Defining Capacity: the Competing Interests of Autonomy and Need

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DEFINING CAPACITY: BALANCING THE COMPETING INTERESTS OF AUTONOMY AND NEED

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I. INTRODUCTION

This Essay parts company with many of the papers presented at the Symposium in that its focus is not limited to legal issues related to mental illness. Instead, it addresses the larger theme of capacity – the basic threshold determination that pervades all areas of the law. An individual must have the requisite level of capacity to consent to sex, refuse medical treatment, enter into a contract, marry, divorce, relinquish parental rights, execute a will, make a gift,
donate organs, vote, serve on a jury, stand trial, and even to hire a lawyer. The standards regulating determinations of capacity are not monolithic. As a result, an individual may be deemed to lack the capacity to contract, but nonetheless may have the requisite capacity to write a will or to refuse life-sustaining medical treatment. Even an adjudication of plenary incapacity under state guardianship law does not operate as a blanket finding of incapacity, although it will render the ward unable to engage in a wide range of transactions and life decisions.

As individuals, we each have a strong personal interest in how the law separates those of us with capacity from those of us without. The determination of incapacity represents a crucial dividing line between legal subjects and those who are the object of legal protections. On one side are individuals who are not only empowered to act and to make legally binding decisions, but who will be held legally responsible for their actions and decisions. On the other side are those individuals who are deemed to have no agency, no decision-making authority and who are, therefore, held blameless, or at least not responsible, for their actions and decisions.

Even those of us who will never experience debilitating mental illness face the very real possibility of encountering some form of diminished capacity as we age.
Up to 50 percent of all individuals who live to age 85 will exhibit some signs of dementia.\textsuperscript{18} This increased likelihood of diminished capacity has added a new layer to estate planning. It is no longer sufficient to plan for the disposition of a client’s property upon death. A comprehensive estate plan must now include a durable power of attorney to avoid the necessity for guardianship proceedings\textsuperscript{19} and an advance health care directive to preserve client preferences regarding medical treatment.\textsuperscript{20}

As greater numbers of Americans face the specter of end-of-life diminished capacity, the estate planning and elder law bars have advocated legal reforms that are designed to preserve degrees of individual autonomy, such as the adoption of limited guardianships and revisions to Rule 1.14 of the Model Rules of Professional Conduct.\textsuperscript{21} In many ways, these recent reforms can be viewed as a natural outgrowth of the sweeping mental health procedural reforms enacted throughout the 1970s and 1980s. By urging the adoption of “least restrictive alternatives,”\textsuperscript{22} the capacity reforms reflect a similar distrust of the supposedly benevolent exercise of the state’s \textit{parens patriae} authority and seek to restrain state power in favor of individual autonomy.\textsuperscript{23}

The reforms also complement the outsider critique offered by feminism and critical race studies, which has attempted to expose the bias inherent in legal concepts of capacity and expresses a deep skepticism regarding the state’s protective impulse. This outsider critique reminds us of the historical fact that the concept of legal capacity traditionally has been an exclusionary project under which certain classes of individuals were by definition incapable of legal agency.\textsuperscript{24}

Against this backdrop, the recent legal reforms in capacity doctrine can be interpreted as providing important limitations on the power of the state to erode individual autonomy. However, neither the reforms nor their ideological

\textsuperscript{18} Alzheimer’s Disease Education & Referral Center - A Service of the National Institute on Aging available at http://www.alzheimers.org/generalinfo.htm (last visited June 10, 2003).


\textsuperscript{21} For a discussion of guardianship reforms see infra text accompanying notes 89-123. For a discussion of amendments to Rule 1.14 of the Model Rules of Professional Conduct see infra text accompanying notes 124-54.

\textsuperscript{22} For example, the purpose clause of the Pennsylvania Guardianship Reform Act of 1992 provides that the “objectives” of the guardianship provisions should be accomplished “through the use of the least restrictive alternative.” 20 Pa. Consol. Stat. § 5502 (West 2002). For a discussion of the mental health reforms and deinstitutionalization see infra text accompanying notes 82-86.

\textsuperscript{23} See Lawrence A. Frolik, Promoting Judicial Acceptance and Use of Limited Guardianship, 31 Stetson L. Rev. 687, 739 (discussing “wave of guardianship reform in the 1980s and 1990s”). Frolik expresses the commonality as follows: “[j]ust as mental-health laws and practices relied excessively on commitment to mental-health facilities, according to its critics, so also the guardianship system was too dependent on plenary guardianship and failed to seek a ‘less restrictive alternative.’” Id.

\textsuperscript{24} See e.g. Susan Stefan, Silencing the Different Voice: Competence, Feminist Theory and Law, 47 U. Miami L. Rev. 763, 767 (1993) (arguing, \textit{inter alia}, that “the concept of incompetence constructs and perpetuates a false social and legal vision of competent women.”). \textit{Id. at} 767.
antecedents have engaged in any basic examination of the nature of the autonomy interests they purport to champion. This unreflective endorsement of autonomy interests reinscribes a liberal fiction of autonomy that ignores the real-life experiences of a great many (if not all) individuals, regardless of whether they are struggling with a mental disability. This Essay concludes that we should attempt to balance our warranted distrust of the state's benevolent impulse with a more critical view of autonomy.

Part II of this Essay discusses the differing standards of capacity as they exist throughout various areas of the law. Part III examines two instances where recent legal reforms privilege abstract notions of individual autonomy: the revisions to state guardianship laws, including the development of the concept of a limited, as opposed to plenary, guardianship, and the 2002 amendments to Rule 1.14 of the ABA Model Rules of Professional Conduct. Part IV presents the outsider critique of capacity doctrine with an emphasis on the way capacity standards evaluate non-normative life choices and silence marginalized identities and identifications. The Conclusion ends on a cautionary note. It suggests that, despite our best intentions, when we venerate abstract principles of autonomy, we may too easily overlook the reality of need and mistake the ideal of liberty as a synonym for human dignity.

II. THRESHOLDS OF CAPACITY

Every individual of at least 18 years of age is presumed to possess the requisite level of capacity.25 All adult individuals are presumptively able to avail themselves of legal protections, to make legally binding decisions, and to be held responsible for their actions and decisions. This represents a significant equalitarian shift in the law under which certain classes of individuals were historically subject to categorical exclusion.26 Today, lack of capacity must be proven affirmatively, often by clear and convincing evidence.27

This section distinguishes among three different types of standards employed to assess capacity: the separate and discrete levels of capacity which exist throughout the law; the requirements under state guardianship law; and the guidelines applicable to involuntary civil commitments. As noted in the Introduction, the level of capacity required to participate in the legal system often depends upon the type of transaction involved or the nature of the decision-making authority required.28 For example, a finding that an individual lacks capacity to contract does not mean that the individual necessarily lacks testamentary capacity.29 Moreover, a plenary finding of incapacity under a state guardianship law will render the ward legally incapable of entering into a wide range of transactions, but

26. See infra text accompanying notes 155-58.
28. See infra text accompanying notes 32-38 (describing different standards of capacity).
29. The capacity required to execute a will is less than that required to enter into a contract. In Lee v. Lee, a ward executed a will and a deed on the same date. Lee v. Lee, 337 So. 2d 713, 714 (Miss. 1976). The court upheld the will, but invalidated the deed. Id. at 715.
it generally will not affect the ward’s ability to exercise certain core decision-making authority without the need for further findings by the court.30 Finally, an order of involuntary civil commitment will not automatically destroy the right of an individual to refuse medical treatment nor will it give rise to a presumption of incapacity.31

A. The Separate Standards of Capacity

At first glance, the fact that the law does not impose a single and uniform standard of capacity may seem unduly complex, perhaps another example of the all too often untidy evolution of the common law. However, there is a ready functional explanation for the existence of these varying standards: different types of transactions and different types of decisions necessarily entail different consequences. In other words, if the law requires a legal subject to be able to comprehend the consequences of his actions, then the relevant capacity standard should incorporate and reference those consequences. The rules governing testamentary capacity easily illustrate this functional approach to capacity doctrine. In order to execute a will, an individual must be “of sound mind,” that is, he must possess testamentary capacity.32 The legal standard of testamentary capacity disaggregates the necessary elements of any testamentary plan and then incorporates these elements as defining features of testamentary capacity. It requires a three-fold finding that the testator understood the nature of his action, the extent of his property, and his intended disposition.33

The right to refuse medical treatment offers another example of this functional approach to defining capacity. Under Pennsylvania law, an individual has capacity to refuse treatment if he is aware of his physical condition and the likely result of the decision to forego medical treatment.34 Even individuals who are delusional and otherwise suffering from severe mental illness have been found to possess the

30. For example, the Pennsylvania statute provides that a guardian cannot "prohibit the marriage or consent to the divorce of the incapacitated person." 20 Pa. Consol. Stat. § 5521(d)(2) (West 2002). In addition, some courts have upheld wills executed after the testator was declared incapacitated under a general guardianship statute. See e.g. In re Estate of Sorensen, 274 N.W. 2d 694, 697 (Wis. 1979)(upholding a will drafted after testator had been mentally committed).


