# ESSAY

## THE CAPACITY TO MARRY

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*This Essay identifies mechanisms by which the law regulates access to marriage for adults with intellectual disabilities, exploring how statutes and court decisions give meaning to the concept of "capacity to marry." The Essay identifies two previously unstudied and contradictory understandings of the relationship between marriage and capacity. One notion of "capacity to marry" operates to exclude adults with intellectual disabilities from marriage based on lack of capacity. Cases grounded in this view reveal that capacity determinations can be a vessel for subjective opinions about disability and the status of marriage, considering factors such as prior romantic and sexual history, financial decision-making, and ability to care for oneself independently. These cases show how capacity requirements can prohibit or limit nonconforming individuals—especially those who rely on external sources of support—from marrying. In contrast, a second notion of capacity conceives of marriage as capacity enhancing. Under this view, a court may decline to impose a guardianship in part because of an existing marriage. This view of capacity focuses more on the power and strength of human relationships. Building on the second notion—that marital relationships can be capacity enhancing—the Essay conceives of supported decision-making as a means of rendering marriage more accessible to people with intellectual disabilities while also recasting the institution of marriage*

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*from one focused on two self-sufficient individuals to one that celebrates human interdependence and connection.*



## INTRODUCTION

Tom and Lucinda Barnes—both adults with intellectual and developmental disabilities (IDD)[1]—had been married for several years when the state sought to annul their marriage.[2] They had been living with

1. This Essay uses both "person-first" ("people with disabilities") and "identity-first" ("disabled person") language because the disability community has diverse views on which is preferred. In general, the person with a disability should determine whether to use person-first or identify-first language. See generally Lydia Brown, Identity-First Language, Autistic Self Advoc. Network, https://autisticadvocacy.org/about-asan/identity-first-language/ [https://perma.cc/YPE9-JF8Y] (last visited Oct. 16, 2025) (discussing arguments for and against identity-first language within the autism community and beyond).

2. This introduction recounts the story of a former client and their spouse. To preserve confidentiality, all names and some other details have been changed. See Letter from Sarah Lorr to Columbia Law Review (Jan. 28, 2026) (on file with the *Columbia Law Review*). Scholars make a strong case that client stories, as all human stories, belong to clients

Lucinda's parents and raising their two children in a shared family home, when an allegation about Lucinda's treatment of one of the children led the state to investigate the family. During a subsequent lawsuit about where and with whom the children should live, a different branch of the state acted on an anonymous tip and removed Lucinda from her home and family. Among other allegations, the state claimed that Tom and Lucinda's marriage should be legally annulled because Lucinda's diagnosed IDD meant she lacked capacity to consent to the marriage. After nearly a year of fighting in court, Lucinda was allowed to return home, and her marriage was left intact. Still, the intrusion into Tom and Lucinda's intimate life caused great damage to their family.

In addition to overt state intervention in an ongoing marriage, there are other ways the state, legally appointed guardians,[3] and others can deprive adults with IDD of marriage. For example, a putative or actual guardian can decide not to approve a marriage,[4] and a court clerk can choose not to grant a license based on a person's appearance.[5] Tom and Lucinda's experience is but one version of how the right to marry can be abridged or cut off for adults with disabilities.[6]

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themselves and that the best practice would be for the impacted person themself to tell their story. See e.g., Rachel López, Participatory Legal Scholarship, 123 Colum. L. Rev. 1795, 1800–02 (2023) (discussing the importance of "shift[ing] power to people who are not lawyers, establishing them as experts in their own legal realities"); Binny Miller, Telling Stories About Cases and Clients: The Ethics of Narrative, 14 Geo. J. Legal Ethics 1, 4 (2000) (arguing that "clients should have a say in decisions about how their stories are told"). This Essay shares the Barneses' story because there are so few reported cases about marriage and IDD, with the vast majority of these cases litigated, if at all, outside of public view. See infra note 12 and accompanying text.

