

CRPD Article 12 and the Alternative to Functional Capacity: Preliminary Thoughts towards Transformation

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0. Prologue

This is written as a philosophical and legal essay. It assumes some familiarity with Article 12 of the Convention on the Rights of Persons with Disabilities, which can be along with related materials at <http://www.un.org/disabilities/default.asp?navid=14&pid=150> and at <http://www.ohchr.org/EN/Issues/Disability/Pages/DisabilityIndex.aspx>. For those who are unfamiliar with the CPRD, Article 12 is copied below, as well as selected Concluding Observations of the Committee on the Rights of Persons with Disabilities, a body that is designated under the CRPD to interpret and apply the treaty.¹ Following that is my introductory note on interpretive issues and on the purpose of this essay.

Article 12

Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the

¹ I have chosen the Concluding Observations on Spain, Hungary and China to illustrate the Committee's approach. The CO on Spain was the first time the Committee used the formulation, "replace substituted decision-making by supported decision-making, which respects the person's autonomy, will and preferences." This encapsulated the core requirements of Article 12 and has been used in all subsequent Concluding Observations. The CO on Hungary was the first to establish that legal capacity includes the right, on one's own, to make decisions in particular areas of life such as free and informed consent to medical treatment. The CO on China established a skeleton version of what is necessary for implementation in a legal system, particularly with reference to 12.3 and 12.4, the premise of universal legal capacity, and the relationship of support to accommodation. The CRPD Committee has recently issued a draft General Comment on Article 12, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>. As I have not made a comprehensive analysis of the draft yet, I do not excerpt it here, but will cite it where relevant.

person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

From Committee on the Rights of Persons with Disabilities, Concluding Observations on Spain (U.N. Doc. CRPD/C/ESP/CO/1, 2011):

34. The Committee recommends that the State party review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences. It further recommends that training be provided on this issue to all relevant public officials and other stakeholders.

From Committee on the Rights of Persons with Disabilities, Concluding Observations on Hungary (U.N. Doc. CRPD/C/HUN/CO/1, 27 September 2012):

26. The Committee recommends that the State party use effectively the current review process of its Civil Code and related laws to take immediate steps to derogate guardianship in order to move from substitute decision-making to supported decision-making, which respects the person's autonomy, will and preferences and is in full conformity with article 12 of the Convention, including with respect to the individual's right, on their own, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work, and to choose their place of residence. The Committee further recommends the State party to provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges, and social workers on the recognition of the legal capacity of persons with disabilities and on mechanisms of supported decision-making.

From Committee on the Rights of Persons with Disabilities, Concluding Observations on China (U.N. Doc. CRPD/C/CHN/CO/1, 27 September 2012):

22. The Committee urges the state party to adopt measures to repeal the laws, policies and practices which permit guardianship and trusteeship for adults and take legislative action to replace regimes of substituted decision-making by supported decision making, which respects the person's autonomy, will and preferences, in the exercise of one's legal capacity in accordance with Article 12 of the CRPD. In addition, the Committee recommends the state party in consultation with DPOs to, prepare a blueprint for a system of supported decision-making, and legislate and implement it which includes:

- a) Recognition of all persons' legal capacity and right to exercise it;
- b) Accommodations and access to support where necessary to exercise legal capacity;
- c) Regulations to ensure that support respects the person's autonomy, will and preferences and establishment of feedback mechanisms to ensure that support is meeting the person's needs;
- d) Arrangements for the promotion and establishment of supported decision-making.

1. Introduction

In this essay I am using an interpretation of Article 12 similar to that of the Committee on the Rights of Persons with Disabilities (in the Concluding Observations quoted above). Guardianship and other forms of substituted decision-making are incompatible with Article 12, and such mechanisms have to be replaced by supported decision-making, which respects the person's autonomy, will and preferences. This interpretation gives precedence to the guarantee of equal legal capacity in all aspects of life in 12.2 and treats the requirement that measures respect the will and preferences of the person as the core element of 12.4, setting aside aspects of the safeguards provision that do not fit well with an inclusive system of legal capacity that replaces all forms of substituted decision-making with support that respects individual autonomy.² It is a reading of Article 12 that most fully gives effect to the purpose of the CRPD to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities" (CRPD Article 1) and to the principles of the Convention, most importantly "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons" (Article 3a). It is also the reading that most faithfully reflects the contributions made by organizations of persons with disabilities to the drafting and negotiation of Article 12.

Legal capacity can be deprived in two ways. A person is assigned the status of a legally incapable person (usually by a formal proceeding in which a guardian is also appointed). Or, a person is denied validity in their exercise of autonomy, particularly in relation to formal legal acts or areas of life where the person's consent is ordinarily required. The second type of legal capacity deprivation is sometimes rationalized as not being about legal capacity but rather as operation of the doctrine of "mental capacity" or "functional capacity." This is nonsense.³ Without an acknowledgement that legal capacity is validly exercised through the person's own voluntary acts, there is no equality in the enjoyment of legal capacity (as required by Article 12.2). This is true whether there is a blanket deprivation over a long period of time, or whether it only applies to a single act, and

² The draft General Comment supports this approach (paragraph 18).