32. In language identical to that employed by the Uniform Probate Code, Pennsylvania law provides that “[a]n individual 18 or more years of age who is of sound mind may make a will.” 20 Pa. Consol. Stat. §2501 (West 2002). See also U.P.C. § 2-501 (stating who may make a will).

33. In Estate of Reichel, the Pennsylvania Supreme Court formulated the standard as follows:

Testamentary capacity exists when the testator has intelligent knowledge of the natural objects of his or her bounty, the general composition of the estate, and what he or she wants done with it, even if memory is impaired by age or disease, and the testator need not have the ability to conduct business affairs.

Estate of Reichel, 484 Pa. 610, 614 (1979). Testamentary capacity is measured at the time the testator executes the will, as opposed to when the will speaks at the death of the testator. In re Ziel's Estate, 467 Pa. 531 (1976).

34. See In re Duran, 769 A.2d 497, 503 (Pa. Super. 2001)(describing a patient’s right to withdraw consent for medical treatment as dependent on her mental and physical ability to consult with her doctor).
level of understanding necessary to refuse treatment.\textsuperscript{35} As discussed in section B below, an individual who is involuntarily committed because he has been determined to pose a threat to himself or others does not automatically lose the right to refuse medical treatment, even when the medical treatment is designed to address the underlying cause of the commitment.\textsuperscript{36}

When viewed individually through this functional lens, the varying standards of capacity present as logical prerequisites to full participation in the legal system. It no longer appears surprising that an individual may have capacity to refuse medical treatment, but lack capacity to execute a will.\textsuperscript{37} Nor is it surprising that an individual may have capacity to execute a will, but lack sufficient capacity to enter into a typical business transaction.\textsuperscript{38}

When the various standards are viewed together, however, they coalesce to construct a hierarchy or continuum of ever-increasing thresholds of capacity. The choice to refuse medical treatment implicates the lowest threshold of capacity, requiring only that an individual must be oriented with respect to his person and the likely effects of his medical condition.\textsuperscript{39} The highest level of capacity is reserved for entering into a business contract, which requires that the individual manifest an understanding of the outward and undeniably other-regarding nature of his actions.\textsuperscript{40}

Once the separate standards are reconfigured along a continuum, comparisons between and among these standards illustrate a basic tension existing within the capacity doctrine – namely whether the capacity doctrine is designed to preserve individual autonomy or to protect society from the incapacitated individual. For example, a relatively low threshold of capacity may indicate that society more highly values the choice or the act in question and, therefore, wishes to preserve

\textsuperscript{35} See e.g. In re Maida Yetter, 62 Pa. D. & C.2d 619, 624 (1973)(finding woman previously diagnosed with schizophrenia competent to refuse medical treatment where her decision was “informed [and] conscious of the consequences,” notwithstanding that others may find decision “irrational and foolish”). The application of this rule is illustrated by the different results reached in two 1978 cases, both of which involved allegedly incapacitated persons who refused to consent to the amputation of gangrenous feet. In the first case, the court refused to order the amputation, even though there was evidence of mental illness, because the allegedly incapacitated person was aware of the consequences of the refusal to allow treatment. Matter of Quackenbush, 383 A.2d 785, 790 (N.J. Super. 1978). In the second case, the court found that the alleged incapacitated person did not have the capacity to refuse treatment because she did not acknowledge that the likely consequences of her refusal would be death. State Dept. of Human Servs v. Northern, 563 S.W.2d 197, 215 (Tenn. Ct. App. 1978).


\textsuperscript{37} 23 Pa. Consol. Stat. § 1304 (West 2002). See e.g. Hoffman v. Kohns, 385 S.2d 1064, 1069 (Fla. Dist. App. 1980)(finding individual had capacity to marry, but lacked capacity to execute will one day after marriage).

\textsuperscript{38} Testamentary capacity requires a lesser level of capacity than that required for entering into a contract. In re Hastings’ Estate, 479 Pa. 122, 129 (1978).

\textsuperscript{39} See supra text accompanying notes 34-36. In some instances, courts may consider the individual’s dependents. See e.g. Fosmire v. Nicoleau, 75 N.Y.2d 218, 230, 551 N.Y.S.2d 876, 882 (1990)(stating ultimately that right to refuse medical care should not be related to existence of dependents); Crouse Irving Memorial Hospital, Inc v. Paddock, 485 N.Y.S.2d 443, 444 (N.Y. App. Div. 1985)(considering life and health of both mother and baby).

\textsuperscript{40} See supra n. 4 (describing standard of capacity for business transactions).
individual autonomy to the greatest extent possible even for those with obviously diminishing capacity. This would be the case with respect to the very low standard applied to the right to refuse medical treatment. Or, to the contrary, a more stringent standard, such as that applied with respect to business transactions, may indicate that society more highly values the activity and has concluded that individuals with diminished capacity should be excluded from participation.

One possible resolution to this conundrum is found in the liberal construction of autonomy as a limit on state power.\textsuperscript{41} It is arguable that the higher thresholds of capacity required for certain legal actions correspond with the increasingly other-regarding nature of the conduct.\textsuperscript{42} This would explain why refusing medical treatment, executing a will, and entering into a contract require correspondingly higher thresholds of capacity.

At the lowest level, the state will not intrude on an individual’s autonomy with respect to medical decision-making, even where the individual is objectively delusional, because the action in question is self-regarding and, therefore, not an appropriate subject for state intervention.\textsuperscript{43} One step further along the continuum, testamentary capacity requires that an individual exhibit a level of comprehension that extends beyond his person to his assets, but not to the larger transactional universe.\textsuperscript{44} The manner in which an individual disposes of his assets on death will affect third parties only indirectly.\textsuperscript{45} At most, a disappointed heir can complain of a

\textsuperscript{41} See generally John Stuart Mill, On Liberty (Prentice-Hall 1997). Mill described his project as a discussion of "the nature and limits of the power which can be legitimately exercised by society over the individual." Id. at 3. With regard to parens patriae authority, Mill theorized that although the state should endeavor to "guard against accidents," it should not infringe on individual liberty in the process. Id. at 117.

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of motive which may prompt him to incur the risk; in this case, therefore, unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty, he ought, I conceive, to be warned of the danger; not forcibly prevented from exposing himself to it. Id.

\textsuperscript{42} Appealing to "the permanent interests of man as a progressive being," Mill argued that "the subjection of individual spontaneity to external control" was only justified "in respect to those actions of each which concern the interest of other people." Id. at 14.

\textsuperscript{43} See e.g. In re Yetter, 62 Pa. D. & C.2d at 624 (finding a woman previously diagnosed with schizophrenia competent to refuse medical treatment where her decision was "informed [and] conscious of the consequences," notwithstanding that others may find her decision "irrational and foolish").

\textsuperscript{44} See e.g. In re Hastings’ Estate, 479 Pa. At 129 (establishing that testamentary capacity requires lower standard of capacity than business contract).

\textsuperscript{45} A spousal elective share represents a general exception to the notion that a testator is free to dispose of his assets as he sees fit. In all separate property states with the exception of Georgia, a surviving spouse has the right to receive a share of the testator’s estate if the will fails to provide the surviving spouse with an adequate share. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts and Estates 480 n. 1. (6th ed., Aspen L. & Bus. 2000). An adequate share is typically considered to be one-third of the testator’s estate. U.P.C., pt. 2, General Comment (1991).
lost expectancy for which no consideration had changed hands. In the case of a commercial contract, the legitimate investment-backed expectations of third parties are at stake, and therefore, the state imposes a relatively high threshold in recognition of the inherently other-regarding nature of the action.