3. "Guardianship is a process by which a court appoints a third party (called a 'guardian' or 'conservator') to make decisions on behalf of an individual the court has found unable to make those decisions for him or herself." Nina A. Kohn, Legislating Supported Decision-Making, 58 Harv. J. on Legis. 313, 321 (2021).

4. In Alabama, for example, guardians automatically have the power to consent to a marriage or divorce on behalf of an adult under guardianship, and to prevent guardians from having this authority, a court must specifically limit the guardians' social decision-making. Sup. Ct. of Ala.'s Comm'n on Adult Guardianships & Conservatorships, Alabama Guide for Guardians and Conservators 19 (n.d.), https://alabamawings.alacourt.gov/media/1063/alabama-guide-for-guardians-and-conservators.pdf [https://perma.cc/9QBB-6XB2] (last visited Oct. 17, 2025). The same is true in Connecticut. See Conn. Gen. Stat. Ann. § 46b-20a (West 2025) (excluding people under conservatorship from the general right to marry); id. § 46b-29 (requiring conservator signature to obtain marriage license). This Essay, though primarily concerned with marriage statutes, will necessarily also address statutes that give the guardians control of marital decisions.

5. See Kristin Booth Glen, Not Just Guardianship: Uncovering the Invisible Taxonomy of Laws, Regulations and Decisions that Limit or Deny the Right of Legal Capacity for Persons With Intellectual and Developmental Disabilities, 13 Alb. Gov't L. Rev. 25, 55 (2020) [hereinafter Glen, Not Just Guardianship] (envisioning "a clerk denying a marriage license where one or both of the parties have [IDD] that is clearly visible, such as Down Syndrome, or cerebral palsy with significant speech impairment").

6. Another central means of marriage deprivation is the so-called marriage penalty. Though not a focus of this Essay, it is explored in notes 177–181 and their accompanying

For people with disabilities, the right to marry—like the right to have or raise children—is one that for generations was so unimaginable that the United States Supreme Court has almost never referenced it.[7] This absence is in stark contrast to marriage in other contexts, in which the Supreme Court has opined that marriage is "fundamental to the very existence and survival of the race."[8] The law's failure to consider people with disabilities within the framework of the American family is consistent with the historical treatment of people with disabilities, many of whom were institutionalized and left without meaningful family relationships of

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text and has been addressed by other scholars. See, e.g., Gabriella Garbero, Comment, Rights Not Fundamental: Disability and the Right to Marry, 14 St. Louis U. J. Health L. & Pol'y 587, 592–95 (2021) (describing and critiquing how marriage impacts social security benefits); Rabia Belt, Disability: The Last Marriage Equality Frontier 1–3 (Stan. Pub. L. Working Paper No. 2653117, 2022), https://ssrn.com/sol3/abstract_id=2653117 (on file with the *Columbia Law Review*) (describing and critiquing how the marriage penalty functions to discourage marital unions for certain people with disabilities).

7. See Sarah H. Lorr, Disabling Families, 76 Stan. L. Rev. 1255, 1271–72 (2024) [hereinafter Lorr, Disabling Families] (describing Buck v. Bell, 274 U.S. 200 (1927), as indirectly opining on the rights of disabled adults to have and raise families).

8. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); see also Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (invalidating bans on same-sex marriage); Turner v. Safley, 482 U.S. 78, 81 (1987) (finding the right to marry impermissibly burdened by regulations limiting marriage for people in prison); Zablocki v. Redhail, 434 U.S. 374, 382 (1978) (finding the right to marry impermissibly burdened by a law prohibiting fathers who owed child support from marriage); Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down bans on interracial marriage).