³ The draft General Comment on Article 12 states that mental capacity, defined as a person's decision-making abilities, cannot be a basis for deprivation of legal capacity (paragraphs 12-13).

whether the deprivation is pursuant to a court adjudication or is only the determination of a notary, banker or doctor that the person “lacks capacity” to make a particular decision.

“Functional capacity” as a way to retain the binary system of legal capacity/incapacity has a definite adverse impact on people with psychosocial disabilities, most significantly as a rationalization for forced psychiatric interventions (which amount to ill-treatment and arguably to torture, and should be subject to an absolute ban, according to the Special Rapporteur on Torture⁴), as well as with respect to the insanity defense or criminal unimputability. In this essay I explore the philosophical underpinnings supporting a thorough and complete rejection of the “functional capacity” doctrine and of all deprivations of legal capacity, examining key issues from a psychosocial disability perspective.

2. Exploring constructs related to legal capacity from a psychosocial disability perspective: Legal personhood and responsibility

Inclusive legal capacity as set out in CRPD Article 12 is more than anything else a pragmatic construct that is demanded by the lived experience of persons with disabilities.⁵ In creating a norm of international law that ensures the right to individual self-determination, operationalized as a right to enjoy legal capacity and to have the support needed in exercising it, Article 12 almost inadvertently sets out a puzzle that challenges us all to develop new philosophical and conceptual frameworks in order to put the new paradigm into practice.

It has been said that Article 12 confronts the question of personhood and shifts from a rationality-based idea of the person to a more holistic one that more accurately reflects human reality.⁶ No one actually moves through the world operating only through the faculty of reason; without emotion, reason is mechanistic and superficial. However, the use of reason to construct a norm of personhood has a nuance that has been insufficiently explored and that is relevant to discrimination against people with psychosocial disabilities, who do not lack cognitive abilities and who may experience a heightened

⁴ See Report of the Special Rapporteur on Torture, U.N. Doc. A/HRC/22/53, 1 February 2013, paragraphs 81 and 89(b).

⁵ See materials in Negotiation Archives from World Network of Users and Survivors of Psychiatry and the International Disability Caucus, <http://www.un.org/disabilities/default.asp?id=1423> and additional materials available at <http://www.wnusp.net> and <http://www.chrusp.org>.

⁶ Gerard Quinn with Anna Arnstein-Kerslake, Restoring the ‘Human’ in Human Rights – Personhood and Doctrinal Innovation in the UN Disability Convention, in *The Cambridge Companion to Human Rights Law*, Conor Gearty and Costas Douzinas (eds.) (Cambridge University Press, 2013); see also Legal Opinion on Article 12 of the CRPD, <http://disability-studies.leeds.ac.uk/files/library/legal-opinion-LegalOpinion-Art12-FINAL.pdf>; and Amita Dhanda, WNUSP Advocacy Note on Legal Capacity, http://www2.ohchr.org/SPdocs/CRPD/DGD21102009/WNUSP_Legal_Capacity.doc.

emphasis on reason despite the stereotype of madness as irrational. It is not actually a construct of reasoning ability alone that is in play in legal doctrine, but a construct of reason as ability to regulate emotion and to exercise self-control – a construct of reason as the faculty that allows a person to govern and subordinate other aspects of human existence as may be socially required. That is to say, it is not only a person’s (apparent) cognitive capabilities that have been treated as grounds for deprivation of legal capacity, but also a person’s (apparent) ability to exercise judgment in ways that seem familiar to the social mainstream, and to relate oneself to social norms.⁷ Capacity in this sense explicitly enters the law in concepts related to responsibility, such as the concept of “discernment” as a requisite for upholding a person’s contractual obligations or for accepting as valid an exercise of free and informed consent or execution of a legal instrument, as well as the insanity defense or the related doctrine of unimputability under which a person is held to have been incapable of understanding the nature of the act or of conforming one’s conduct to the requirements of law.⁸

This, albeit more nuanced, concept of personhood as a human being who interacts among others exercising judgment in a way that can be appreciated or apprehended by the social mainstream, is the one that persons with psychosocial disabilities fail to meet, and that must be interrogated in order to truly root out the discriminatory aspects of legal incapacity and move entirely to a regime of inclusive legal capacity.⁹ As long as “support in exercising legal capacity” is treated as a panacea without examining and confronting issues of responsibility, there will be both resistance to the new paradigm and an inability to fully imagine it. I will return to the issue of responsibility, and the related issues of worldview and mutuality in social relationships, as this paper progresses.