B. Guardianship v. Involuntary Civil Commitment

Although the appointment of a guardian is often confused with involuntary civil commitment, the two are quite different. Under a guardianship, an individual is declared incapable of engaging in a wide range of transactions and making all but a few significant life decisions. A guardian is appointed to act on behalf of the incapacitated person or ward, and the declaration of incapacity extends until a court finds that the individual has regained capacity. Under an order of involuntary civil commitment, an individual is remanded into psychiatric care against his will for a statutorily limited period of time upon a finding that he represents a clear and present danger to himself and others. Guardianship law is considered an exercise of the state’s parens patriae authority, whereas civil commitment can be more appropriately considered an exercise of the state’s police powers. Finally, involuntary commitment does not necessarily mean that the individual is legally incapacitated without further findings. Likewise, a finding of incapacity does not operate to authorize the guardian to commit the ward to an in-patient psychiatric facility.

Given that a will does not speak until the death of the testator, there is no concern that an unwise testamentary disposition will adversely affect the testator. Mill had particularly harsh words for will challenges:

There is something both contemptible and frightful in the sort of evidence on which, of late years, any person can be judicially declared unfit for the management of his affairs; and after his death, his disposal of his property can be set aside if there is enough of it to pay the expenses of litigation—which are charged on the property itself. All the minute details of his daily life are pried into...

Mill, supra n. 41, at 83.

47. Supra n. 38.

48. Under Pennsylvania law, an incapacitated person is defined as:

[A]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

20 Pa. Consol. Stat. § 5501 (West 2002). Under the 1992 Reform Act, a petitioner must now prove incapacity by clear and convincing evidence. 20 Pa. Consol. Stat. § 5511(a) (West 2002). In addition, the petitioner must show that the incapacity has impaired the individual’s ability to manage his assets or secure his physical well being and that the individual actually needs the protective services offered by a guardianship. 20 Pa. Consol. Stat. § 5511 (West 2002).


51. See O’Sullivan, supra n. 11, at 690 (describing origin of guardianship laws).


53. For example, the Pennsylvania Mental Health Procedures Act specifically provides that “[e]very person who is in treatment shall be entitled to all other rights now or hereafter provided under the laws of this Commonwealth.” 20 Pa. Consol. Stat. § 7113 (West 2001).

1. Guardianship

Guardianship law, as an exercise of parens patriae authority,\(^\text{55}\) can be traced to the statute of De Praerogativa Regis enacted during the reign of Edward II in 1325\(^\text{56}\) under which the sovereign recognized a fiduciary responsibility to safeguard the assets of an individual who had “happen[ed] to fail of his wit.”\(^\text{57}\) In the United States, the parens patriae authority devolved to the states upon independence from Great Britain.\(^\text{58}\) Today guardianship remains a state issue that is typically within the jurisdiction of county probate judges.\(^\text{59}\) Traditionally, there have been two types of guardianships: a guardian of the estate who was responsible for handling the management of the ward’s assets and financial concerns and a guardian of the person who was responsible for making personal life decisions on behalf of the ward regarding his physical well being.\(^\text{60}\) As fiduciaries, guardians are accountable for their actions and, in many jurisdictions, are required to file annual reports with the court detailing their administration.\(^\text{61}\)

Courts are also empowered to appoint emergency or temporary guardians to address a particular situation that has arisen in the life of an alleged incapacitated

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\(^{55}\) See O’Sullivan, supra n. 11, at 690 (describing nature of parens patriae authority).

\(^{56}\) Id. (quoting statute). The statute provides:

   The King shall provide, when any, that before time hath had his wit and memory happen to fail of his wit, as there are many [per lucida intervallo] that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustenance shall be kept to their use, to be delivered unto them when they come to right mind, so that such lands and tenements shall in no wise be alienated, and the King shall take nothing to his own use . . .


\(^{58}\) A frequently cited 1918 decision of the Maryland Supreme Court explains the historical devolution of parens patriae authority as follows:

   In this country after the Revolution, the care and custody of persons of unsound mind, and the possession and control of their estates, which in England belonged to the King as a part of his prerogative, were deemed to be vested in the people, and the courts of equity of the various states have, either by inheritance from the English Courts of Chancery, or by express constitutional or statutory provisions, full and complete jurisdiction over the persons and property of idiots and lunatics . . .

   In this country as has been seen, jurisdiction over the persons and property of the insane is exercised by the courts of equity of the various states as the representatives of the people of the state, and from this general jurisdiction in the absence of statute authorizing any particular court or officer to issue a commission of inquiry, the right to ascertain judicially whether or not a person is of unsound mind is deemed to be impaired.

Bliss v. Bliss, 104 A. 467, 471 (Md. 1918).

\(^{59}\) Under Pennsylvania law, the alleged incapacitated person has the right to request a jury trial. 20 Pa. Consol. Stat. § 777 (West 2002). But see Frolik, supra n. 23 at 735 (stating that “[i]n the great majority of guardianship hearings, there is no jury[.]”)

\(^{60}\) The powers of a guardian of the estate are generally the same as those extended to trustees and personal representatives. See e.g. 20 Pa. Consol. Stat. § 5521(b) (West 2002) (incorporating by reference fiduciary powers extended to personal representatives). The powers of a guardian of the person extend to basic decisions regarding the care, maintenance and custody of the incapacitated person. See e.g. 20 Pa. Consol. Stat. § 5521(a) (West 2002).

person. These guardianships are most often invoked where a quick decision must be made regarding medical treatment, and they are generally of very limited duration. With the exception of emergency guardianships, until recently, a declaration of incapacity was an all or nothing proposition.

As explained in Part III below, guardianship law reforms have introduced the concept of a limited guardianship that is tailored to the ward’s particular circumstances and is designed to preserve the maximum level of autonomy consistent with the ward’s abilities. In addition to the notion of a limited guardianship, statutory reform has increasingly restricted a guardian’s ability to consent to certain types of intrusive or controversial medical procedures and to make certain major life decisions, such as marriage or divorce, without prior court approval. For example, under Pennsylvania law, a guardian does not have the power to consent to participation in an experimental medical procedure or to consent to “an abortion, sterilization, psychosurgery, electroconvulsive therapy or removal of a healthy body organ.”

2. Involuntary Civil Commitment

Involuntary commitment of an individual to an inpatient psychiatric facility is generally controlled by specific statutory procedures that are distinct from guardianship law. The bifurcation of guardianship from commitment proceedings exists in recognition of the particular Due Process concerns implicated with respect to involuntary confinement. The standard for involuntary commitment requires an individual to be mentally ill and to represent a clear and present danger to himself and others. Accordingly, individuals subject to commitment proceedings represent an imperfect subset of the larger class of incapacitated persons.