While it is true that most other categorical bans on marriage have been rejected by the Supreme Court, some of the concerns raised in the disability context run parallel to other prior bans on, or barriers to, marriage. For example, the asserted basis for the prohibition on marriage for prison inmates at issue in *Turner v. Safley*—which dealt with a Missouri law preventing prison inmates from marrying unless a warden found a "compelling reason to allow the marriage"—suggests an infantilization of female inmates and their need for protection that is similar to the attitude toward people with disabilities who seek to marry. See *Turner*, 482 U.S. at 97–98 (including among the safety concerns that support a ban on marriage without the warden's consent, "that female prisoners often were subject to abuse at home or were overly dependent on male figures, and that this dependence or abuse was connected to the crimes they had committed"); see also infra notes 164–166. Likewise, long before *Loving* overturned bans on interracial marriage, some of the arguments against marriages involving enslaved people were baldly based in what we would now identify as eugenic logic. See, e.g., Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) ("We are unable to read . . . the Fourteenth Amendment . . . [to] prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or . . . [to] deny the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens."). Others were based on lack of capacity. See Scott v. Raub, 14 S.E. 178, 179 (Va. 1891) ("A slave cannot marry, because he cannot make a valid contract, because the duties of a slave are inconsistent with the duties of a husband or a wife, and because a slave is property. So the marriage of a slave is a mere nullity . . . ."); see also Cumby v. Garland, 25 S.W. 673, 677 (Tex. Civ. App. 1894) (describing a marriage between two enslaved people, when achieved with consent of their enslaver, as "natural and moral, was so recognized and sanctioned, and lacked only the legal capacity of the parties to make it lawful wedlock").

any kind.[9] Indeed, the denial of the right to marry is yet another denial in a line of relational deprivations that disabled adults face, including deprivations to sexual intimacy[10] and the parent–child relationship.[11]

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9. See, e.g., Chris Chapman, Five Centuries' Material Reforms and Ethical Reformulations of Social Elimination, *in* Disability Incarcerated 25, 33 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014) (describing "the proliferation of schools for intellectually disabled or blind pupils, asylums, and Indian Residential Schools" in the nineteenth century as part of "white ruling-class political rationality"); id. at 37 ("At the height of eugenics, some intellectually disabled people were more likely to be subjected to rehabilitative institutionalization, others to purely custodial institutionalization, and others to public torture and murder—in part due to interlocking oppressions."). For a particularly wrenching story of one family separation, see Jennifer Senior, The Ones We Sent Away, The Atlantic (Aug. 7, 2023), https://www.theatlantic.com/magazine/archive/2023/09/disabled-children-institutionalization-history/674763/ (on file with the *Columbia Law Review*).

10. See, e.g., Alexander A. Boni-Saenz, Sexuality and Incapacity, 76 Ohio St. L.J. 1201, 1213–15 (2015) [hereinafter Boni-Saenz, Sexuality and Incapacity] (describing "explicit legal and regulatory effects" as well as "expressive effects" of law that "invalidate[] the apparent consent choices of those who are deemed to lack legal capacity"); Natalie M. Chin, Group Homes as Sex Police and the Role of the *Olmstead* Integration Mandate, 42 N.Y.U. Rev. L. & Soc. Change 379, 413 (2018) [hereinafter Chin, Group Homes as Sex Police] (discussing how "the structural systems that are tasked with identifying and administering services to intellectually disabled individuals . . . often perpetuate the desexualization" of such adults); Natalie M. Chin, The Structural Desexualization of Disability, 124 Colum. L. Rev. 1595, 1618–20 (2024) [hereinafter Chin, Structural Desexualization] (canvassing modern laws that contribute to the "desexualization" of people with IDD); Deborah W. Denno, Sexuality, Rape, and Mental Retardation, 1997 U. Ill. L. Rev. 315, 324 (noting that a "high consent standard" in institutions "can totally prohibit sexual relations among residents"); Elizabeth F. Emens, Intimate Discrimination: The State's Role in the Accidents of Sex and Love, 122 Harv. L. Rev. 1307, 1311 (2009) [hereinafter Emens, Intimate Discrimination] ("[T]he law has required intimate discrimination with regard to sex and disability."); Jasmine E. Harris, The Role of Support in Sexual Decision-Making for People With Intellectual and Developmental Disabilities, 77 Ohio St. L.J. Furthermore 83, 86 (2016), https://kb.osu.edu/server/api/core/bitstreams/22dd8720-12b5-5773-8387-b98a63c51926/content [https://perma.cc/GAD4-PGFT] [hereinafter Harris, The Role of Support] (describing people with "more severe intellectual and developmental disabilities" as "currently precluded from exercising sexual agency" despite potentially having "the mental capability to do so"); Jasmine E. Harris, Sexual Consent and Disability, 93 N.Y.U. L. Rev. 480, 495 (2018) (noting that for people with disabilities "sexual regulation is often a reflexive part of legitimate state regulation of some other area of their lives").

