THE PARADOX IN MADNESS: VULNERABILITY CONFRONTS THE LAW

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Marie A. Failinger*

He was a gentleman, moving through the hospital halls with a kind word for staff members usually invisible to others. He was almost military with his nurses, methodically executing the minute protocols dictated by the surgeon’s craft, one order after another, demanding, life-giving. He walked into a patient’s room with an aura of assurance and calm so convincing that any thinking person would have trusted her life to his hand. His life was rich beyond measure—he drank deeply from the well of love and admiration that his wife and sons blessed him with, from the mountain air and the busy streets of the places he traveled, from the classical music and untold eclectic books and art that framed his days. He called himself blessed, and even in the cruelty of pain, even though he was robbed of the dignity of bathing and dressing himself, he recited to anyone who came to see him the love and pride that he felt for his family.

He was also, in the end, cruel, and suspicious—and confused. Nearly blind, he could dictate a lecture describing step-by-step the most complicated surgery on the most delicate parts of the human body, correcting even slight mistakes. Then in the next moment, he would become fixated on the illusion that his nurses were philandering in the halls. He could praise the steady, endless care his wife lavished on him as she washed stained bed sheets, and gave up her sleep, night after night for him, at home, and in many hospital stays, and yet, he could also believe she was conspiring to kill him. He could lean upon a son who spent day after day caring for his

* Professor of Law, Hamline University School of Law. This opening story comes out the true experience. I would like to thank Martha Fineman and all of the participants in the Beyond Rights: Vulnerability and Justice conference sponsored by the Emory Vulnerability Project and Smith College in May, 2011, for their comments on this project. Thanks to my research assistant, George Blesi, for his careful work on this project.
THE PARADOX IN MADNESS

every need, like a baby’s mother, and then turn upon him in a cold fury, cutting him with words like a jagged blade.

In the end, his paranoia robbed him of what he most treasured. He gave up legal control of his life to a relative whom he had not trusted when he was, as people casually say, in his right mind. She took from him, and took him away from, his family, his home, control over the finances he had so carefully shepherded for his family, and control over his very obituary. In his last months, most days he sat alone in a wheelchair in a nursing home, sometimes unkempt, often confused, because he surrendered himself to that relative. The “No Visitors” sign on his door kept out the friends, colleagues, and loved ones who longed to see him. And, apparently under orders from the one who acted legally in his stead, the nursing home administrator called the police to remove his wife in his last hours, and made sure that he died almost alone, save a faithful son who was permitted in the room. As his pastor said, he was lost, not only to others, but to himself. All of this was done in the name of law and human autonomy.

The Law and Madness

The legal treatment of mental illness in United States jurisprudence is paradigmatic of the inability of Western law to address the complex nature of most human beings. We are rational and irrational, trusting and suspicious, loving and angry, capable and incapable, independent and needy. In the best of circumstances, there is a consistency and integrity to the dynamic flow of rational and irrational, trusting and suspicious, and so forth, so that those who know us best can imagine each of us as a non-contradictory whole. Our family and friends can largely anticipate, and come to trust, which of these opposites will surface in us in particular situations, and which triggers will set us off in one direction or another. If they are very close, our loved ones can
THE PARADOX IN MADNESS

often predict how these opposites will manifest themselves, sometimes even at the same time, in the smoldering kindness of a disappointed partner, the fiercely independent yet needy beckoning defiance of a teenager, or the proud and yet anxious teetering of a newly walking toddler into a mother’s arms. Yet our loved ones will surely be surprised, as will we sometimes; there will be those moments when we are “not ourselves,” as we describe it, even though physically, emotionally, spiritually, the same human being stands in the place where we are “not ourselves.”

As human beings slide into what was once called “madness,” the integrity of their actions and emotions, the tight weave of character that makes them unique and known as distinct persons to others and to themselves, begins to unravel; sometimes slowly and imperceptibly over a long period of time, other times dramatically fast. The predictable becomes less predictable. Aspects of character that are subtle, like minor themes in a grand piece of music, are magnified and appear more frequently, drowning out the person people have come to know, and then receding back into the background, while the predictable, the familiar re-appears. Those aspects of the self that we deem distasteful and suppress, either by willpower or by cultivation of habit, re-surface and seem to take over in mental illness. The embarrassing becomes the commonplace: clothing is disrupted and askew, hygiene becomes irrelevant, a sense that one is being loud or disruptive or bizarre goes unnoticed.

In these moments, the liberal concept of autonomy is confounded. There will be many moments in which the “mad” will be “lost to themselves”—searching desperately for the persons they thought they were, but overcome by the darkness, groping for a way out. They may be oblivious to the ways that they have themselves changed, believing they are the same and the world outside has changed radically, and that the trustworthy is now dangerous. Or, as in
THE PARADOX IN MADNESS

depression, they may be numb to the world outside themselves, while inside being stabbed over and over by pain, like a ceaseless knife.¹

In these dark journeys, the self that governs, the autonomous self, becomes a fantastical concept. Within a previously (supposedly) ordered life, no one, including the self, knows which persona will manifest itself, or what will trigger its presence. Those who are becoming paranoid will read the gentlest touch as diabolical, the most innocuous interaction as freighted with danger. They will align with those whom they considered morally reprobate; they will be seduced by constructions of reality they would have resisted. Those who suffer from significant chronic but not fully incapacitating mental illness bring this paradox into high relief for all of us because they can swing from one extreme to another, rational to irrational, for no apparent reason.