62. See e.g. 20 Pa. Consol. Stat. § 5513 (West 2002) (providing for appointment of emergency guardian where “failure to make such an appointment will result in irreparable harm to the person or estate of the alleged incapacitated person”).
63. See e.g. id. (providing for appointment of emergency guardian for 72 hours, subject to court extension not to exceed 20 days).
64. See infra text accompanying notes 114-23 (describing limited guardianships).
65. Interestingly, the balance is struck in favor of marriage. The statute provides that a guardian cannot “[p]rohibit the marriage or consent to the divorce of the incapacitated person.” 20 Pa. Consol. Stat. § 5521(d)(2) (West 2002).
69. For example, the “statement of policy” of the Pennsylvania Mental Health Procedures Act provides: “The provisions of this act shall be interpreted in conformity with the principles of due process to make voluntary and involuntary treatment available where the need is great and its absence could result in serious harm to the mentally ill person or to others.” 50 Pa. Consol. Stat. § 7102 (West 2001).
70. See e.g. 50 Pa. Consol. Stat. § 7301(a) (West 2001) (describing person subject to involuntary treatment).
71. By and large individuals subject to involuntary commitment would most likely satisfy the incapacity standard. However, there could be individuals who are capable of managing their resources, but who still might pose a threat to themselves or others. In addition, the bifurcation of guardianship from commitment proceedings can have the effect in many instances of splitting the jurisdiction over an incapacitated person between two different court systems.
The comprehensive mental health reforms enacted throughout the 1970s and 1980s instituted procedural safeguards to protect the Due Process rights of the mentally ill.\footnote{See In re Hutchinson, 500 Pa. 152, 156 (1982)(stating that commitment constitutes deprivation of liberty and must be in accord with due process protections).} In an attempt to balance these interests with the need to provide treatment and secure potentially dangerous individuals, states adopted mental health procedures acts that favored the least restrictive alternatives.\footnote{See generally e.g. the Pennsylvania Mental Health Procedures Act provides: “Treatment on a voluntary basis shall be preferred to involuntary treatment; and in every case, the least restrictions consistent with adequate treatment shall be employed.” 50 Pa. Consol. Stat. § 7305 (West 2001).} These new acts redefined the class of individuals subject to commitment proceedings and severely limited the amount of time an individual could be involuntarily committed to an in-patient psychiatric facility.\footnote{For example, under Pennsylvania law, the initial period of voluntary treatment cannot exceed 90 days. See 50 Pa. Consol. Stat. § 7304(g) (West 2001). Under certain circumstances, however, the court may order an additional period of involuntary treatment for 180 days. See id. § 7305 (West 2001).} The result was the massive deinstitutionalization of the mentally disabled.\footnote{Jefferson D. E. Smith and Steve P. Calandrillo, Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L. C., 24 Harv. J.L. & Pub. Policy 695, 707 (2001). Smith and Calandrillo summarize the process of deinstitutionalization as follows: Political and legal activism led to the deinstitutionalization of large numbers of the mentally ill – particularly of the civilly committed. In response to the clamor for reform, Congress enacted several laws, including the Rehabilitation Act of 1973, to protect various interests of disabled individuals. Advances in psychotropic medications, the development of the community-health-center movement, and litigation brought by mental health advocates and civil rights lawyers contributed to a dramatic reduction in the number of individuals housed by the public mental health system. Since the 1960s, nearly 1.5 million people have been released into community settings. Id.} Under Pennsylvania law, the standard for involuntary commitment involves a two-part determination: an individual must be “severely mentally disabled and in need of treatment”\footnote{Id. An individual is considered to pose a clear and present danger to others if “within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and there is a reasonable probability that such conduct will be repeated.” 50 Pa. Consol. Stat. § 7301(b)(1) (West 2001). An individual is considered to pose a clear and present danger to himself if he has attempted suicide and there exists a “reasonable probability” that he will commit suicide or if he has “mutilated himself” and there exists a “reasonable probability of future mutilation.” 50 Pa. Consol. Stat. § 7301(b)(2)(i), (iii) (West 2001). In addition, an individual can pose a clear and present danger to himself if he is unable to care for himself and “there is a reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days[,]” 50 Pa. Consol. Stat. § 7301(b)(2)(i) (West 2001).} and he must “pose[] a clear and present danger of harm to others or himself.”\footnote{50 Pa. Consol. Stat. § 7304(g) (West 2001).} The Pennsylvania Mental Health Procedures Act (MHPA) specifically excludes “[p]ersons who are mentally retarded, senile, alcoholic, or drug dependent” unless they are also diagnosed “mentally ill.”\footnote{50 Pa. Consol. Stat. § 7301(b)(2)(i) (West 2001).} Under the MHPA an individual is considered “severely mentally disabled” where “as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his own personal needs is so
lessened that he poses a clear and present danger of harm to others or himself.\footnote{79} The initial period of involuntary commitment is limited to 90 days.\footnote{80} Under certain circumstances, the court can approve an additional period of no more than 180 days.\footnote{81}

III. RECENT REFORM EFFORTS

As noted above, recent legal reforms in the area of capacity exhibit the same pervasive distrust of state interference with autonomy interests which animated the sweeping mental health procedure reforms of the 1970s and 1980s.\footnote{82} The public policy shift in favor of the deinstitutionalization of psychiatric patients and the mentally disabled was prompted in part by revelations of shocking abuses and inhuman treatment.\footnote{83} However, the shift was also influenced by a growing intellectual skepticism of psychiatry which posited mental illness as a social construct and therapeutic intervention as a means to impose social conformity.\footnote{84} Under this view, the capacity doctrine, as enforced by the state, represented a threat to individuality. It had the potential to stifle creativity, dissent, and even healthy eccentricity.\footnote{85}

The response was to erect procedural safeguards to make it more difficult to

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80. 50 Pa. Consol. Stat. § 7304(g) (West 2001). Under certain circumstances, an individual may be subject to a period of involuntary emergency treatment. 50 Pa. Consol. Stat. § 7302 (West 2001). The initial emergency treatment period may be extended as long as twenty days. 50 Pa. Consol. Stat. § 7303 (West 2001). In addition, the period of involuntary commitment can be extended to one year if the individual has been charged with a serious crime. 50 Pa. Consol. Stat. § 7304(g)(2)(i) (West 2001).
82. Supra text accompanying notes 72-75 (discussing mental health procedure reforms).
83. See Joanmarie Ilaria Davoli, Still Stuck in the Cuckoo’s Nest: Why Do Courts Continue to Rely on Antiquated Mental Illness Research? 69 Tenn. L. Rev. 987, 999 (2002) (discussing goals of deinstitutionalization). Smith and Calandrillo note that even currently “[i]nstances of abuse and neglect have been documented regarding institutional care. Residents and their families complain of unsanitary conditions, abuse by residents, and neglect by caregivers.” Smith and Calandrillo, supra n. 75, at 703.
84. In The Myth of Mental Illness, Thomas Szasz theorized that the notion of mental illness was a social construct designed to displace religious or moral misappropriation as an organizing feature of society. Thomas S. Szasz, The Myth of Mental Illness: Foundations of a Theory of Personal Conduct (Hoeber-Harper 1961). See also Thomas Szasz, The Myth of Psychotherapy xi (1988) (asserting “that psychotherapeutic interventions are not medical but moral in character and are, therefore, not literal but metaphorical treatments[,]”). In Madness and Civilization, Michel Foucault offered an alternative historiography of mental illness where the creation of mental illness was a necessary corollary for the ascendancy of reason. Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason (trans. Richard Howard, 1988). Referring to the construction of mental illness at the end of the 18th century, Foucault wrote: “Here madness and non-madness, reason and non-reason are inextricably involved: inseparable at the moment when they do not exist, and existing for each other, in relation to each other, in the exchange which separates them.” Id. at x. See also Gary Gutting, Foucault and the History of Madness, The Cambridge Companion to Foucault 48 (Gary Gutting ed., 1994) (noting “that historians are sharply split in their view of the value of Foucault’s work” regarding the history of psychiatry).
85. In popular culture, this view was reflected in Ken Kesey’s bestseller book which was later made into an award-winning movie and play, One Flew Over the Cuckoo’s Nest. Ken Kesey, One Flew Over the Cuckoo’s Nest (Viking Penguin 1977) (motion picture). Davoli argues that this view of mental illness continues to inform judicial decisionmaking. Davoli, supra n. 83, at 1010.
impinge on an individual’s autonomy and, where state interference was necessary, courts were directed to adopt the least restrictive alternatives. The goal was to avoid what Foucault referred to as “the juridical minority assigned to the madman” and to preserve, to the extent possible, some degree of autonomy. The recent reforms in capacity doctrine have adopted the same general goals as the earlier mental health procedural reforms, in that they endeavor to make state intervention more difficult and they jealously guard even diminishing levels of capacity. Like their predecessors, however, the more recent reforms do not interrogate the nature of this zealously protected ideal of individual autonomy nor do they ask whether the ideal they seek to preserve is actually attainable.

A. Guardianship Reforms

The general call for the reform of guardianship law began in the late 1980s after a series of Associated Press articles exposing guardianship abuses. In 1987, a Congressional committee undertook an investigation into guardianship abuses. One year after the House Report concluded that guardianship was the “most severe form of civil deprivation which can be imposed on a citizen of the United States,” the influential Wingspread Conference assembled noted experts on guardianship law and produced a series of recommendations regarding procedural and substantive reforms.