3. Exploring constructs related to legal capacity from a psychosocial disability (and feminist) perspective: Interdependence
 - a. Theoretical

A second and related philosophical construct that Article 12 brings to the forefront, and that needs to be interrogated from a psychosocial disability perspective, is the question of independence versus interdependence. The supported decision-making paradigm is said to be based on an appreciation of natural human interdependence and a determination to

⁷ I emphasize “apparent” since it is not possible for any person to directly know another person’s mental abilities. Assessment of those abilities is always conditioned by the social context and differences in worldview among parties to the interaction. Differences in worldview interact at multiple levels, including worldview with respect to the meaning of such differences and with respect to the nature and value of “assessment of capabilities” as a social interaction. Worldview is discussed further below.

⁸ See Office of the High Commissioner for Human Rights, Thematic Study on CRPD, UN Doc. A/HRC/10/48, 26 January 2009, paragraph 47.

⁹ See Tina Minkowitz, Norms and Implementation of CRPD Article 12 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2037452 for an equality-based framework for implementation of Article 12.

include and embrace persons with disabilities in this natural social condition from which they have been excluded. There are issues with this framing of interdependence as a natural condition from a gender perspective, since it has traditionally been females who do the work of interdependence while males reap much of the benefit, and this disparity must be addressed not only to properly deal with the creation of systems for support in decision-making, but also to deal with the overall paradigm of disability rights that has been applied in Article 12, that is, the notion that social solidarity must be called upon to secure individual autonomy. (There is a precursor to this concept in Article 22 of the Universal Declaration of Human Rights, which treats “free development of the personality” as the end to be secured by realization of key economic, social and cultural rights.)

There is also a sense in which the concept of interdependence takes on new dimensions when we contemplate the situation of persons with psychosocial disabilities. What happens when a person chooses to withdraw from society or simply does not fit with the society around them, and does not form supportive relationships? To what extent do others have rights and obligations towards such individuals, and what do such rights and obligations consist of? Clearly the approach of modern societies, to attribute to the person a right to intervention and treatment such that she/he cannot say no, based on fallacious notions that mental illnesses exist as biological disease processes and also cause the person to lack awareness that they are ill, is not correct and is prohibited under both Article 12 and other articles of the CRPD, particularly Article 14 on liberty and security of the person, as well as Article 25 on health (right to free and informed consent) and Articles 15, 16 and 17 which guarantee freedom from torture, ill-treatment and other violations of physical and mental integrity.¹⁰ Not all persons with psychosocial disabilities withdraw from society or are unable to engage with other people; a person may be intensely seeking connection with others or might maintain strong relationships while dealing with serious distress and challenging states of consciousness. But there is a sense in which psychosocial disability, as we have named it, always has a social dimension, such that the concept of relationship and the concept of interdependence cannot be taken for granted but need to be understood dynamically and with a certain flexibility; in particular both relationship and interdependence must be understood as inescapably mutual and interactive, with room for moving apart as well as coming together: relationship and interdependence are always particular and evolving as the expression of an interaction between individual human beings. Mutuality also helps to bring the gender perspective into focus, with an acknowledgement that each party to a relationship has her or his own needs and concerns, even if the relational work being done is disproportional.

I use the framework of Intentional Peer Support,¹¹ developed by Shery Mead, as my primary reference point for understanding what support in the exercise of legal capacity

¹⁰ It is also contrary to the principles of equality, autonomy and respect for difference, which are affirmed in CRPD Article 3.

¹¹ See www.intentionalpeersupport.org.

means for persons with psychosocial disabilities.¹² IPS emphasizes mutuality and the creative potential inherent in relationship itself, the mindful (intentional) creation of relationship by two human beings, that can transform an individual's experience of challenging thoughts or emotions or difficult life situations. In emphasizing mutuality, IPS also addresses shared responsibility, so that it is not a matter of ignoring or avoiding issues of concern (such as the possibility of suicide, or a discrepancy between one person's experience of reality and another's) but discussing them as they arise in the relationship itself, not emphasizing them as the mental health system does but giving them space to develop and potentially change. In this regard, IPS also emphasizes the concepts of worldview¹³ – that each person has a worldview different from that of others which cannot be judged but has to be respected as such – and connection as the desired state of affairs.

I struggle with an emphasis on connection and interdependence, since I believe that disconnection needs to be honored as a valid choice. For women in particular, a choice to disconnect from relationship – either a particular relationship or interaction, or mainstream society that remains patriarchal and suppresses women to a significant extent – is commonly treated as both socially suspect and as a sign of madness or mental illness in itself. It is therefore necessary to nurture the space for solitude and for disconnection, to affirm that possibility in ourselves and make space for it to exist in our relationships and communities, while also acknowledging the human matrix in which we all exist, if nothing else by having been born of a mother and raised by other human beings. Our relationships may have been horrifying and traumatic but they exist within us even when we disconnect, so that ultimately I accept the framework of connection and interdependence while needing to modify it so as to incorporate an acceptance of disconnection and of those who disconnect. This is related within the framework of IPS to worldview; and in my own thinking to the incommensurability of another human being, the way in which any human being is a subject unto her/himself and is ultimately unknowable by any other. It is not that our connections are meaningless or a mirage, they are real but they must acknowledge the separateness and be based on continual curiosity about and exploration of the separateness (similar to the “playful world traveling” posited by Sara Lucia Hoagland in the book *Lesbian Ethics*), as well as on the experience of closeness and connectedness.