American law does not often tolerate ambivalence, ambiguity, or paradox; its values are clarity, consistency, and logic. It eschews open texture in standards or procedures in order to bring organization to the anxiety that the person descending into madness lives within, the chaos that he creates for others around him.

In imagining the life of the “normal” American whom the law serves, the law relies on certain defaults. The default for “normal” in human behavior is “predictable;” we know that a “normal” person will show up for work every day, wearing his usual clothes, interacting in his usual manner, and accomplishing his usual duties, for example. By contrast, unpredictability is a sign of madness. Similarly, the default for describing our “normal” mental processing of the external world and internal thought is “rational.” The “normal” autonomous self will assess the pros and cons of potential behavior; for example, he will decide where to spend financial

¹ I owe this insight to Teri Popp, an Executive Committee Member of the National Action Alliance for Suicide Prevention.
resources as an economist might, making decisions that increase short- and long-term happiness or wellbeing based on facts. He will be neither profligate nor penurious in spending for food or entertainment, for example—unless that’s the way he always is. By contrast, to be non-rational and non-empirical—to perceive reality differently than the rest of us perceive it, to misjudge or even throw away one’s self-interest “inappropriately”—is to be crazy. The neighbor who bets his fortune on a crazy invention, or suspects that he is being watched by agents of the state, becomes suspect.

The default for emotion is limited and managed kindness, polite distance, and reasonable care for others’ concerns that is wedded to a self that protects against exploitation and dominance. “Normal” human beings, in the law’s view, are not hostile; nor are they so self-giving that they cannot protect themselves against being taken advantage of. The friend who starts giving his entire fortune away, or who begins a stalking campaign against someone who had never offended him, raises our suspicions about sanity.

Finally, the default assumption for behavior of a normal person is action, not passivity. The law presumes that every adult is capable and independent. The law presumes that the actor will be able to make and carry out decisions about how he will act, that he will not be too emotionally or intellectually crippled to make them. The legal self does not need others, or if he does, the self has the means and skill to negotiate freely for what he needs.

Responding to these default understandings of the “normal” person, American law confers a wide range of freedom: the freedom to choose; the freedom to choose unwisely; the freedom to choose in derogation of others’ needs, feelings, and demands; and the freedom to act on these choices. In the past, such autonomy was quickly stripped from anyone who challenged the default, who became unpredictable, who was not willing or able to be “normal,” who was not
THE PARADOX IN MADNESS

willing or able to follow social norms. Among women, this included those whose sexual behavior was unpredictably non-monogamous, who were addicted, who were disobedient to husbands or who found no joy in housework or childrearing, who asserted themselves in dress or behavior as a man would, or who were bereft of the ability to be good wives and mothers because of their depression. The response of the law was to hide them in unwed mothers’ homes, in insane asylums, or in institutions for the mentally retarded, and, as in the case of Carrie Buck, to make sure that difference was wiped from the future by sterilization.

For important reasons, the mentally ill have been deinstitutionalized. The autonomy pendulum in American law has swung from hiding and restraining the mentally ill to “mainstreaming” them into their communities, assuming that they should be given maximum freedom until their incapacity is proven in a court of law. Beyond the proper demands for justice and respect for the mentally ill, law’s demand for simplicity, scientific evidence, and uniform application of an abstract and clear standard, and the American passion for the value of freedom have driven this movement.

At the same time that the mentally ill have been mainstreamed into American society, the ubiquity of the durable power of attorney (DPA) has given rise to a new set of paradoxes created by law. The DPA was developed in response to the growing awareness that at some point in many people’s lives, particularly in old age, they do not fully meet the “default” liberal paradigm of the human condition that permits independent decision-making and action by adults. An

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2 Phyllis Chesler, Women and Madness 5-6, 32, 42-43, 50-51 (1972).
4 Id. at 36-38 (2003) (discussing Buck v. Bell and the American eugenics movement.)
5 Id. at 39-40 (discussing the deinstitutionalization movement.)
6 See Chris Koyanagi, Learning from History: Deinstitutionalization of People with Mental Illness as Precursory to Long-term Care Reform 1, 4-5 (August 2007).
THE PARADOX IN MADNESS

instrument intended to streamline the transfer of legal control, the DPA gives the attorney-in-fact the ability to make decisions for the principal. Its innovation, “durability,” extends this power from the classic situation, when the principal is fully competent to control the attorney’s actions, to the time when the principal becomes incompetent, indeed perhaps even unconscious.