The recommendations for reform included procedural safeguards, greater accountability measures for guardians, and substantive changes regarding the relationship between guardian and ward. Since the Wingspread Conference, many states have made significant changes to their guardianship law and procedures. However, guardianship law continues to vary widely from

86. For example, the purpose clause of the Pennsylvania Guardianship Reform Act of 1992 provides that the “objectives” of the guardianship provisions should be accomplished “through the use of the least restrictive alternative.” 20 Pa. Cons. Stat. § 5502 (West 2002).
87. Foucault, supra n. 84, at 252-53.
88. Frolik notes that the recommendation offered by proponents of guardianship reform “reflected their suspicion, if not antagonism, to guardianship.” Frolik, supra n. 23, at 739.
89. O’Sullivan, supra n. 11, at 694. The Associated Press Special Report investigated 2,200 guardianship cases and concluded that it was a “dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect.” A. Frank Johns and Charles P. Sabatino, Wingspan – the Second National Guardianship Conference, 31 Stetson L. Rev. 573, 576 (2002). See Frolik, supra n. 23, at 739 (discussing guardianship reform movement).
91. Id. at 23032.
92. Johns and Sabatino, supra n. 89, at 573.
94. For example, the Pennsylvania Guardianship Reform Act was enacted in 1992. 20 Pa. Consol.
jurisdiction to jurisdiction. The Uniform Guardianship and Protective Proceedings Act was completed in 1997, but to date it has only been adopted by one state, Colorado.

The overriding goal of the recent guardianship reforms has been to curb the exercise of state power and preserve some level of individual autonomy. Enhanced procedural safeguards and the imposition of a higher threshold for incapacity make it more difficult for an individual to be declared incapacitated, thereby operating as a check on state power. In the interests of preserving zones of autonomy consistent with the perceived abilities of the individual, the creation of limited guardianships removes the all or nothing impact of a declaration of incapacity. Moreover, even a person who is subject to a plenary adjudication of incapacity is directed to continue to participate in certain life decisions.

1. 1992 Guardianship Reform Act

When Pennsylvania substantially revised its guardianship law in 1992, it adopted many of the Wingspread recommendations, including the express provision of Due Process protections. In addition, the revised guardianship law utilized the term “incapacitated person,” rather than “incompetent.” It also increased the threshold necessary to support a finding of incapacity, enhanced the reporting requirements for guardians, and carved out a variety of instances where the guardian must consult the incapacitated person with respect to certain decisions. Perhaps most importantly, it introduced the concept of limited guardianships, which reflects the continuum of capacity standards that can be found throughout all areas of the law.

Under the 1992 Reform Act, a petitioner must now prove incapacity by clear and convincing evidence. In addition, the petitioner must show that the incapacity has impaired the individual’s ability to manage his assets or to secure his physical well being, and the petitioner must show that the allegedly incapacitated

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Stat. § 5501 et seq. (West 2002).
97. *See infra* text accompanying notes 106-109 (discussing new procedural safeguards).
98. *See infra* text accompanying notes 114-123 (discussing limited guardianships).
99. *See infra* text accompanying notes 111-113 (discussing guardians’ obligation to involve ward in certain decisions).
102. Incapacity must be proven by clear and convincing evidence. *Id.* § 5511(a).
103. *Id.* § 5521(c).
104. *Id.* § 5502.
105. *Id.* § 5512.1 (West 2002).
106. *Id.* § 5511(a).
person actually needs the protective services offered by a guardianship.\textsuperscript{107} An incapacitated person is defined as:

\begin{quote}
[A]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.\textsuperscript{108}
\end{quote}

Aside from modernizing earlier language, the most significant change in the 1992 Act is the omission of the “victim of designing persons” standard under which an individual could be declared “incompetent” if it were shown that he was “liable” to “become a victim of designing persons.”\textsuperscript{109}

The stated purpose of the 1992 Reform Act is to “establish[] a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them[.]”\textsuperscript{110} In particular, the Reform Act requires the court to give preference to the alleged incapacitated person’s choice of a guardian.\textsuperscript{111} Once appointed, a guardian of the person is directed to involve the incapacitated person, “to the greatest extent possible,” in a wide variety of decisions concerning the incapacitated person’s well-being.\textsuperscript{112} Specifically, the guardian is directed to “encourage the incapacitated person to participate to the maximum extent of his abilities in all decisions which affect him, to act on his own behalf whenever he is able to do so and to develop or regain, to the maximum extent possible, his capacity to manage his personal affairs.”\textsuperscript{113}

2. Limited Guardianships

The introduction of limited guardianships represents another effort to empower the incapacitated person and to preserve zones of autonomy. Until recently, a guardianship proceeding was an all or nothing proposition and a decree of guardianship would confer plenary powers over the incapacitated person and his estate to the guardian.\textsuperscript{114} Under prior law, the appointment of a guardian could be limited by subject matter to cover either the person or his individual estate. However, the guardian’s power to act on behalf of the ward was plenary, subject to

\begin{flushright}
107. See id. \textit{§} 5511.
108. Id. \textit{§} 5501.
113. Id.
114. There are two distinct types of guardians: a guardian of the estate and a guardian of the person. The powers of a guardian of the estate are generally the same as those extended to trustees and personal representatives. \textit{See e.g. id. \textit{§} 5521(b)(incorporating by reference fiduciary powers extended to personal representatives).} The powers of a guardian of the person extend to basic decisions regarding care, maintenance and custody of the incapacitated person. \textit{See e.g. id. \textit{§} 5521(a).}
\end{flushright}
the few statutory limitations discussed in Part III above concerning intrusive medical procedures. Under a limited guardianship, the partially incapacitated person retains all powers not expressly delegated to the guardian in the court order. The introduction of limited guardianships is consistent with the purpose clause of the 1992 Reform Act, which directs courts to fashion remedies that represent the “least restrictive alternative.”

Although limited guardianships have been available in Pennsylvania for over ten years, commentators suggest that courts and perhaps practitioners are reluctant to use them. This perceived reluctance is in direct opposition to the statutory command that courts favor limited guardianships to plenary guardianships. Indeed, limited guardianships would seem to be appropriate in a variety of presumably common instances. For example, a limited guardian of the estate would be warranted where a partially incapacitated person had the requisite capacity to pay household bills as they come due, but was not able to manage investments. The limited guardianship order could then specifically grant the guardian authority over investment accounts, but the partially incapacitated person could continue to receive social security checks and have access to a basic checking account.

Where an individual’s level of capacity is relatively stable, a limited guardianship seems to strike a desirable balance between the protective impulse and preserving individual autonomy. However, a common objection against the use of limited guardianships is that they are impracticable where an individual is experiencing an increasingly diminishing level of capacity, such as would be the case with an individual suffering from Alzheimer’s disease. The objection is that in such a case a limited guardianship will require successive court filings as the disease progresses.

115. See supra text accompanying notes 66-67 (describing types of medical treatment not authorized without further court order).
117. Id. § 5502.
118. See Frolik, supra n. 23 at 741.
120. In the case of a limited guardian of the estate, the court is directed to “specify the portion of assets or income over which the guardian of the estate is assigned powers and duties.” Id. § 5512.1(d).
121. In the case of a limited guardianship, the partially incapacitated person is deemed to retain all rights not designated by the court. Id. § 5512.1(g).
122. See Frolik, supra n. 23, at 743 (noting inefficiency of limited guardianships which may “require the guardian to return to court for expanded powers if the ward suffers a further decline in capacity”).
123. Although this and other objections regarding limited decrees have certain merit in terms of efficiency, the assessment of incapacity must be determined at the time the individual is before the court. The nature of progressive disease does not so much undermine the efficacy of limited guardianships as it does recommend the creation of springing guardianship powers and close monitoring by the court. Frolik, supra n. 23, at 750. Frolik rejects the view that limited guardianships are not suitable for individuals with declining capacity. Id. at 748. Instead, he argues that in such cases courts “must be ready to amend or expand the power of the limited guardian in response to the changing needs and conditions of the incapacitated person.” Id. at 750.
B. 2002 Amendments to Rule 1.14 of the Model Rules of Professional Conduct

Much like the recent reforms in guardianship law, the 2002 amendments to Rule 1.14 of the ABA Model Rules of Professional Conduct recognize a continuum of capacity and attempt to preserve individual zones of autonomy and decision-making authority.\textsuperscript{124} Rule 1.14 directs that an attorney representing a client with diminishing capacity must maintain a "normal attorney-client relationship to the extent possible."\textsuperscript{125} The 2002 amendments to Rule 1.14 elaborate on this mandatory requirement and clarify the circumstances under which a lawyer may take protective action on behalf of a client with diminishing capacity or take emergency action on behalf of a non-client.\textsuperscript{126} These amendments and the newly expanded commentary once again illustrate the desire to balance liberty interests against the protective impulse.