Allowing for disconnection, including in times of distress and crisis,¹⁴ is crucial to understanding and implementing Article 12. It is allowing for disconnection, and for the incommensurability of any person's subjectivity or worldview with that of any other, that prompts us to add the caveat that support is distinguished from substitution in that it respects the autonomy, will and preferences of the person concerned.¹⁵ In any

¹² Chris Hansen first made this connection and introduced me to IPS.

¹³ The concept is familiar from the work of Paolo Freire, Thomas Kuhn and other thinkers who grapple with cultural difference and change.

¹⁴ This is supported by the draft General Comment (paragraph 16).

¹⁵ See CRPD Concluding Observations at beginning of this paper. The Committee has made this distinction consistently in its observations on all countries since its review of

relationship, autonomy and interdependence are continually shifting, and we commonly act on assumptions about another person's choices or values that may be proven wrong, or take liberties that risk being unwelcome; we make mistakes in our relating and connecting just as we do in other aspects of life. Such mistakes will happen when providing support to another person in exercising legal capacity, just as they do at other times. The point however, is that they are acknowledged to be mistakes, and resolved in the context of the relevant relationships, rather than having the possibility of such mistakes constitute a justification for disqualifying any person's exercise of legal capacity, as is now the case. Law and practice have to embrace persons with disabilities in this framework of allowable disconnection that is the essence of autonomy, the essence of the individual as a social construct, and the *raison-d'être* of legal capacity.

b. Practical implementation issues

The significant features of IPS with respect to interdependence and autonomy are: dynamic rather than static view of both relationship and individual worldview; mutuality and the sharing of power and responsibility as a core principle; and acknowledgement of risk as an inescapable part of human life and relationships. IPS is not the only model for support related to the exercise of legal capacity from a psychosocial disability perspective. There are ways of working with support that emphasize the practical form taken by support, or particular issues to be explored, rather than the nuances of attention to relationship; these can be merged with IPS if the people involved wish to bring such intentionality to the support relationship. WRAP – Wellness Recovery Action Plan can be used for self-support and to choose supporters and ask for particular kinds of support during a crisis or to prevent crisis. Family Group Conferencing and Open Dialogue are initiatives that depend on outside facilitators to bring people together and hold the space for connection, exploration of worldview and mutual learning and growth.¹⁶ Traditional practices of trance, yoga, meditation and ceremony, as well as art and music of any kind, bring people into a sacred space of transformation that mediates creative potential through intuitive logic and bypasses obstacles created by disconnects within the person's own worldview or with the social environment. Hearing Voices Network support groups hold a space to explore and manage the risks associated with often unsought and sometimes unwelcome phenomena of consciousness; this approach can be adapted for unusual beliefs and other phenomena besides voice hearing. Survivor work on suicide and self-harm (such as the work of David Webb and Louise Pembroke, respectively) emphasizes the need for spaces to explore these feelings and acts without repercussions,

Spain in September 2011. It is based on the provision in Article 12.4 that requires safeguards to ensure that measures related to the exercise of legal capacity respect the rights, will and preferences of the person, and to the principle of “respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons” articulated in CRPD Article 3(a).

¹⁶ In Open Dialogue, the facilitators are mental health professionals including psychiatrists. Hearing Voices groups are often co-facilitated by a voice hearer and a mental health professional; the other models including IPS are typically self-directed and/or peer-oriented.

and particularly with regard to self-harm, sharing knowledge to minimize unintended consequences.

The Personal Ombudsperson uses outreach to build trust and offer both support and advocacy to individuals who appear to be disconnected from the social environment; this model is somewhere between formal and informal support as the PO receives a mandate from the person to undertake advocacy on her/his behalf and is bound by strict duties of loyalty, accountability and confidentiality, but also includes free-ranging exploration of topics that may be of interest or concern to the client. The PO is a service provided by NGOs and typically utilizes professionals from fields such as law and social work, who have relevant skills and knowledge but are outside the medical model worldview of psychiatry.

Formal support measures have been developed in order to manage the interface between a person in crisis and the legal system which treats crisis or unusual states of consciousness as grounds for removal of legal capacity. These measures – particularly Powers of Attorney and Advance Directives – may still be valuable in an inclusive system of legal capacity, to allow another person wide scope to take action in a situation where one is not able to manage responsibilities of everyday life or needs advocacy to make one's wishes known effectively. These formal supports should abide by the same standards as the PO, i.e. a strict duty of loyalty, accountability and confidentiality.