The DPA was originally developed to avoid the cost and complication of court supervision over the transfer of legal responsibility from principal to agent at the time when the principal is no longer able to decide for himself. The 1954 Virginia DPA prototype erased the typical presumption that when the principal became incapacitated, his power of attorney automatically terminated. Pursuing the model in response to American Bar Foundation and other studies of the needs of disabled and elderly persons, the National Conference of Commissioners of State Laws provided a limited “Model Special Power of Attorney for Small Property Interests Act.” In its original design, it was intended as an instrument of social justice, meant to help those individuals with meager resources who did not have enough assets to justify a complicated and expensive court process, but were not so dependent on others as to need a full-blown guardian.

The Model Special Power of Attorney Act attempted to limit the possibilities for abuse that accompanies any surrender of a person’s legal power to another. To ensure some “daylighting” of the transfer of legal power, the model act required that the power be signed in

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9 Id. at 6.
10 Id. at 6-7.
11 Id. at 6.
12 Id. at 6-7.
13 Id. at 7-8 (noting the drafters’ hope that the judge would know the principal and thus be in a good position to judge whether there were any concerns about the power of attorney).
THE PARADOX IN MADNESS

front of a judge and that the attorney-in-fact account to the principal or a legal representative or a judge who approved the power. To reach its intended beneficiaries and guard against temptation, the Act provided that the DPA would terminate if the value of property subject to it exceeded a “‘relatively small’” amount, which each state could designate. To account for the differing circumstances and abilities of attorneys-in-fact, the model statute offered various alternatives for liability of attorneys-in-fact if they defaulted on their responsibilities: one option would make attorneys-in-fact liable only for intentional wrongdoing or fraud, a second would treat attorneys-in-fact like other fiduciaries, and the third permitted that standard to be waived in the power of attorney if the principal so chose. Yet, because of well-meaning modifications introduced into the Uniform Probate Code to make the DPA less cumbersome, the DPA is now most often given outside the shadow of the formal procedures used to check abuse and overreaching. Its limitation to meager estates managed by trusted friends or family has also been abrogated in many state statutes. As a result, financial abuse of elders and others through the durable power of attorney has burgeoned. The National Center for Elder Abuse estimated that over 52,000 persons suffered financial abuse by those entrusted with their property in 2004, many of whom presumably were fleeced through durable powers of attorney.

15 Boxx, supra note 8, at 8.
16 Id. at 8.
17 Id. at 9.
18 Id. at 44-45 (noting that the Code abandoned the dollar limitations on the durable power of attorney and the requirement to account to a legal representative when the principal became incapacitated).
19 Id. at 45 (discussing the nature of the durable power of attorney and the attempts or non-attempts at oversight.)
20 Id.
THE PARADOX IN MADNESS

The Uses and Abuses of Vulnerability

The paradox created by allowing the law to transfer legal power between private individuals, and the consequences of the American preference for the private transfer of power, are clearly evident in the abuse that has risen from employment of the DPA. A person who has not been declared incompetent by a court may essentially give a durable power of attorney even when he is at times “autonomous” and competent, and at other times incompetent, because the law inquires of competence only at the time of signing, and indeed presumes competence. This leads to a paradox: if the principal is not competent when the power is signed, the attorney technically has no legal authority at all, and his actions are essentially illegal, albeit facially valid; if the principal is competent, the attorney has every power, even to overrule the principal’s earlier wishes about his life, when he later becomes incompetent to express them.

Thus, there is no way of knowing for sure whether the power of attorney actually confers legitimate legal power or is completely void, absent a full judicial hearing on the competence of the subject, which is exactly what the durable power of attorney was designed to avoid. For those who cannot get the courts to hear a challenge to the principal’s competence---either because they lack the resources, or sufficient evidence of the subject’s incompetence at the particular place and time of signing---an attorney-in-fact with a document not provably void can take over the principal’s very life. Moreover, the rise of well-meaning health privacy legislation such as HIPAA has meant that the attorney-in-fact, allegedly acting to protect the principal’s

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22Id. at 171 (stating that a general requirement of durable powers of attorney is that the principal be competent at the time of signing the instrument); Carolyn Dessin, Acting as an Agent Under a Financial Durable Power of Attorney: An Unscripted Role, 75 Neb. L. Rev. 574, 581 n. 32 (1996)
privacy interests, may use his legal document to withhold from loved ones the very evidence that proves that his document is legally void.23

This paradox becomes alarming when we realize that we are all vulnerable citizens, a key insight by Professor Martha Fineman.24 Particularly with respect to mental illness, every one of us is vulnerable and uncontrollably so. We may be vulnerable from birth, through a genetic predisposition or from an imbalance in brain chemistry. We may become mentally ill or incompetent because of accident, crime, illnesses, or chemicals introduced into our body by choice or coercion. We may become mentally ill not only from a series of abusing choices, but from one single mistaken choice.25 We may succumb to mental illness extremes, and sometimes less than extremes, that fluctuate from day to day,26 unaware and by surprise. This unpredictability should prompt us to recognize not only our current vulnerability, but the possibility of a vulnerable future. It should prompt us to ask: what does the law offer us when we are ourselves and not ourselves all at once, when the integrity of person we display to others becomes fractured or, to put it another way, when the complicated person inside us exceeds our ability to control it?