11. This is well documented in the context of child welfare, also called family regulation. See, e.g., Joshua B. Kay, The Americans With Disabilities Act: Legal and Practical Applications in Child Protection Proceedings, 46 Cap. U. L. Rev. 783, 814–18 (2018) (advocating for the use of the ADA in defense of parental rights in family regulation cases); Sarah H. Lorr, Unaccommodated: How the ADA Fails Parents, 110 Calif. L. Rev. 1315, 1326–27 (2022) [hereinafter Lorr, Unaccommodated] (describing discrimination against parents with IDD in the family regulation system); Robyn M. Powell, Safeguarding the Rights of Parents With Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law, 20 CUNY L. Rev. 127, 141 (2016) (describing the assumptions that undergird discrimination against parents with IDD); Charisa Smith, Making Good on an Historic Federal Precedent: Americans With Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents With Mental Disabilities, 18 Quinnipiac Health L.J. 191, 200 (2015) ("[P]arents with mental disabilities, as a disadvantaged population, are

It is impossible to estimate how many people like Tom and Lucinda experience this kind of intrusion into their marital lives. Cases like theirs occur in different courts depending on the state, and many are litigated outside of the public eye, if at all.[12] The paucity of publicly available decisions obscures the question of marriage access for people with IDD from broader scrutiny and renders it nearly impossible to know with certainty the scope of state intervention and judicial resolutions. There is evidence, however, that marriage deprivation is not uncommon.[13]

This Essay provides critical insight into the understudied question of how the law conceives of marital capacity in the context of adults with IDD.[14] In every state, statutes or case law provide that the ability to marry

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often typecast as perpetrators of child maltreatment and not offered the opportunity to find the root of the alleged maltreatment and reunify their family systems."). It is also documented in private custody disputes. See Ella Callow, Kelly Buckland & Shannon Jones, Parents With Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community, 17 Tex. J. on C.L. & C.R. 9, 27–28 (2011) (discussing how various court actors exhibit "a biased response to a parent's disability" in private family law disputes involving child custody). As Professor Robyn Powell has demonstrated, these rights deprivations extend to reproductive decisions. See Robyn M. Powell, Forced to Bear, Denied to Rear: The Cruelty of *Dobbs* for Disabled People, 112 Geo. L.J. 1095, 1102–14 (2024) (examining reasons for high rates of unintended pregnancies among disabled people).

12. Decisions about marital capacity—if they ever come to court—are often made in the context of guardianship proceedings, see infra section II.B., which are frequently closed from public access. See Jasmine E. Harris, Processing Disability, 64 Am. U. L. Rev. 457, 504 (2015) [hereinafter Harris, Processing Disability] ("[W]ith few exceptions, privacy considerations have de jure or de facto subsumed the public's interests in accessing [guardianship and civil commitment] proceedings and the respondents' interests in visibility and autonomy."); id. at 504–14 (providing a detailed analysis of the procedural process in guardianship capacity cases). There is no source or data repository for information about the number of people with disabilities facing challenges to their capacity to marry. Indeed, it is difficult to identify even the number of people under guardianship. See Nat'l Council on Disability, Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People With Intellectual and Developmental Disabilities 41 (2019), https://www.govinfo.gov/content/pkg/GOVPUB-Y3_D63_3-PURL-gpo121724/pdf/GOVPUB-Y3_D63_3-PURL-gpo121724.pdf [https://perma.cc/FFT3-4VSW] ("Even identifying the number of active cases or their status is not possible in many states.").