From a psychosocial disability perspective, the safeguards required by Article 12(4) must be unintrusive and must empower rather than disempower the person who is using, or who may want to use, support in exercising legal capacity. We have preferred the notion of “feedback mechanisms” to hold the space for individuals to consider and express their views on how support is working for them, rather than monitors who investigate whether supporters are acting properly to convey the person's will and preferences or whether they are exercising undue influence. This is not only a reflection of the shifting, dynamic and often intense situations that pertain to psychosocial disability; it also reflects the values developed by our community that shape a prevalent worldview that we bring to legal capacity and support in general. It is a worldview informed by an awareness of trauma and traumatizing experiences as a factor in human interactions – which may be understood in part as another type of harm-reduction – and by a healthy disrespect for authority or hierarchy which create unequal power relations.

4. Making the paradigm shift: acceptance of risk and uncertainty

a.

Law has to risk a kind of uncertainty in the new paradigm that is unfamiliar in some ways yet familiar in others.¹⁷ The classification of incapacity as a legal construct (sometimes

¹⁷ Uncertainty as I describe it here is a feature of any paradigm shift in the sense described by Thomas Kuhn in *The Structure of Scientific Revolutions*. Similar to paradigm shifts in science, the paradigm shift in legal capacity happens because our

referred to as “functional capacity,” “mental capacity” or “competence to consent”) has to be let go, and there is actually nothing to replace it with. Incapacity has stood in for a simultaneous protective impulse and restrictive actuality, a differentiation in status that is supposed to warrant a higher degree of care and concern but amounts to an exercise of power by some persons over others, which causes a sense of shame and inferiority in those whose capacity is restricted and a corresponding sense of superiority and over-confidence in those who enact or initiate the restriction. It is true that incapacitation (including all types of substitute decision-making as well as coercive measures claiming a protectionist impulse, such as involuntary institutionalization) may be met with a sense of relief at no longer having to contend with burdensome responsibilities of ordinary life. But such relief may be short-lived, and it comes at great expense. Ultimately it is not possible to escape responsibility for one’s own actions, since actions have inherent consequences. When legal capacity is restricted, the scope for action is diminished and others’ actions take a larger portion of one’s personal sphere, so that one may experience oneself as being acted upon more than acting upon others or the world. This in turn reinforces the stereotype that the individual is as a matter of fact as well as law incapable. Support in the exercise of legal capacity is intended to allow for the sharing of burdens and the setting aside of burdens that may be optional, while not penalizing the need for relief by imposing restrictions on personal autonomy and freedom. A support framework acknowledges that, so long as a person interacts with the environment in any way (including by deliberate withdrawal), choice is always accompanied by inescapable responsibility. Framing such responsibility within a context of mutual relationships allows us to continually revisit our choices and adjust to the present situation.

The protective impulse of incapacity suggests that social and legal interactions are highly risky, and reminds us that freedom itself is all about risk – risk to ourselves and risk to our relationships. Support aims to reduce risk, and does not pretend to eliminate it. The legal system can reflect this paradigm by ensuring that mechanisms exist to allocate responsibility fairly in any situation without categorically placing any individual outside the realm of having responsibility for choices she or he has actually made. Particularly when a choice actively harms others, as in certain instances of criminal conduct (recalling that not all criminal conduct has a victim, and not all criminal conduct is violent), it may not be possible (in the sense that it would amount to an unreasonable modification of our social rules, under a reasonable accommodation analysis) to avoid holding the person responsible even if they were acting under the influence of an intense state of emotion or altered perceptions such that they could not subjectively control or avoid doing the harmful act. In contemplating situations that feel subjectively uncontrollable, I believe it is likely that whether we experience a choice to act in a particular way or a surrender to

understanding of human agency and relationships can no longer be contained within the older hierarchical construction of legal capacity, of which functional capacity is the most modern iteration. The new paradigm is discontinuous from the old one and requires/allows us to refocus with a new lens.

an uncontrollable impulse is a matter of perspective and should not be the basis for legal distinctions or the assignment of or absolution from moral blame.¹⁸

Due to the arbitrary nature of distinctions made with respect to people with psychosocial disabilities that reflect no more than ignorance and fear of difference, I argue for a unitary framework to address questions of responsibility. Mitigating circumstances should affect the consequences imposed by society for acts of harm (or, in the civil context, for harm incurred or harm caused to others in the exercise of one's freedom and risk) within a context that affirms the mutuality of social relations and the integrity of each individual human being. (By integrity, I mean that, while a person might experience self as fragmented or alien, there is still an interface with the world that has to be affirmed dynamically even if one might argue for some alternative social allocation of responsibility to partial or separate selves in one body.) Such affirmation by society is both necessary in order to relate to the person at all, and potentially of value to the person as a form of support that holds the space in which subjective transformation can occur.