To recognize that we are vulnerable—acted upon as well as acting, dependent as well as independent—is to recognize that others hold our life in their hands. Unfortunately, just as we cannot guarantee that we ourselves will be predictable, especially when the ravages of mental illness overcome us, we cannot guarantee that those who hold that life in their hands will be predictable or faithful. The kind of omnivorous power over our lives that traditional legal

23 See, e.g., Harriet H. Onello, Anticipating Guardianship or Conservatorship, GCP MA-CLE, ch. 3 (2009) (recommending that durable powers of attorney include a HIPAA clause providing the attorney-in-fact with the power to assert HIPAA rights to medical information otherwise protected against others).
24 See Martha Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 YALE J. L. & FEMINISM 1, 8-9 (2008) (being vulnerable is a “universal, inevitable, enduring, aspect of the human condition . . .”)
25 See id. at 9.
26 See id. at 11.
THE PARADOX IN MADNESS

regimes are designed to transfer—the power of attorney, the guardianship, the conservatorship—is a gamble with our lives. Those who hold these powers may be loving, self-sacrificing persons, who know us well, who will use their common sense to do what we would want to do but cannot do when we succumb to mental illness. Those who hold these powers may also be ruthless and self-involved, believing that they are morally entitled to take property that belongs to incompetents. They may be so heedless of the difference between themselves and their principal that they substitute their own notions of the incompetent’s best interests in such a way that lacks any integrity, and is discontinuous with an incompetent person’s former life and his objective well-being. Also, of course, they may simply be negligent and indifferent to what happens to the principal and the principal’s assets.

The law needs to take full cognizance of, and account for, all of these varieties of relationships. In the best of world, where the principal is competent enough to supervise the attorney-in-fact, who is himself caring and capable, a streamlined, simple, and economical process such as the durable power of attorney is ideal to accomplish the transfer of legal power. At the other extreme, where the principal is fully incompetent and there is a high risk of self-dealing or the agent has the strong desire to control of the principal’s life (e.g., in a parent-child relationship or among battling siblings or because of a history of conflict between principal and agent), only a high degree of institutional interference will ensure that the newly entrusted agent acts in the best interests of the principal. Modern guardianship and conservator systems, which require traditional application to court, strong evidence of incompetence to manage either personal or financial affairs, continuous accounting and approval of important decisions by the court, and regular review, are the best available, if not ideal, models to respond to these circumstances.
THE PARADOX IN MADNESS

The problem is that the law is confounded in two sets of cases: one in which it is not clear whether the principal is competent and the agent trustworthy; and the other in which the principal seems to move between competence and incompetence, and the personal histories of both principal and agent suggest that the agent may, or may not, do what is in the principal’s best interest. These challenging situations illustrate Professor Fineman’s warning that the law itself can be a vulnerable institution, in the sense that the goals and values of the law can be so easily thwarted because of its very substance and structures.27 The law grants guardianship or conservatorship because the courts do not want to, or cannot, monitor the lives of mentally ill individuals to the extent necessary to protect them from harm, and their assets from theft. The private resolution of messy situations is the hallmark of American law. Yet, the very delegation of legal power to individuals or private organizations provides the possibility that those very agents will make the courts helpless to rectify abuse: as managers of the assets of a mentally ill person, clever attorneys-in-fact, as well as guardians and conservators, can all conceal disposal of property and dissipation of income, including self-dealing in expenditures of a type that are inappropriate to secure the principal’s situation.

Equally important, as managers of the client’s affairs, attorneys-in-fact, like guardians and conservators, can employ the principal’s own legal rights to confidentiality and secrecy, to hide critical health, financial, and other information from those most likely to be investigating improprieties, or advocate justice for the disabled principal. Unless someone cares enough to take his own time and resources to aggressively double-check, to question others besides the attorney-in-fact (or even the guardian or conservator), and to seek explanation from records, most reports to the courts will be rubber-stamped or ignored. Attorneys-in-fact have a magnified

THE PARADOX IN MADNESS

power to abuse as compared with guardians and conservators, since usually they do not even have to report to the court.28

There are a significant number of horror stories about attorneys-in-fact who took severe advantage of their principals using durable powers of attorney. As a result of this abuse, the Uniform Law Commission studied DPA abuse, discovered that most states no longer followed the Uniform Durable Power of Attorney Act, amended in 1987, and undertook a new uniform statute, the Uniform Power of Attorney Act of 2006 (UPOAA), approved by the ABA House of Delegates in 2007. More than half of the states have responded to the risk of possible abuses, some with attempts to assimilate the law of the DPA to something closer to the law of guardianship and conservatorship.29 In reviewing the types of changes that could be made, we might look to Professor Samuel Bray’s helpfully division of the types of rules that the law can provide to protect a vulnerable person into harm rules and power rules. Harm rules penalize the powerful person, here the attorney-in-fact, if he or she violates the rights of the vulnerable person. Power rules limit that person’s ability to accumulate power over the vulnerable principal in the first place.30

One response to DPA abuses has been to propose changes to harm rules (i.e., raising the level of fiduciary responsibility undertaken by attorneys-in-fact, expecting economically competent, not just ethical, investment and disposal of assets—and imposing