13. See infra note 174 (listing state statutes that specifically preclude marriage for people with IDD); infra notes 248–265 and accompanying text (collecting and discussing cases).

14. In this regard, this Essay focuses primarily on statutes controlling marriage—who is allowed to marry and under what circumstances, as well as those marriage-related laws that speak to who may have standing to challenge the legitimacy of a marriage through a legal process of annulment. See infra section II.A. This is, of course, not the only assessment of the statutes and laws related to disability and marriage. See generally Alexander A. Boni-Saenz, Personal Delegations, 78 Brook. L. Rev. 1231 (2013) (studying the role of "personal delegation" in various statutes affecting people with intellectual disabilities); Lois Guller Jacobs, Note, The Right of the Mentally Disabled to Marry: A Statutory Evaluation, 15 J. Fam. L. 463 (1976) (examining various "legal deficiencies" in marriage statutes related to individuals with disabilities). But it is unique in its critical view and study of judicial findings

hinges upon capacity, and many states also have statutes that provide lack of capacity as a ground to render a marriage void or voidable.[15] Both sets of laws leave open a pathway for a judicial determination of incapacity, rendering marriages in which one partner is a person with IDD unstable in ways that are inconsistent with the very purpose of the institution.[16] In undertaking this analysis, this Essay bridges two bodies of scholarship: first, scholarship interrogating the function and purpose of marriage, and the government's role in who can claim legitimacy within the American family;[17] and second, scholarship illuminating the marginal-ization of people with disabilities in intimate and family life.[18]

This Essay focuses specifically on adults with IDD, as distinguished from other disabilities, because within the diverse and varied community of people with disabilities, people with IDD are among the most likely to face legal capacity challenges.[19] Additionally, people with IDD are a diverse and complex group who present unique issues in the context of marriage-capacity decisions, distinct certainly from people with physical disabilities[20] but also from those with psychiatric- or age-related cognitive disabilities.[21]

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on capacity to marry. This Essay joins a more extensive scholarship on sexuality and intimacy. See supra note 10 (collecting articles).

15. See infra sections II.A, II.C.1. "[V]oid marriages are void from their inception, while voidable marriages are valid unless and until one of the spouses seeks annulment." Douglas E. Abrams, Naomi R. Cahn, Linda C. McClain, Catherine J. Ross, Kaiponanea T. Matsumura & Jessica Dixon Weaver, Contemporary Family Law 202 (6th ed. 2023).

16. See infra sections II.A, III.A.

17. See infra note 109 (collecting just some of this vast scholarship).

18. See supra notes 10–11 (collecting scholarship).

19. See Cathy E. Costanzo, Kristin Booth Glen & Anna M. Krieger, Supported Decision-Making: Lessons From Pilot Projects, 72 Syracuse L. Rev. 99, 111 (2022) (explaining how supported decision-making has primarily been used for people with IDD, given that their legal capacity is often challenged); Matthew S. Smith & Michael Ashley Stein, Legal Capacity and Persons With Disabilities' Struggle to Reclaim Control Over Their Lives, Petrie-Flom Ctr. (Sep. 29, 2021), https://blog.petrieflom.law.harvard.edu/2021/09/29/legal-capacity-disabilities/ [https://perma.cc/T645-SCF7] ("Capacity assess-ments are sometimes weaponized to restrict persons with intellectual disabilities' right to sexual expression. Similar capacity assessments are also deployed systematically to deprive persons with intellectual disabilities[] of their parental rights.").

20. Despite the clear distinction, the capacity to marry was still questioned in cases involving certain "physical condition[s]." See, e.g., Snyder v. Snyder, 43 Pa. D. & C. 115, 115–16 (Ct. C.P. Del. Cnty. 1941) (characterizing epilepsy as a "physical condition" and allowing annulment based on its concealment). Impotence was also a historical ground for annulment. See, e.g., Kaufman v. Kaufman, 164 F.2d 519, 520 (D.C. Cir. 1947) ("[D]irect evidence of the defendant's impotence . . . was amply sufficient to require a judgment of annulment.").