Beyond legal capacity, our legal, social and economic systems can reduce risk by collectivizing it, by assuring the provision of basic needs (such as food, water, decent housing, clothing, health care, means to participate in community, education, safety of environment) irrespective of a person's own resources or ability to produce economic value for her/himself. To the extent that society can collectivize risk, irrespective of the level of resources available, the consequences to any particular individual of making detrimental choices are less dire; yet in order to ensure that such a system does not become annoying to those who in effect bear the brunt of the work required to implement it, there needs to be a corresponding collectivization of responsibilities (subject to reasonable accommodation for individual circumstances) and of the benefits of risk-taking as well. (In mentioning collectivization of the benefits of risk-taking, I am thinking of the disparity that has been widely noted in the financial bailouts of banks, where economic risk was collectivized while benefits remained privatized. I'm not sure that this model applies to all types of risk, but it does point to the value of reciprocation whether giving back, paying forward or simply being mindful of the collective implications of what one chooses to do.) There may be pros and cons to collectivization, which also differ depending on the role of the state and of any hierarchical authorities, and depending on the possibilities for participatory democracy and satisfying processes of collective decision-making. Such questions impact on persons with disabilities both in a general sense as members of society and because other types of vulnerability such as poverty significantly intersect with disability, particularly in respect to the effective enjoyment of autonomy and legal capacity. When a person's choices are severely

¹⁸ The Epilogue to Tolstoy's *War and Peace* is worth noting here. Tolstoy, a hereditary count and of course male, understood human agency and subjective experience of free will to be the natural condition, while from an "objective" point of view and in a larger context our actions may seem to be determined. Tolstoy considered the acts of mad people to be determined, demonstrating that he was unable to imagine the subjectivity of madness or the dual consciousness of self-for-others (being painfully aware of the power of others' regard) that is a mark of oppression.

restricted by poverty, war, displacement or catastrophic events, legal capacity may seem irrelevant, yet legal incapacity adds yet another burden and obstacle to the person's capability of managing in dire situations. (For example, benefits such as disability pensions are sometimes made contingent on a restricted legal capacity, as is the case in El Salvador, and in the U.S. in the form of requiring some individuals to receive benefits through a representative payee. Such a regime punishes people for needing assistance and treats such assistance as discretionary charity rather than as a fulfillment of basic economic and social rights.) If we are holistically and comprehensively concerned about the actual, effective enjoyment of all human rights by all persons with disabilities (the purpose of the CRPD according to Article 1), we cannot ignore those situations of risk or their intersection with legal capacity, and must address them in ways that are fully consonant with the paradigm of Article 12.

In the criminal context, collectivization of risk and responsibility may take the form of restorative justice, in particular the sort of practices that involve whole communities surrounding a particular defendant and victim, and inquire into the justice needs of all concerned and the potential for any of the concerned individuals to contribute to creating justice.¹⁹ There are often problems with such initiatives from a gender perspective²⁰ and from a perspective of mutuality; it can be more desirable for either the defendant or victim, or both, to have an impersonal adjudication and sentencing. But in some cases, especially given the destructiveness of a prison sentence, it is also highly desirable to find solutions outside the strict imposition of the dictates of law. The principle of reasonable accommodation for disability, along with a restorative justice approach, supports an obligation to implement resolutions that may require investment of time or resources by the community, in cases where disability was a factor relating to the crime: for example, if a person is engaging in conduct defined as criminal to meet needs that are poorly understood or appreciated because of a difference in worldview (which is labeled as psychosocial disability), it may be possible to collaboratively find a solution that allows the person to meet her/his needs in some other way, or to reconsider the laws and policies defining such conduct as a criminal offense.

Restorative justice models are not all equal; some of them can be quite paternalistic and include diversion to mental health services as a supposedly restorative outcome. If mental health services are desired by the person to improve her/his well-being, provision of such services can be a component of restorative justice in the particular case, but mental health services cannot bear the responsibility of preventing future criminal conduct. To charge them with such responsibility, as is the case in diversion programs that monitor the individual's progress and impose consequences for non-compliance, results in a conflict of interest for mental health service providers, who then have

¹⁹ See Kay Pranis, "Restorative Values," in *Handbook of Restorative Justice*, Gerry Johnstone and Daniel W. Van Ness, eds. (2007); James J. R. Guest, *Aboriginal Legal Theory and Restorative Justice*, in Wanda D. McCaslin, ed., *Justice as Healing: Indigenous Ways* (2005).

²⁰ See Kathleen Daly and Julie Stubbs, "Feminist Engagement with Restorative Justice," in *Theoretical Criminology* 10(1): 9-28 (2005).

obligations both to the individual concerned and to third parties interested in the outcome, this entails enforced (or highly incentivized and therefore not freely consensual) treatment in violation of the CRPD.