28 See Dessin, supra note 21, at 584 (noting that most attorneys-in-fact do not need to seek court approval for their decisions.)
29 Author Query: AARP report, supra note 21, at 8-9. The report catalogues twenty-one provisions of the UPOAA that are intended to protect against abuse, including the breadth of the agent’s control, the lack of third-party oversight, and the lack of legal standards and clarity about agent duties. Id. at 11. Among its provisions are section 116 which permits court petitions to review attorney-in-fact conduct or construe a power of attorney, section 117 which governs liability of attorneys in fact, and Sections 201 and 301 which prevents the exercise of certain powers unless they are expressed in the power of attorney. Id. at 12.
THE PARADOX IN MADNESS

corresponding damages for failure to live up to these duties).\(^\text{31}\) Most notably, the Uniform Power of Attorney Act of 2006 (UPOAA), adopted by only eight states and the Virgin Islands as of 2010, specifies default and mandatory duties owed to the principal in more detail, imposing liability for misconduct and providing for judicial review of agents.\(^\text{32}\) It also requires that any power to change the principal’s estate plan or dispose of his assets be expressly granted.\(^\text{33}\) However, these few changes that have been enacted have not been enough to obviate the difficulties caused by the surrender of power to an attorney-in-fact. While the UPOAA has eliminated some of the ambiguity about the duties of an attorney-in-fact, its protective provisions fall short of what is necessary to prevent against exploitation.\(^\text{34}\)

There are at least some commentators who argue that these states’ decision to ratchet up DPA “harm rules” and penalties for violating them without clearly specifying the extent of fiduciary duties also deters acceptance of the power by the people most likely to execute DPAs in an inexpensive and meaningful way—family members and friends who do not have the business acumen to ensure that assets are invested or transferred for an optimum price.\(^\text{35}\) Deterring “lay” family and friends from assuming the burden leaves the principal sliding into incompetence with two poor alternatives: hiring an expensive professional agent to administer his assets, or surrendering to a guardianship or conservatorship well before he “needs” one because he has become incompetent under state guardianship law.

Harm rules have largely failed to stem the abuses of the DPA, leading states to propose three types of “power rules” in DPA reforms. First, states have attempted to create more robust

\(^\text{31}\) Boxx, \textit{supra} note 8, at 45 (noting the availability of civil remedies for abuse of vulnerable adults).
\(^\text{32}\) \textit{See} Andrew Hook and Lisa Johnson, \textit{The Uniform Power of Attorney Act,} 45 REAL PROP. TR. \& EST. L.J. 283 (noting adoption of the UPOAA, as of 2010, by Idaho, New Mexico, Nevada, Maine, Virginia, Colorado, Maryland, Wisconsin, and the Virgin Islands); Rhein, \textit{supra} note 21, at 176.
\(^\text{33}\) \textit{Id.}
\(^\text{34}\) Rhein, \textit{supra} note 21, at 180 (highlighting three of the UPOAA’s provisions that fail to adequately protect individuals).
\(^\text{35}\) \textit{See} Boxx, \textit{supra} note 8, at 43 (noting some of the risks to the agent).
THE PARADOX IN MADNESS

execution requirements that will “daylight” DPAs upon creation and provide some minimal assurance that the principal is competent, including notarization of the document, increasing the number of witnesses to the document, and setting qualifications for witnesses.\textsuperscript{36} Second, states have attempted to limit the attorney-in-fact’s power to act in certain circumstances, such as transactions that benefit the attorney-in-fact.\textsuperscript{37} Third, states have attempted to create policing mechanisms during the life of the power of attorney.\textsuperscript{38} Professor Boxx notes, for example, that North Carolina requires the attorney-in-fact to record the power of attorney when the principal becomes incapacitated, account to the court, and file inventories of property that the attorney holds.\textsuperscript{39} Other states permit interested parties to petition for an accounting or other relief from the attorney-in-fact, and Tennessee permits relatives of the principal to require the attorney-in-fact to post a bond to protect the principal against potential financial wrongdoing.\textsuperscript{40}

Another approach to the problem of the sometimes incapacitated principal, which might be borrowed from guardianship law, is to provide more specificity about when a principal will be deemed to be incapacitated, given that many principals are adopting “springing” powers of attorney that do not come into use until the principal is incapacitated. As an analogy, Minnesota’s standard for guardianship and conservatorship was rewritten in 1980 “to make it harder to create a guardianship”\textsuperscript{41} by, inter alia, including “clear definitions of what incapacity involve[s].”\textsuperscript{42} The statute requires a clear and convincing demonstration that the person is “impaired to the extent of lacking sufficient understanding or capacity to make or communicate..."
responsible personal decisions . . . [and] has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance.” A conservator may not be appointed unless there is clear and convincing evidence that the principal cannot “manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance . . .”

Yet another “power” approach is to limit the specific powers and rights that an attorney-in-fact gains with a power of attorney, absent more extensive oversight. The Minnesota guardianship law is a good example of this. One of the purposes of the 1980 reform stated: “once [a guardianship] is created . . . the powers of the guardian should be kept to the bare minimum necessary to care for the ward’s needs,” including “specific statements about the powers and duties of a guardian.”