21. Age-related disabilities and age-related cognitive decline can be distinguished from other cognitive disabilities in various ways, not least because of the way age-related disabilities can be said to cause decisions "that the 'real person' would never have made; the dementia is speaking, not my father." James Toomey, Narrative Capacity, 100 N.C. L. Rev. 1073, 1077–78 (2022); see also Morgan K. Whitlatch & Rebekah Diller, Supported Decision-Making: Potential and Challenges for Older Persons, 72 Syracuse L. Rev. 165, 184–202 (2022) (discussing, at length, the capacity issues unique to age-related disabilities).

In reviewing a selection of judicial decisions related to marital capacity for adults with IDD from the last sixty years,[22] this Essay identifies two different and contradictory understandings of the relationship between marriage and capacity. In the first conception, courts understand capacity as a necessary prerequisite to marriage; they block people with IDD from marrying based on factors such as prior romantic and sexual history, financial decision-making, and ability to care for one's self independently.[23] Courts issuing these decisions not only exclude certain individuals from normative conceptions of the family, delegitimizing and preventing intimate relationships, but also construct notions of the modern American family as an institution reserved for those who uphold certain moral standards of romantic and sexual behavior and are capable of financial and practical independence.[24]

The second conception of capacity takes an almost opposite view. In the context of guardianship proceedings,[25] a small number of courts have found that an existing marriage is a protective and supportive relationship that can strengthen and even increase the decision-making capacity of an

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Psychiatric disabilities, due to their often-episodic nature, also present unique issues. See Kathryn E. Ringland, Jennifer Nicholas, Rachel Kornfield, Emily G. Lattie, David C. Mohr & Madhu Reddy, Understanding Mental Ill-Health as Psychosocial Disability: Implications for Assistive Technology, 2019 ASSETS 156, 161 (discussing how participants of a study described their mental health issues and the "recurrent, episodic nature"). Despite the focus on IDD, the Essay draws upon and cites related case law involving people with brain injuries, age-related cognitive decline, or psychiatric disabilities where it is instructive.

22. By going back to 1965, the research intends to capture the cultural and legal understandings of capacity that exist and have taken shape from the apex of the disability rights movement to the present. See Paul K. Longmore & Lauri Umansky, Introduction: Disability History: From the Margins to the Mainstream, *in* The New Disability History: American Perspectives 1, 10 (Paul K. Longmore & Lauri Umansky eds., 2001) (describing the passage of the Americans with Disabilities Act in 1990 as "capp[ing] a generation of innovative lawmaking regarding Americans with disabilities" and "activists' campaign[ing]" going back to the 1960s).

23. See infra section II.C.1.

24. See infra sections II.C.1, III.A.

25. See infra section II.B. Guardianship, also called conservatorship in certain states, can be plenary or limited, and it has come under significant scholarly and governmental critique. See, e.g., Jasmine E. Harris, The Political Economy of Conservatorship, 71 UCLA L. Rev. 1364, 1368 (2024) [hereinafter Harris, Political Economy of Conservatorship] ("Sometimes used interchangeably with 'guardianship,' conservatorship is a legal device for substitute decisionmaking for a limited number of individuals deemed incapable of managing decisions about their finances or self-care."); id. at 1390 (arguing that conservatorship has been a form of public governance to control and subjugate through the "manipulability of the legal category of disability"); Robyn M. Powell, Disability Reproductive Justice, 170 U. Pa. L. Rev. 1851, 1853–55 (2022) (critiquing the role of guardianship in the context of Britney Spears and reproductive justice); Pamela B. Teaster, Erica Wood, Sally B. Hurme & E. Carlisle Shealy, Environmental Scan of Guardianship Abuse and Fraud, Full Report (2023), https://www.ojp.gov/pdffiles1/nij/grants/307525.pdf [https://perma.cc/9LA6-MCH5] (discussing the literature on the scope and nature of abuse and fraud by guardians).

adult.[26] Significantly, this vision rests on the notion that capacity can be expanded by people and supports beyond the individual in question.[27] This Essay demonstrates that these two sets of cases, taken together, reveal both the extent to which capacity can bar certain nonconforming individuals from marriage and the ways marriage itself can expand notions of capacity.

