People with Cognitive Disability—What has been Learned from Pilot Programs in Australia from 2010 to 2015*, 52 AUSTL. J. SOC. ISSUES 222, 234, 236 (2017).

the current paradigms of rationality and autonomy. They raise questions about whether neurotypical people engage in rational decision-making and, if not, whether persons with I/DD should be held to that unrealistic and prohibitory standard in order to exercise their legal capacity. While the intent in Part IV was to call the concept of rationality into question, there is an additional issue, relevant to "recasting" capacity, that flows from behavioral economics and our current understanding of heuristics.

Applying heuristics to employment law, for example, scholars have noted a particularly pernicious form of mental shorthand, assuming qualities about individuals because of identity group membership. In other words, stereotyping. These "cognitive heuristics affect perceptions of issues as well as assumptions about people."[308] The combination of egocentric biases that researchers have documented,[309] coupled with "tendencies toward stereotypic classifications" make it likely that decision-makers will "make mistakes in the direction of their pre-existing biases."[310]

Heuristics thus also provides a lens through which to understand how stigma and discrimination against people with I/DD leads to, and/or reinforces, capacity evaluations and standards that deprive them of legal capacity. Exposing those negative and erroneous heuristics is another potential step toward "re-casting" capacity.[311]

2. Possible Legislative Change

One way to ensure *legal* capacity for people with I/DD or cognitive impairments would be to legislatively enact an overarching new definition of "capacity" that would apply to all laws and regulations, and that would, as well, bind judges in areas where the determination has been traditionally made

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308 Levit, *supra* note 201, at 394.

309 *See* Guthrie et al., *supra* note 202, at 787. Anecdotally, judges making capacity determinations of people with I/DD, especially those with visible manifestations like Down Syndrome and cerebral palsy, often draw on their own "experience" (and stereotyping bias) to focus on deficits that allegedly prevent decision-making, rather than supports that could make it possible.

310 Levit, *supra* note 201, at 394.

311 Levit focuses on the up-to-now failure of feminist legal theorists to explore "heuristic errors or the ways heuristics and biases combine with conventional approaches to identity issues" and thus "the gendered consequences when errors of probabilistic reasoning combine with stereotypes," but her gender-based analysis can be equally, and profitably, applied to disability. *See id.* at 395.

through the common law.[312] A statute could provide that, for all purposes, capacity to engage in any legal transaction, or enter into any legal relationship must be defined as "capacity with support."[313]

Rather than relying on an increasingly problematic, post-Enlightenment conception of an unfettered individual making "rational" decisions in a vacuum, entirely on her/his own, the legislature could embrace a view of individuals in relation to others, making decisions embedded in those relationships. It could acknowledge the support we all use, thus normalizing the more particular or intense supports utilized by persons with intellectual disabilities. It could adopt the equation proffered by one of legal capacity's leading scholar/advocates, Michael Bach, that legal capacity equals an individual's own capabilities *plus* accommodations *plus* support.[314]

It is, however, extremely unlikely that New York, or any other state legislature, will soon make such a radical break from the traditional view of capacity, or the long-standing connection between and/or equation of mental and legal capacity. Nonetheless, it is an idea that might encourage new thinking about decision-making and what the law should require to validate transactions between adults, without discrimination based on disability. Evidence from the experience of jurisdictions like Peru, as well as SDMA statutes and SDM practice in the U.S. may prove an important contribution to that enterprise.

D. *Final Thoughts: Changing Hearts and Minds or, The Expressive Quality of the Law*

As this article demonstrates, our existing system of laws equates "capacity" to engage in a variety of transactions and activities with "mental capacity," and, in the case of

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312 The legislature is, of course, free to abrogate common law so long as it does not violate constitutional guarantees.

313 Of course, any formulation this terse would, itself, raise many questions; it is presented here as a thought exercise, not an actual legislative proposal.

314 Michael Bach, *Vulnerability to Losing Legal Capacity and Power Over Personal Life: A Disability Rights Framework for Analysis* (forthcoming 2019) (on file with author).

guardianship, permits a total deprivation of legal capacity. Beside the harm done to those whose rights to be treated equally, without regard to disability, are denied, this body of law undergirds and reinforces society's view that people with intellectual, cognitive, and psychosocial disabilities are somehow "less" than others. The law requires them, often solely because of their disability, to "understand and appreciate" their decisions, and to make "rational" choices—even though it makes no similar demand on the rest of "us"—and when it finds them lacking, deprives them of the legal capacity that "we" enjoy without question.

Because of these virtually ubiquitous laws, people with intellectual disabilities are seen as lacking in full personhood and moral agency, so that the deprivation of their full range of human rights is justified as "normal" and appropriate. This is the expressive quality of the law. As M. Alexander Pearl and Kyle Velte wrote: "It is axiomatic that the law plays a cultural role as well as a strictly legal one. . . . the 'expressive' function of the law sends a normative and cultural message about shared values of the community."[315]

So long as guardianship and the "invisible taxonomy" remain unchallenged, so too will the stigma and devaluation of people with intellectual disabilities. Questioning our, and the law's, understanding of "capacity"—how we actually think, how we make decisions, and how doing so is deeply embedded in our social relations—is a necessary first step. Changing those laws to reflect how "capacity" is *always* [316] supported, and then recognizing and providing the supports necessary for people with intellectual disabilities is next.[317]

It has, of course, often been noted that changing existing laws or adopting new ones "will not automatically translate to change on the ground"[318] and that "with regard to legal capacity and Article 12, not only does it require states parties to make changes in their existing legal systems; it also tests people's ability and willingness to change their often ingrained perceptions of

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[315] M. Alexander Pearl & Kyle Velte, *Indigenizing Equality*, 35 YALE L. & POL'Y REV. 461, 489 (2017).

[316] *See* Donchin, *supra* note 225, at 45; Meixner, *supra* note 217, at 1006–07.

[317] This is why the CRPD itself, and the CRPD Committee, insists on the connection between abolishing substituted decision-making schemes and establishing a robust system of supports for decision-making.

[318] Laufey Löve et al., *The Inclusion of the Lived Experience of Disability in Policymaking*, LAWS, Dec. 2017, at 4, https://www.mdpi.com/2075-471X/6/4/33.

disabled people as lacking in decision making skills."[319] But laws that, for example, recognize SDM, open up conversations about how people use supports to make decisions, and laws like Alaska's normalize the process for everyone, not just people with intellectual disabilities.

SDMAs, even where acceptance is not yet legally mandated, can provide an advocacy tool for persons with I/DD who make such agreements in their dealings with service providers and others. Laws that require third parties to recognize SDMAs not only relieve third parties of the fear of liability, but enable them to see people with intellectual disabilities as legally "worthy" actors; that is, persons whose rights are recognized and enforceable.[320] Perhaps the "cultural" shifts that occur over time as a result of such legal changes, now actually occurring, will, through the expressive power of the law, eventually lead to "undoing" the "invisible taxonomy" and ensuring the right of legal capacity for all people.

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[319] *Id.*

[320] Anecdotal experience has shown that the existence of an SDMA, with its explanation of how a person's decisions are made with support, and the statement that the person wants those decisions to be respected by third parties, can itself move the dynamic to one of greater respect.