Finally, Professor Kohn has proposed more statutorily required involvement by the principal, so long as he retains any capacity to review the attorney-in-fact’s plans for his life or estate, which includes notice and consultation. Although only six states require communication to the principal about the agent’s expectations and transactions, Professor Kohn argues that the failure to communicate with the principal violates the agent’s duty of obedience and is critical to ensuring appropriate limits on control over the principal’s life. This may not prevent most

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43 Minn. St. Ann. § 524.5-102 subd. 6 (2008); see also In re Andreszczuk, 2009 Minn. App. Unpub. Lexis 564 at *8
45 Lundgaard, 453 N.W.2d at 61 quoting In re Guardianship of Mikulanece, 356 N.W.2d 683, 687 (Minn. 1984).
46 Id.
47 Kohn, supra note 7, at 52. See also Lundgaard, 453 N.W.2d at 61. (stating the third purpose of the 1980 Minnesota reforms of guardianship law, to provide “sufficient oversight of the guardian’s role and participation by the ward . . . by expanding the due process rights of a proposed ward in a guardianship hearing.”).
48 Id.
49 Kohn, supra note 7, at 52.
abuses, but may trigger a principal’s inquiry to others in his life at times when he is relatively competent.

**Paradigms for Government Involvement**

As Professor Fineman has noted, we are all vulnerable, but we are all vulnerable in very distinctive ways. We need to challenge the law’s demand that standards for protecting the mentally vulnerable must be uniform, and that scientific evidence of incapacity must be overwhelming. It is important for us to interrogate the law’s presumption for uniform standards, and for overwhelming scientific evidence of mental incapacity—we must seek in favor of a contextual approach that embraces the particularity of the mentally ill person, and outlines her specific capabilities and needs. There is some reason for concern about the robust government involvement in the lives of mentally ill persons that a vulnerability model might suggest. Instead, we might envision a more appropriate model in a public-private partnership: a legal regime that will marshal a circle of persons and resources able to engage the mentally ill person in her paradoxical complexity. Through negotiation and compromise, such a partnership can craft legal powers that will permit dignity and opportunity to mentally ill individuals crying out for the embrace of the community and understanding (even by themselves) of their engagement with a “real” world that has become confusing for them, and for the opportunity to live creative lives and care for others to the limits of their abilities.

The vulnerabilities movement rightly criticizes American legal structures for failing to respond to the needs of vulnerable citizens. However, both historically and in modern times,

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50 Fineman, supra note 23, at 10 (stating that our different economic and institutional positions create a varying “range” and “magnitude” of our potential vulnerabilities).

51 For a sampling of these articles, see the Emory Law School Vulnerability and Human Condition website bibliography: [http://web.gv.emory.edu/vulnerability/resources/Publications.html](http://web.gv.emory.edu/vulnerability/resources/Publications.html) (visited July 29, 2011)
one cannot help but recognize that the government’s decision to acknowledge its duty toward citizens at risk of catastrophes that rob us of a full life can be a two-edged sword. Those advocating for a negative state have made a good case that limited governmental powers are necessary to protect individuals against the overweening power of government. If individual attorneys-in-fact can strip mentally ill people of their lives and wealth, so can governments composed of individual bureaucrats.52 Although few states currently take an “all-or-nothing” approach to the troubling issues that mentally ill people confront in living full and meaningful lives, we might imagine what those approaches might look like. This is not difficult given that these approaches characterized our not-too-distant past. One might call the “all” approach the oppressive neglect approach, and the “nothing” approach the indifferent neglect approach.

In the oppressive neglect approach typified by state policies on mental illness through the first half of the 20th century, the government played a relatively aggressive role in responding to persons with mental illness.53 Government policies were both oppressive and neglectful. In their oppressive forms, the policies stripped the institutionalized mentally ill of their freedom of movement.54 Through guardianships and other legal transfers of power, they were also stripped of their ability to make decisions about their own lives and property.55 What was taken from them were the very things that most of us depend on to create a sense of security and identity in our lives—our family and friendships; our home and those creature comforts we depend on when we step out of our public lives, whether books or art or crafts or furnishings; our clothing and

52 Id. at 7
54 Id. at 750 n.34.
THE PARADOX IN MADNESS

those outward signs we use to tell people how to think about us. In some cases, through medication, electroshock, and other treatments, what was taken from them was their very ability to think and feel as they had before. This very oppressive intervention was also neglectful. For many reasons, political and social, the institutionalized mentally ill became invisible to lawmakers and society. Rather than providing for the care that would maximize their capacities as participating and productive members of society, government provided minimal care that perhaps saved their lives and prevented harm they might have done to others, but rarely provided the means for them to live authentic lives.56

On the other hand, history shows us the consequences of indifferent neglect as well. When governments did not intervene to provide even basic supportive care for mentally ill persons, the burden came crashing down on families, often unable to cope with the additional demands that mental illness thrust upon them.57 Mentally ill persons who manifested self-destructive or violent behaviors were most likely to end up in prisons, or the basements of hospitals, both of which were rarely therapeutic.58