Building on the idea that the marital relationship can be capacity expanding, this Essay argues that supported decision-making (SDM)—an increasingly well-recognized means of ensuring the autonomy and decision-making capacity of people with IDD—can offer a significant intervention to this field.[28] SDM offers a means both of expanding access to marriage for people with IDD and of recasting the institution of marriage as one that accepts and celebrates human interdependence as inherent and welcome, rather than understanding it as a problem or failure.[29] In this reformed notion of marriage, the benefits of the marital relationship could be accessible to not only those who meet society's expectations of independence and self-sufficiency but also those who most need the support and care of the community around them. While this Essay critiques limits on the right to marry, it neither promotes nor criticizes the institution itself.[30] Instead, it responds to the very real desire of certain members in the disability community to have the state sanction and recognize their choices to enter loving and supportive relationships.[31]

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26. See infra section II.C.2.

27. See infra section II.C.2.

28. Supported decision-making is "a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life." Robert D. Dinerstein, Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons With Disabilities: The Difficult Road From Guardianship to Supported Decision-Making, Hum. Rts. Brief, Winter 2012, at 8, 10; see also infra notes 78–91 and accompanying text.

29. See infra sections III.C–.D.

30. After all, there is strong evidence that marriage itself—and even access to marriage—is not an unalloyed good. See Katherine Franke, Wedlocked: The Perils of Marriage Equality 198 (2015) [hereinafter Franke, Wedlocked] ("[T]he gay community has been able to leverage its social capital in whiteness to their advantage in the marriage equality movement, yet African Americans have received little benefit in any endowment they might enjoy from the stereotype that all or most black people are heterosexual."); R.A. Lenhardt, Marriage as Black Citizenship?, 66 Hastings L.J. 1317, 1319 (2015) (arguing "that the stock narrative that attends black marriage in this country is one that legal scholars and others concerned about African American citizenship and families should interrogate more deeply, if not resist").

31. Lori Long, a disabled woman who has publicly advocated for the right to marry her long-term, abled partner but who is now unable to marry her partner due to the steep financial penalty that would inhere, has described her desire to marry in these terms: "We are husband and wife. And it means something. It just does, that added title." Erika Mahoney, A Love Story Worth Fighting For, Salinas Couple Battles Bureaucracy to Get Married, KAZU (Feb. 12, 2021), https://www.kazu.org/local/2021-02-12/a-love-story-worth-fighting-for-salinas-couple-battles-bureaucracy-to-get-married [https://perma.cc/TQ

Part I of this Essay defines the terms IDD and "capacity," explaining the distinction between capacity as a mental status and capacity to marry. Next, it discusses the legal foundation and cultural meaning of marriage, focusing on the notion of a married couple as a self-sufficient unit. It also describes how disability status has interacted with the right to marry and reviews present-day barriers people with disabilities face when they seek to wed. Part II examines both the statutes and case law relating to marital capacity. It explores a selection of cases, identifying two very different ways of understanding marital capacity. Part III critiques how some judicial decisions both idealize the status of marriage and hold people with disabilities to unrealistic and unattainable standards before allowing them to marry. It proposes avenues for courts, advocates, and individuals with IDD to counter ableism in marital capacity cases. Ultimately, Part III urges courts and advocates to embrace SDM in the marital capacity context, both as a vehicle to increase access to marriage for people with IDD and to counter the normative, idealized vision of marriage as a self-sufficient unit that should not require external support.

## I. CAPACITY, MARRIAGE, AND DISABILITY

This Part defines intellectual and developmental disability and offers the basic legal and psychological underpinnings of capacity doctrine. It then discusses the institution of marriage as a central organizing mechanism in American law and culture. Finally, it explores the historical and contemporary relationship between the institution of marriage and people with disabilities, particularly IDD, including some of the present-day barriers to marriage faced by people with disabilities.