In order to enter into an attorney-client relationship, the client must possess the requisite level of capacity to conduct ordinary business transactions and must be able to, on some level, participate in the representation.\textsuperscript{127} Once an individual is adjudicated incapacitated, any legal proceedings will be instituted through the guardian and the guardian will have the power to choose legal representation.\textsuperscript{128} Rule 1.14 is designed to provide guidance for a lawyer where an existing client shows signs of diminishing capacity.\textsuperscript{129} It also addresses the circumstances under which a lawyer can seek emergency legal assistance for an individual "with


\textsuperscript{125} ABA Model R. Prof. Conduct 1.14. Although Pennsylvania has adopted the Model Rules, Pennsylvania Model Rule 1.14 is permissive rather than mandatory, providing that "the lawyer \textit{should}, as far as reasonably possible, maintain a normal client lawyer relationship with the client." \textit{Pa. St. R. Prof. Conduct 1.14 (2002)(emphasis added).}

\textsuperscript{126} The 2002 amendments reflected the recommendations of the Ethics 2000 Commission. Love, \textit{supra} note 125, at 443. The ABA House of Delegates adopted them in February 2002. \textit{id.} Love describes the amendments to Rule 1.14 as "further explicating a lawyer’s duties to a client whose capacity to make decisions concerning the representation is diminished by reason of minority or mental disability, or for some other reason." \textit{id.} at 460. A redlined version of Rule 1.14 is available at ABA Center for Professional Responsibility, \textit{Revision to Rule 1.14} at http://www.abanet.org/cpr/e2k-rule114.html (accessed May 28, 2003). In addition, the amendments added subsection (c) to Rule 1.14, which specifically addresses the potential conflict of the confidentiality mandate of Rule 1.6 with the ability of a lawyer to pursue protective action under Rule 1.14. ABA Model R. Prof. Conduct 1.14(c). The new subsection (c) provides: "\[\text{information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is implicitly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.\} \textit{id.}

\textsuperscript{127} Pursuant to Rule 1.2, the client establishes the objectives of the representation, whereas the lawyer is responsible for determining the means of the representation. \textit{id.} at 1.2.

\textsuperscript{128} Pennsylvania Rules of Civil Procedure provide that a guardian or guardian ad litem must represent an incapacitated person in any court proceeding. \textit{See Pa. R. C. P. 2053 (2002). See In re Sigel, 372 Pa. at 531 (incapacitated person must be represented by guardian, not attorney of own choosing).}

\textsuperscript{129} ABA Model R. Prof. Conduct 1.14(a)-(b).
seriously diminished capacity” who is not able to establish an attorney-client relationship.130

At base, the attorney-client relationship is one of principal and agent.131 In delineating the scope of a lawyer’s representation, Rule 1.2 provides that the client determines the objectives of the representation, whereas the lawyer has the discretion to choose the means.132 Central to this principal and agent relationship is the notion of informed consent.133 The lawyer/agent is authorized to act on behalf of the client, provided the client is reasonably informed about the representation. This assumption necessarily breaks down in the case of a client who is acting under some form of disability or incapacity.134

Prior to its amendment in 2002, Rule 1.14 referred to clients who were “disabled” rather than those who exhibited diminished capacity.135 This change in terminology is consistent with the guardianship reforms discussed above where the term “incompetent” has been rejected in favor of “incapacitated.”136 The amendments to Rule 1.14 did not alter its central mandate that:

When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.137

However, the official comments now list factors that a lawyer should take into consideration when attempting to assess capacity and specifically authorize a lawyer to consult “an appropriate diagnostician.”138

The enumerated factors follow the rationale of the separate standards of

130. ABA Model R. Prof. Conduct 1.14 cmt. 9-10.
131. See Peyton v. Margiotti, 398 Pa. 86, 92 (1959) (referring to attorney and client as example of agent and principal relationship).
132. ABA Model R. Prof. Conduct 1.2.
133. For a discussion of revisions to the Model Rules regarding “informed consent” see Love, supra n. 125, at 445.
134. Comment 1 notes: The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects.
135. See Love, supra n. 125, at 460 (noting that “diminished capacity” is substituted for “disability” throughout the rule).
136. ABA Model R. Prof. Conduct 1.14 cmt. 1.
138. ABA Model R. Prof. Conduct 1.14 cmt. 6. The Comment provides: In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. The Comment concludes that “[i]n appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.”
capacity discussed in Part II. A. They ask the lawyer to consider whether the client understands the consequences of a particular decision and whether the client can "articulate reasoning leading to a decision."\textsuperscript{139} The factors, however, also authorize the lawyer to base his evaluation of his client’s level of capacity, at least in part, on the lawyer’s past dealings with the client and the lawyer’s opinion regarding the correctness of the client’s decision.\textsuperscript{140} For example, unlike the separate standards of capacity, which focus on isolated incidents, Comment 6 of Rule 1.14 directs the lawyer to consider whether the decision is consistent "with the known long-term commitments and values of the client."\textsuperscript{141} Moreover, the lawyer is directed to consider "the substantive fairness of a decision."\textsuperscript{142}

Subparagraph (b) of prior Rule 1.14 authorized a lawyer to seek the appointment of a guardian or take other protective action "only when the lawyer believes that the client cannot adequately act in the client’s own interest."\textsuperscript{143} The amended Rule 1.14 is more specific regarding when a lawyer is permitted to take protective action.\textsuperscript{144} Under the prior version of Rule 1.14, the direction with respect to permissible protective action was limited only by the requirement that the lawyer "reasonably believe[] that the client cannot act in the client’s own interest."\textsuperscript{145} As amended, Rule 1.14 adds two distinct requirements in addition to the more general requirement that the lawyer reasonably believes that the client "cannot adequately act in the client’s own interest."\textsuperscript{146} First, the lawyer must "reasonably believe[] that the client has diminished capacity," as described more fully in the new Comment 6.\textsuperscript{147} Second, the lawyer must reasonably believe that the client "is at risk of substantial physical, financial or other harm unless action is taken."\textsuperscript{148}

As expressed in the new Comment 5, the lawyer should be guided by "the goals of intruding into the client’s decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections."\textsuperscript{149} In this regard, the amended Rule 1.14 appears one step ahead of the guardianship law reforms in that it recognizes that an allegedly incapacitated person is not simply a previously autonomous legal subject, but an individual who

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. Presumably, the inclusion of the modifier "known" limits the ability of the lawyer to speculate regarding the "long-term commitments and values of the client." Id.
\textsuperscript{142} Id.
\textsuperscript{144} The amendments incorporate many of the views expressed in ABA Formal Opinion 96-404, which provided guidance regarding under what circumstances a lawyer could take protective action. However, the amendments did not incorporate the conclusion reached in ABA Formal Opinion 96-404 that "the action taken should be the least restrictive of the client’s autonomy that will yet adequately protect the client in connection with the representation." Id. The Ethics 2000 Commission rejected a similar requirement and did not include it in its formal recommendations. \textit{Love}, supra n. 125, at 461.
\textsuperscript{146} ABA Model R. Prof. Conduct 1.14(b)(emphasis added).
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} ABA Model R. Prof. Conduct 1.14 cmt. 5.
most likely has social, community, and familial relationships that he values. The Model Rules thus conceptualize the autonomous client as inextricably contextualized – as connected to others. New subsection (c) of Rule 1.14 provides that a lawyer is “impliedly authorized” to disclose client information to third parties “to the extent that it is reasonably necessary to protect the client’s interests.”

Finally, the 2002 amendments clarify the distinction between taking protective action with regard to an existing client and providing emergency legal assistance to an individual with “seriously diminished capacity” with whom the lawyer is not able to establish a lawyer-client relationship. Emergency legal assistance is authorized only where the individual “is threatened with imminent and irreparable harm.” In the interests of preserving autonomy, a lawyer who provides such emergency legal assistance is directed to act with respect to the individual “as if dealing with a client,” despite the fact that the individual exhibits “seriously diminished capacity.”

IV. THE OUTSIDER CRITIQUE OF CAPACITY DOCTRINE

Today, every individual 18 years or older is presumed to possess legal capacity. Historically, however, the presumption of capacity was reserved for certain classes of individuals. The life-denying system of racial slavery reduced individuals to property. Married women were unable to own property under the common law doctrine of coverture. More recently, the mentally ill and mentally retarded were subject to indefinite involuntary commitment without Due Process protections.