Responding to the failure of these two models, current state mental health laws struggle toward a regime that is minimally invasive and maximally beneficial to the mentally ill, focusing on “least restrictive” settings and treatments. However, because of the strong liberal orientation of American law, the “minimally invasive” aspect of this formula is much more successfully carried out than the “maximally beneficial” aspect. With the exception of the durable power of attorney, neither the state nor any other individual is granted comprehensive power over the life

56 See Klapper, supra note 50, at 752, 776 (1993) (noting that the ADA doesn’t ensure services but merely requires that existing services be open to the mentally ill); Ellard, supra note 50, at 227 (noting late 19th century overcrowding of public institutions and emphasis on moral treatment of institutionalized mentally ill persons.)
57 Id. at 4 (noting how the improved public opinion of the new public mental hospitalties encouraged families to turn over their members who were difficult.)
58 Id. at 3 (noting emphasis on keeping the insane subdued.)
of a mentally ill person without an extensive inquiry into the nature and extent of the person’s mental illness; and the presumption of competence is very strong. Similarly, the rights of mentally ill persons to refuse treatment are strong, even when there is a fairly compelling state interest, such as the interest in making them competent enough to stand trial for criminal acts that they are accused of having committed. Institutionalization is a very last resort, usually only when the mentally ill person has demonstrated that he is a danger to himself or others.

On the other hand, the structure of government programs for the mentally ill, combined with ambivalence of social actors toward the mentally ill, has meant that they can rarely lead “maximally beneficial” lives (i.e., lives that reflect their authentic selves and enable them to contribute according to their abilities in the same measure that their non-mentally ill peers are able to do). Government programs for the mentally disabled suffer from two main ills: the usual under-resourcing typical of programs for citizens who require complex and intensive interventions to be successful; and the structure of bureaucratization, which prizes streamlined, uniform programs that guard against charges of unfair treatment.

The modern ambivalence of social actors toward the mentally ill contributes to this “no-man’s-land.” The state wants to treat the mentally ill as a private problem of the family, as it traditionally did, but recognizes the need for family supports, both of restraint and of assistance. The state and the individuals who surround the mentally ill want to respect their dignity, but fear their unpredictable and idiosyncratic behavior, or are exhausted by the complex and incessant demands that they place on loved ones. It is difficult to create a government “program” that

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59 See, e.g., Sell v. United States, 539 U.S. 166, 180-81 (2003) (requiring the state to show that involuntary medication to render a defendant competent must be necessary to meet a significant governmental interest, and medically appropriate to the defendant’s medical condition).


61 See Klapper, supra note 53, at 774 (noting the reduction of funds for the treatment of mentally ill persons under the Reagan budget proposals).
embraces the ambivalence, complexity, and unpredictability that attends mental illness, for
government programs are supposed to work (i.e., accomplishing measurable objectives), work
now, and work efficiently (i.e., not spending too much financial or human capital.)

Moving Towards A Workable Model

The recognition of human vulnerability calls for a different response. It asks the state to
recognize and even to value the mentally ill person as an equally respected member of the human
community, a person—One who can be exploited or harmed by others, and who can in turn
exploit or harm those who love him. It asks the state to acknowledge realistically that in the case
of the mentally ill, it truly does “take a village” of public and private citizens to surround that
citizen with the kind of care he needs, while including the mentally ill person himself in the
planning for long-term care. It asks for legal regimes that neither strip the mentally ill individual
of the autonomy he needs to feel truly respected, nor permit him to be exploited by either the
individuals or the state.

Such a regime would minimally include a holistic evaluation, a formal legal or administrative
proceeding, greater community involvement, and mandatory alternative dispute resolution for
contested cases.

A. Holistic Evaluations

A holistic evaluation of any person issuing a DPA who presents signs of mental illness is
necessary. That should include an analysis of his capabilities and his dependencies, and should
be comprehensive enough to recognize the center and integrity of his life as it has been lived
throughout the years. Such an evaluation may require difficult judgments about who this
mentally challenged person really is, and how this person would have wanted his life to unfold if he had been able to explain his values and needs. It should account for, but not be distorted by, the mental illness that makes him who he is today. This evaluation needs to take account of all of the aspects and all of the seasons of the mentally ill person’s life. This requires the evaluation to be informed by those who have lived with, worked with, and socialized with the individual at risk. This evaluation should be the responsibility of the state if there is any credible evidence that the person might be vulnerable to exploitation. It should be conducted with the cooperation of, and where possible the approval of, the person himself and those around him.