5. Universal legal capacity and children

As with guardianship over adults, it is necessary that guardianship over children be re-examined.²¹ There is no point at which a person by virtue of age becomes automatically wise, yet we treat the age of majority as a magic number that entitles a person to an entirely new status, one in which she/he presumptively merits social approval for the exercise of initiative and risk-taking, and in which society pre-emptively disclaims responsibility for ensuring the person's well-being. This presumption is not available to many persons with intellectual disabilities who are placed under guardianship as their transition to adulthood, or to persons who experience a life crisis in the coming of age that is labeled as psychosocial disability and treated as grounds for the deprivation of freedom and autonomy rather than as an opportunity to take new steps with a new kind of support. The notion of maturity as a construct of legal significance²² is equally problematic as the notion of discernment or self-control; it conflates a subjective developmental process with an observable manifestation that can be judged by others. If maturity is subject to assessment, it can be no more than conformity to others' expectations, while it is often said that maturity consists of the development of an inner compass that does not depend on anyone else's approval; this disparity particularly creates a quandary for those who lack the presence of wise elders whose judgment they might respect. Infants and young children need a great deal of care and support just to survive, but there is no need to subordinate them legally to adult caregivers; demands for subordination reflect the insecurity of adults and their own sense of powerlessness vis-à-vis the state, than the nature of a care relationship itself. Adulthood may be most meaningful as a social institution in which members of society negotiate collective values and beliefs and take responsibility for creating and passing on culture, through education, discipline, conflict resolution, arts and celebration, contemplation and other activities related to order and meaning. It is a dynamic institution and not an exclusive one (i.e. children should and can participate), and it is reflected in unique ways depending on individual circumstances including the degree of social integration a particular person may enjoy (which does not imply any judgment about the person or about the mainstream of society); allowing wide scope for individuals to express their relationship to society in complex ways so as to offer perspective on dominant social discourse (such as the court jester, the hermit, the artist in modern times, the revolutionary) is desirable so as to affirm and honor different styles of participation. Part of the role of adulthood is to guide

²¹ See Kathleen O'Neal, "The Case for Abolishing Guardianship for Minors" (2012), unpublished.

²² Although there is no actual assessment of maturity required to qualify for adulthood in a state-based legal system, it is the concept underlying the distinction between children and adults with respect to legal capacity. Furthermore, this concept is used in Article 12 of the Convention on the Rights of the Child and Article 7 of the CRPD for the partial legal capacity that can be accorded to children under those instruments.

younger people and nurture their capability to develop wisdom; this requires an acknowledgement of and respect for the subjective inner space of freedom and responsibility, to develop confidence in risk taking and negotiating shared spaces of connectedness and separateness. For these reasons, it needs to be considered from a legal standpoint what it would mean for an inclusive system of legal capacity to encompass children within a model of support similar to, but perhaps not identical with, the models being developed by persons with disabilities from an adult perspective. (It should also be understood that the models required by persons with disabilities are multiple, broadly reflecting different types of disability experience such as intellectual disability, psychosocial disability, brain injury and dementia, but also varying from one individual to another within these broad groups.)

6. Implementation and practice

In conversations with colleagues on an early draft of this paper, issues have arisen that don't belong clearly to any particular section, so I will address them here.

a. Protection against abuse in support arrangements

The first is that the question of protection against abuse, and the need for safeguards in relation to support or in relation to inclusively designed protocols for the exercise of legal capacity, needs to be reframed as a question of power. Providing information to a person entails the power to decide what to say and how to say it.²³ How can this power be acknowledged within a support relationship, without destroying the trust and mutuality necessary to sustain it?²⁴ It is a question that needs to be addressed inclusively, in practice, with leadership from those who are involved in support relationships particularly as persons receiving support. A few ideas at the outset could be:

- Application of a modified fiduciary principle in any transactions where one party has greater knowledge or bargaining power than the other, and where that party is or should be aware of this disparity.
- Including the question of power in all training and information provided to supporters and to persons receiving support, as an open-ended question that parties are invited to explore. Providing information and training separately to persons receiving support, designed to address questions related to power in their lives including in support relationships. Any training or information provided to supporters must be open and welcoming to persons receiving support as well, so that there are no formal spaces in which persons receiving support can be objectified or discussed in their own absence.

²³ Thanks to Shery Mead for raising this concern.

²⁴ I struggle with how to frame this concept. In reality, trust and mutuality cannot exist without an acknowledgement of power within the relationship. Yet it often feels like a challenge to the good feeling and connection that is being created, when issues of power are raised.