This historical exclusion of entire categories of individuals from participation in the legal system has left an enduring legacy of institutionalized inequality that decades of civil rights initiatives have yet to displace. It also provides the starting point for an outsider critique of capacity doctrine, which endeavors to expose the purportedly neutral standard of capacity as an unexamined assumption that is coded as white, male, and able bodied. Pursuant to this critique, the farther an alleged

150. ABA Formal Opinion 96-404 specifically addressed the extent to which a lawyer could consult with family members consistent with the demands of client confidentiality as mandated by Rule 1.6. ABA For. Op. 96-404 (1996).
151. ABA Model R. Prof. Conduct 1.14(c).
152. ABA Model R. Prof. Conduct 1.14 cmt. 9-10.
153. ABA Model R. Prof. Conduct 1.14 cmt. 9.
154. ABA Model R. Prof. Conduct 1.14 cmt. 9-10. In particular, Comment 10 directs that “[a] lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client[.]” ABA Model R. Prof. Conduct 1.14 cmt. 10.
158. For a discussion of the process of deinstitutionalization, see Smith and Calandrillo, supra n. 75.
159. This default setting presumes an individual who is capable of rational decision making, whereas
incapacitated person falls from this highly normative view of capacity, the more likely it is that the individual will be found to lack capacity.\footnote{160} A supposedly neutral finding of incapacity can be driven by bias and used instrumentally by a court or a family member or a state institution to insure that the individual in question behaves in a prescribed manner.\footnote{161}

This section discusses two particular instances where the capacity doctrine may work to disfavor historically marginalized groups.\footnote{162} First, assessing capacity often entails evaluating the reasonableness of an individual’s decisions, as well as the individual’s ability to engage in a deliberative decision-making process.\footnote{163} The value a court places on a given decision, therefore, may influence or even determine whether the court views the decision in question as evidence of incapacity. Second, in the case of an individual with diminishing or questionable capacity, a court may be reluctant to validate the individual’s identity where that identity and its attendant life choices are contested or deemed controversial by the individual’s family. In this way, a finding of incapacity not only denies autonomy, but also silences identity.

The outsider critique makes explicit the strong normative thrust of the \textit{parens patriae} authority and sounds an important alarm with respect to the vulnerability of outsiders when measured against a falsely neutral standard.\footnote{164} In the end, however, it leaves in place the liberal fiction of autonomy for those least likely to achieve it.

\textit{A. Evaluating Choices}

Determinations of incapacity under the separate standards, guardianship law, and Model Rule 1.14, all take into account the ability of the individual to arrive at reasoned decisions and be aware of their consequences.\footnote{165} It is arguably difficult,

outsiders have traditionally been defined in opposition to this white, male, and able-bodied rational decision maker. \textit{See} Stefan, \textit{supra} n. 24, at 772 (noting that “[w]omen have long been portrayed and perceived as irrational, as incapable of objectivity or of engaging in reasoned decisionmaking[.]”).

\footnote{160} This would be particularly true for individuals with intersecting minority identifications, those living in poverty, or those struggling with mental illness or other physical disability.

\footnote{161} The belief that findings of incapacity may be used as a means of social control echoes the intellectual distrust of psychiatry discussed in Part III, but it differs importantly with regard to perspective. The earlier intellectual distrust of the state’s benevolent impulse identified a majority member non-conformist whose rights to free speech and expression would be curtailed in the interests of conformity. The outsider critique does not have the luxury of starting from the perspective of a legal subject, rather it identifies clearly with historically marginalized groups and those exercising non-normative life choices.

\footnote{162} Both instances are presented from the perspective of individuals in same-sex relationships. Until 1973 homosexuality was classified as a mental illness. \textit{See generally} Nancy J. Knauer, \textit{Science, Identity and the Construction of the Gay Political Narrative}, 12 L. & Sexuality 1 (2003).

\footnote{163} For example, Comment 6 to Rule 1.14 provides that “[i]n determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision . . . the substantive fairness of a decision[,]” ABA Model R. Prof. Conduct 1.14 cmt.6.

\footnote{164} On this point, Stefan concludes: “women do figure disproportionately high among those who are found incompetent, while men figure disproportionately high among guardians. In addition, the values of objectivity, distance and self-interest embedded in concepts of rational decisionmaking and rational outcomes probably work against women in competence hearings.” Stefan, \textit{supra} n. 24, at 776.

\footnote{165} For example, Comment 6 to Rule 1.14 provides that the lawyer should consider “the client’s
however, to evaluate the quality of an individual’s decision-making process without also considering the quality and social desirability of the decision ultimately reached.  

For example, feminist scholars have suggested that courts are more willing to find a woman has the requisite capacity to relinquish her parental rights than to find that a woman has the capacity to consent to sex because the former choice is the one the law and society values. In this way, capacity has the potential to become the ultimate self-fulfilling doctrine: those who exercise approved choices have capacity, whereas those who exercise socially undesirable choices lack capacity.

The area of testamentary capacity provides a clear example of the extent to which a non-normative choice can presage a finding of incapacity. Although courts traditionally have gone to great lengths to disclaim that mere eccentricity or foibles are necessarily indicative of lack of capacity, in some instances, a non-traditional disposition may be sufficient to bring into question the capacity of the testator. In other words, a non-traditional disposition may be perceived as so outside the realm of the plausible that the nature of the disposition may suggest that the testator was not of “sound mind.”

This presents an unenviable Catch-22 for same-sex partners. A surviving same-sex partner qualifies as an intestate heir in only a small handful of states. Accordingly, an individual must name his same-sex partner as a beneficiary of his will in order to secure property and other decision-making rights for his surviving partner. However, the very fact that the testator designates his same-sex partner,

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ability to articulate reasoning leading to a decision.” ABA Model R. Prof. Conduct 1.14 cmt. 6.

166. Comment 6 to Rule 1.14 acknowledges this and invites the lawyer to consider “the substantive fairness of a decision” when evaluating capacity. Id.

167. Stefan, supra n. 25, at 775.

168. Stefan notes that “[f]ar from being an internal characteristic of an individual, competence is a value judgment arising from an individual’s conversation or communication with individuals in positions of power or authority.” Id. at 766.

169. In re Estate of Wright, the court upheld the testamentary disposition of an individual known for objectively bizarre behavior. 60 P.2d 434, 438 (Cal. 1936). The court noted: “[t]estamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act.” Id.

170. For example, in the case of a will which names a surviving same-sex partner as a beneficiary, the decedent’s surviving intestate heirs automatically have standing to contest the will because they would stand to benefit under intestate laws if the will were set aside.

171. Pennsylvania law provides that “An individual 18 or more years of age who is of sound mind may make a will.” 20 Pa. Consol. Stat. § 2501. See also Unif. Prob. Code § 2-501 (stating who may make a will).


174. In addition to providing for the distribution of the testator’s property, a will appoints an executor who, acting in a fiduciary capacity, is responsible for safeguarding and distributing the estate and who
as opposed to a member of his biological or adopted family, may signal a lack of capacity or the existence of undue influence.

As explained in Part II. A., the standard for testamentary capacity is relatively low. A testator must be aware of the nature of his action, the extent of his assets, and his intended disposition.\(^\text{175}\) Although during the first wave of the HIV/AIDS epidemic, commentators noted an increase in family challenges of the wills of gay men on the grounds of lack of mental capacity,\(^\text{176}\) the related doctrine of undue influence represents the more likely way that disappointed family members would challenge a will benefitting a surviving same-sex partner.\(^\text{177}\) Indeed, the doctrine of undue influence is in many ways tailor-made to invalidate wills which favor non-marital romantic partners.\(^\text{178}\)

Undue influence is similar to the "victim of designing persons" standard that was once frequently used to justify findings of plenary incapacity prior to the recent guardianship reforms.\(^\text{179}\) With regard to testamentary dispositions, undue influence exists where a beneficiary induces the testator to favor that beneficiary over the testator's intestate heirs whom the law considers the natural objects of the testator's bounty.\(^\text{180}\) A court will set aside a will that is the result of undue influence because it does not represent the true intent of the testator. The beneficiary is said to have substituted his will for that of the testator. In some jurisdictions, undue influence is easier to prove where the beneficiary and the testator were in a "confidential relationship," as would be the case with a same-sex partner.\(^\text{181}\) Upon a showing of a confidential relationship, the burden can shift to the proponent of the will to prove


175. Under Pennsylvania law, the testator must have understood the nature of the act, the extent of his property, and his intended disposition. Estate of Reichel, 484 Pa. 610, 614 (1979). This traditional common law standard included a finding that the testator also knew the "natural objects of his bounty," thereby introducing the strong normative force of the rules of intestate succession.