B. Formal Transfer Ritual

A ritual for the transfer of that individual’s financial and personal legal power is necessary. It should be fully informed by those who have known the applicant deeply and for a long period. This ritual must ensure that the immediate community, including judges and government actors, can ascertain whether the individual’s behavior and attempted legal acts are consistent with the integrity of his person, expressed over time, or rather are the result of an immediate delusion or impulsive act. This requirement provides more protection than the current durable power of attorney provisions, which may be effectuated without the knowledge of those who are closest to the subject, and may not receive the oversight of even a notary public, much less a witness, a judge, or a state administrator. However, there may be less formal ways of accomplishing this proceeding than a traditional trial. Administrative agencies or streamlined court approval processes could be developed to triage DPA requests and refer only those where an issue of competence or overreaching is concerned to a traditional adversarial proceeding.
THE PARADOX IN MADNESS

The need for a careful ritual proceeding suggests that a person executing a power of attorney should be required to notify anyone who would be a legitimate object of the person’s bounty or duty of support, including his spouse and children; or if he has none, parents or siblings, as well as any persons named in trusts or wills who are expected to share in his property. Such interested parties should be permitted to file a contest with the newly created administrative review board, arguing that the executing principal is incompetent to grant such a power or is vulnerable to abuse by the attorney-in-fact. Unless there are any compelling circumstances such as imminent surgery, travel, or incapacity that make it necessary for the power to be conferred, the review board should be empowered to issue a stay against the effectiveness of the document.

C. Greater Community Involvement

The state should provide for a person’s loved ones to question him about the reasons for his decision to transfer power to someone who would not naturally and obviously be the selected agent for the mentally ill person’s transfer of power. In the case of conflicts among loved ones, there should be the opportunity to consider who the person would actually have trusted, and to get some perspective from those close to the vulnerable person who are not involved in the conflict. These interested persons should generally be able to secure court or agency assistance in delaying or terminating the power of attorney until a determination of competence can be made, unless the attorney-in-fact can demonstrate the compelling need for transfer of legal power, if the following factors are present:

- The attorney-in-fact has isolated the subject from family, friends or colleagues who have been the natural subject of the principal’s affection and bounty;

Comment [J12]: Who is going to oversee this process? What if persons does not have access to will. What if they simply say “your honor, he has no family”? What if the objects of the persons’ bounty are the very ones trying to bleed him dry?

Comment [J13]: For how long? How would such a stay be lifted?
THE PARADOX IN MADNESS

- The principal has transferred significant economic power and wealth to a single individual (or entity) that is not bonded or does not have a track record of experience in managing this kind of wealth;
- The instrument does not provide for oversight including checks and balances, either by individuals close to the principal, or by appropriate business or institutional actors with expertise;
- The principal explicitly eliminates family and friends as objects of the principal’s benevolence, or simultaneous termination of loving relationships, either in the instrument itself or by acts of the attorney-in-fact; or
- The document specifically attempts to exclude judicial review of abusive practices.

The law should require that when transferring power to an attorney-in-fact, the principal give informed consent when he transfers power to an attorney-in-fact. In order for such consent to be informed, the principal must be given an opportunity to consult counsel who will solely represent his interests. Many states have adopted a uniform health care power of attorney, an appropriate model to adopt for PDAs, which usually require the principal to list or check and initial every specific power he is giving the attorney-in-fact. An explanation of what such a power entails is also required to ensure that the principal has not simply signed a boilerplate document, but has instead thought about and chosen to grant each power to the attorney-in-fact.

D. Mandatory Alternative Dispute Resolution for Contested Cases

Finally, the law should provide, as a default to be ordered by the court without evidence, mandatory alternative dispute resolution in cases where a naturally interested party contests the
creation of the power of attorney. Such mechanisms would give the principal, or those who care for him, the opportunity to build a trusting community of support around the mentally ill person, which may consist of family, friends, private professionals, and public actors. The restorative circle model, which constitutes a group of friends, family, professionals, and court personnel who work with someone who has created a rupture in the community, usually involving crime, is a possible model for this trusting community. In the restorative circle, members have the duty to hold the individual accountable for his actions and, in this case, for his perception of himself as acting “sanely” in the decisions that he is making. However, they also have the duty to provide support to him to get his life back on track, including identifying resources that they or others can offer in order to shore up deficits in the subject’s ability to lead a productive and contributing life within the community.

Creating such a model, which will demand both government involvement and private volunteers, poses the best chance of taking the current expression of the principal’s interests into consideration, while guarding against overreaching and self-dealing by the attorney-in-fact. Studies have shown that if the principal is surrounded by government actors, as well as those who love him, his being called to responsibility and accountability in a circle of care is more likely to keep him “sane.” At the same time, there will be a larger number of persons who are in a position to judge when he has moved from capacity to incapacity, such that stronger intervention, like a guardianship supervised by a traditional court, is warranted. With a circle, the possibilities that an attorney-in-fact will engage in self-dealing, or even assert his power to

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62 See, e.g., KAY PRANIS, BARRY STUART & MARK WEDGE, PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY 10-14, 34-45 (2003) (discussing process and core values animating restorative circles.)
63 Id. at 10-14, 72-74 (describing process of support and accountability in restorative circles.)
64 See supra note 47 and accompanying text (advocating for greater involvement by the principal as long as practical).
65 Kohn, supra note 34, at 44 n.176 (citing a study showing that greater involvement led to an decrease in depression and increased satisfaction and overall well-being).
re-create the principal’s life in his own image, will be vastly constrained by the perspectives and opinions of others in the circle. At the same time, the possibilities for government oppressive neglect are limited by the oversight and possibility for “push-back” by private actors who better know and care about the principal than government bureaucrats might.