- Mitigating the power differential by continually expanding the spaces in which people with all kinds of disabilities can interact with anyone they choose without any special accommodation or involvement by supporters. This means applying the principle of inclusive design to social spaces and community building, as well as to law and the everyday application of law.
- Generating a public discourse on power in social relationships, inherent kinds of power and illegitimate power, with inclusive participation by adults and children with disabilities, children, older persons, women and girls, and racialized persons and those from minority ethnic groups.

b. Creativity and criticism

A second issue is the notion of creativity and criticism, as a dialectic that mad people struggle with and that may be at the core of a dynamic understanding of legal capacity as a right to fully express oneself and to create one's own continually evolving self-narrative.²⁵ For people with psychosocial disabilities, it is a relationship with self that ultimately may be most important: while it can be helpful for supporters to hold possibility for us when we are in crisis and feel destroyed, the possibility being held is precisely for the individual to discover and affirm her or his own self-narrative out of the chaos and discord. While others' views play a role in shaping how we see ourselves, the emphasis needs to be placed on supporting whatever self-narrative the person creates, rather than seeing it as a role of supporters to construct a narrative of the person. This is especially true with psychosocial disability, but I think that it is true more generally. In some situations there is a desire or a practical necessity to rely on another person's interpretation, support and construction of narrative either for a period of time or as a basis for one's ongoing engagement in the world, including with disabilities in which the person loses more functioning over time. This relates a great deal to the issue of power discussed just above, and both the necessity/desire for such support and the concerns it raises should be placed into open discourse.

c. Harm reduction

A third issue concerns the framework of harm reduction as a way of addressing the care and concern that is part of our connections with each other, in relation to activities perceived as excessively risky or destructive. Harm reduction approaches were developed with great care for the purpose of HIV/AIDS prevention, as a result of the leadership provided by a socially aware LGBT community. Use of condoms and other barriers to prevent transmission, universal precautions for personnel dealing with bodily fluids, and needle exchange programs for IV drug users are examples of harm reduction. Other examples can be found any time there is an awareness of harm, a respect for the person's autonomy and choices (or else a universal approach aimed at interrupting risk without needing to identify anyone as a particular source of risk). There is a harm

²⁵ See Reshma Valliappan, *The Madness in Creation*, posted on Facebook 28 October 2013, © Val Resh.

reduction approach to going off psychiatric drugs,²⁶ and services for homeless people that provide easily carried shelters and freely available meals and sanitary facilities, rather than coercing people to enter institutionalized services of any kind. Survivors with lived experience of self-harm and suicide advocate harm reduction, and point to the harm done by denial of safe spaces to explore these issues.²⁷ According to Louise Pembroke:

It is about accepting the need to self harm as a valid method of survival until survival is possible by other means. This does not condone or encourage self-injury, it's about facing the reality of maximising safety in the event of self-harm. If we are going to harm it is safer to do so with information. Information on basic anatomy, physiology, first aid, wound care, correct usage of dressings and safer ways to harm.²⁸

Harm reduction (harm minimization) includes:

- Respecting people's need to self-harm (so they don't have to hide it, justify it, or make bargains or promises they can't keep)
- Providing practical information to maximise safety
- Offering non-judgmental support: a space where people can make sense of the meanings and role of self-harm in their life histories & build up a range of strategies for survival that reflect their definitions and experiences.²⁹

Similarly, a harm reduction approach needs to be adopted in relation to any concerns we might have about another person's expressive activity or conduct, treating the concern as part of the conversation and respecting each person's worldview and self-sovereignty.

7. Summation

In sum, I have argued that the alternative to functional capacity is the creation of a framework for inclusive legal capacity that conclusively presumes contractual capacity and that treats the use of support as a practical measure to enhance the exercise the exercise of legal capacity while providing for safeguards designed to equalize power in support relationships and in other transactions related to the exercise of legal capacity. Such a framework for inclusive legal capacity is consistent with the interpretation of CRPD Article 12 by the Committee on the Rights of Persons with Disabilities, and represents the most coherent account of the shift from substituted decision-making to

²⁶ Will Hall, *Harm Reduction Guide to Coming Off Psychiatric Drugs*, published by The Icarus Project and Freedom Center (2nd edition, 2012).

²⁷ See David Webb, <http://www.thinkingaboute suicide.com>, Sera Davidow, P.S.

Sometimes I still Hurt Myself... P.P.S. So do you...,

<http://www.madinamerica.com/2013/11/p-s-sometimes-still-hurt-p-p-s/> .

²⁸ Louise Roxanne Pembroke, *Harm-Minimisation: Limiting the damage of self-injury* (reprinted from Helen Spandler and Sam Warner, eds., *Beyond Fear and Control*, 2007), <http://www.dbdouble.freeuk.com/harmminimum.htm>.

²⁹ Information provided by a survivor advocate, citing Pembroke article.

“supported decision-making, which respects the person’s autonomy, will and preferences.” It is not a question of finding a protective mechanism that can do the job assigned to functional capacity; rather we need to continually interrogate the impulse towards protection and distinguish between its components of concern and control. Rather than amalgamating concern with control, thereby reinforcing a hierarchical social structure that disadvantages persons with disabilities among others (particularly females), we need to affirm both the necessity for a social framework to express concern and offer relevant support, and the necessity for appreciation of one’s own subjectivity and that of others. Mechanisms for social regulation and resolution of disputes have to be interrogated with respect to inclusive participation in rulemaking as well as substantive unfairness; with that caveat they should be applied to persons with disabilities on an equal basis with others, including reasonable adjustment or modification within a unitary framework to ensure equal access to justice in the particular case.