176. Thomas J. Maier, AIDS Victims' Bitter Legacy: Lovers and Relatives Battle for Estates in Disputes Over Wills, Newsday, Oct. 2 1988, at 4 (noting number of will challenges was increasing).

177. Knauer, supra n. 172, at 46.

178. There are no reliable statistics regarding the frequency with which next of kin contest wills primarily benefit surviving same-sex partners. Gary Spitko notes "[t]here is some evidence that gay men and lesbians who exercise their donative freedom to execute a will in a non-probate means to transfer their estate to their same-sex partner at their death are more likely than those in a non-gay relationship to have their donative intent disregarded by the trier of fact in a challenge to their estate plan." E. Gary Spitko, The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion, 41 Ariz. L. Rev. 1063, 1075 (Winter 1999).

179. Recent reforms in guardianship laws have largely discredited the "victim of designing persons" standard. 20 Pa. Consol. Stat. § 5501 (repealed). However, it continues to exist in other areas of the law. For example, under Pennsylvania law, individuals who are "weak minded, insane [or] of unsound mind" are ineligible to marry without court approval. 23 Pa. Consol. Stat. § 1304.


181. A confidential relationship can include an attorney-client or other fiduciary relationship, as well as any non-marital sexual or romantic relationship.
the absence of undue influence. The surviving same-sex partner is then faced with the task of proving that he did not influence the testator’s disposition.

B. Silencing Identities

As discussed above, in the case of the relinquishment of parental rights or a non-normative testamentary disposition, the value attached to the choice in question may very well foretell whether the choice will be respected or invalidated for lack of capacity. In a broader sense, a finding of plenary incapacity can operate to silence non-normative identities when the ward is subsumed under the protective and authoritative care of the court-appointed guardian. The seven-year legal ordeal of Sharon Kowalski and Karen Thompson illustrates the fragility of same-sex relationships when faced with the strongly normative and ostensibly benevolent authority exercised by the state within the context of guardianship proceedings.

In 1983, the car Kowalski was driving was struck by a drunk driver and she suffered brain stem damage leaving her paralyzed and with short-term memory loss. At the time of Kowalski’s accident, she and Thompson had lived together for four years in a home they had bought jointly. They had exchanged rings in a private commitment ceremony, but they had not told their parents about the nature of their relationship.

After the accident, Thompson informed Kowalski’s parents that she and Kowalski were partners, but the parents refused to believe Thompson and accused her of lying. Thompson petitioned to be appointed Kowalski’s guardian in 1984. Kowalski’s father cross-petitioned and the probate court declared Kowalski incapacitated and appointed her father, Donald Kowalski, as guardian. The probate court directed Donald Kowalski to “consider, regarding all visitation decisions, that the primary consideration is the best interest of the ward and any reliably expressed wishes of the ward[.]” Despite this admonition, he terminated Thompson’s visitation rights immediately.

Thompson appealed to the Minnesota Court of Appeals. The appellate court upheld the probate court’s decision. Specifically, it rejected Thompson’s

182. See e.g. Estate of Reichel, 484 Pa. at 614 (holding that after clear and convincing showing of confidential relationship, burden shifts to proponent to disprove undue influence, provided certain other requirements are satisfied).
185. Id.
186. Id.
187. In an interview, Mr. Kowalski stated that his daughter “never gave us any indication” that she was gay. Id.
188. In re Guardianship of Kowalski, 382 N.W.2d 861, 863 (Minn. App. 1986).
189. Id.
190. Id. at 864.
191. Nadine Brozan, Woman’s Hospital Visit Marks Gay Rights Fight, N.Y. Times, D25 (Feb. 8, 1989). This included the ability to communicate with Kowalski by mail. Id.
192. Kowalski, 382 N.W.2d at 864.
193. Id.
characterization of the relationship. The court found that visits from Thompson left Kowalski depressed and therefore, were contrary to the "quietude" that was an essential part of the ward's treatment. In the first instance, the court refused to acknowledge the force of the closet and found it incredible that a daughter would not tell her parents she was gay. In the second, the court failed to concede that the fact that Kowalski was depressed at the conclusion of Thompson's visits simply underscored the strength of their relationship. A doctor who testified for the Kowalskis warned the court that "visits by Karen Thompson... would expose Sharon Kowalski to a high risk of sexual abuse."

As a result of this ruling and the grant of guardianship to Kowalski's father, Thompson was not permitted to visit or speak with Kowalski for three and a half years. After visitation was restored in 1989, it took Thompson two more years to be appointed as Kowalski's guardian, even though, when asked, Kowalski would express her preference for Thompson and her desire to live with Thompson. By the time of the final court proceedings in 1991, the Kowalski case had become a cause celebre for gay rights and the rights of the disabled. The probate court resisted Thompson's appointment to the end, appointing sua sponte a supposedly neutral third party in lieu of Thompson. On appeal, the Minnesota Court of Appeals held that the probate court abused its discretion by ignoring Kowalski's expressed preference and the uncontroverted medical testimony that Thompson was the most suitable guardian. After seven years of litigation, a court was finally willing to find that Kowalski had sufficient capacity to express her wish to name Thompson as her guardian consistent with Minnesota law. The court found that "[a]ll the medical testimony established that Sharon has the capacity reliably to express a preference in this case, and she has clearly chosen to return home with

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194. The court concluded:

The relationship between Sharon Kowalski and Karen Thompson is uncertain. They had been roommates for four years prior to the accident, had exchanged rings, and had named each other as beneficiary in their life insurance policies. Prior to the accident, Sharon had closed their joint bank account and had also told her sister she was considering moving to Colorado or moving home and that Karen Thompson was becoming very possessive. Karen Thompson claims a lesbian relationship with Sharon Kowalski. Sharon never told her family of such a relationship or admitted it prior to the accident.

Id. at 863.

195. Id. at 866. The court noted:

Quietude is essential to a patient's recovery or improvement and in the patient's best interest. The record indicates certain visitation has an unsettling effect on the ward. A pattern has developed indicating Thompson's visits may produce significant responses from the ward, but the ward regularly experiences depression and moodiness following Thompson's visits.

Id.

196. Brozan, supra n. 184.
197. Brozan, supra n. 191.
198. Id.
199. Id.


201. Kowalski, 478 N.W.2d at 797.
Thompson if possible." As Thompson’s lawyer explained, “Sharon doesn’t have the short-term memory to remember what happened an hour ago, but she does remember [Thompson] and the past, and that she is a lesbian.”

V. CONCLUSION

Capacity is the threshold requirement for participation in the legal system. The standards for determining capacity vary depending upon the nature of the decision-making authority required. However, when an individual lacks capacity, he is not only excluded from participation, he may become the subject of certain legal proceedings, such as the appointment of a guardian and involuntary commitment. Reforms in the areas of guardianship law and involuntary commitment reflect a pervasive distrust of state interference with individual autonomy interests. To maximize individual autonomy, these reforms have generally imposed procedural safeguards and mandated the adoption of least restrictive alternatives.

The outsider critique of the capacity doctrine illustrates that the doctrine rests on a falsely neutral standard. As a result, historically marginalized groups are particularly vulnerable to allegations of incapacity. They may have decisions set aside because their choices do not conform with the court’s unstated value system. In addition, such individuals may find their non-normative identities disregarded or ignored.

Both the mainstream reform movement and the outsider critique advance important cautions with respect to the capacity doctrine. Not only is the construct of capacity a powerful tool of the state, but it disadvantages outsiders by measuring them against a supposedly neutral model that is coded to reflect majority interests and values. However, the resulting pervasive distrust of the capacity doctrine can induce clients, lawyers, families, and judges to privilege the preservation of individual autonomy over the satisfaction of basic human needs, such as food, shelter, and health care. In such case, we run the risk of attempting to preserve a legal fiction at the expense of the safety and dignity of some of the most vulnerable individuals in society -- those struggling with mental illnesses.

203. Kowalski, 478 N.W.2d at 797.
204. Lewin, supra n. 183.