### A. *Defining Intellectual Disability and Capacity*

This section defines IDD, as used in this Essay, and the concept of capacity. Understanding the relationship between capacity and the right to marry requires engagement with language on one hand and with the philosophical understanding of personhood on the other. To do so, we must both identify the terms of our discussion and grapple with how the law understands and limits the power of human decision-making.

1. *Intellectual and Developmental Disability.* — Disability studies and legal scholars have devoted much thought to the challenges of defining disability writ large.[32] It is a term and concept that differs depending upon

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4L-MGVP] (internal quotation marks omitted) (quoting Lori Long). Indeed, marriage has also been described as the "ultimate merit badge." Ralph Richard Banks, Is Marriage for White People?: How the African American Marriage Decline Affects Everyone 21 (2011) (internal quotation marks omitted) (quoting Andew Cherlin, sociologist).

32. See, e.g., Samuel R. Bagenstos, Subordination, Stigma, and "Disability", 86 Va. L. Rev. 397, 406 (2000) (noting that "[t]he ADA provides its own definition of 'disability,' but the statute has not avoided the difficulties that have marked all attempts to demarcate the boundaries of the 'disability' category"); Sharon N. Barnartt, Disability as a Fluid State:

context—from law,[33] to medicine,[34] to social-psychological settings[35] and others. It can be understood as medical in nature, defined by a physical difference or specific diagnosis,[36] or as a social construction.[37]

This Essay is about adults with IDD, one group among the diverse set of people living with disability. When considering adults with IDD, it is especially fraught to rely merely on a medical model of disability "in that the broad diversity of who is included by the medical definition is not well expressed by rigid listings from a medical manual."[38] After all, medical diagnoses do little to delineate how, among the vast community of adults with IDD, a particular individual manifests or experiences their disability.

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Introduction, *in* Disability as a Fluid State 1, 2 (Sharon N. Barnartt ed., 2010) (arguing that, in contradiction to most major models of disability, "there is a lot of evidence that disability is a fluid state and not a dichotomous one"); Doron Dorfman, Disability as Metaphor in American Law, 170 U. Pa. L. Rev. 1757, 1795 (2022) (describing how the concept of disability has evolved into a "far more complex and nuanced concept" over time).

33. Compare Americans With Disabilities Act of 1990, 42 U.S.C. § 12102(1) (2018) (defining an individual with a disability as someone who (1) experiences a physical or mental impairment that significantly restricts one or more major life activities, (2) has a documented history of such an impairment, or (3) is regarded by others as having such an impairment), with How Do We Define Disability?, SSA, https://www.ssa.gov/redbook/eng/definedisability.htm [https://perma.cc/F97S-GMYP] (last visited Oct. 18, 2025) (defining an individual with a disability as someone who is not "able to engage in any substantial gainful activity" due to a "medically determinable physical or mental disability[]" that is either expected to lead to death or has lasted/is expected to last continuously for at least a year).

34. See, e.g., Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 37–46 (5th ed., text rev. 2022) [hereinafter DSM-5-TR] (defining and describing "intellectual disability" to include deficits in intellectual and adaptive functioning, the onset of which occurs "during the developmental period").

35. See Dana S. Dunn, Only Connect: The Social Psychology of Disability, *in* Handbook of Rehabilitation Psychology 143, 143–46 (Lisa A. Brenner, Stephanie A. Reid-Arndt, Timothy R. Elliott, Robert G. Frank & Bruce Caplan eds., 3d ed. 2019) (discussing the "social psychology of disability," including the ways in which individuals with disabilities interact with nondisabled individuals and how such individuals perceive each other).

36. See Harris, Political Economy of Conservatorship, supra note 25, at 1369 ("Today, disability as a word, concept, or category, often serves as a proxy for medical diagnosis. Even for those who recognize its social construction, the medicalization of disability continues to predominate in legislation, courts, and the public imagination.").

37. See Samuel R. Bagenstos, Disability and Reproductive Justice, 14 Harv. L. & Pol'y Rev. 273, 278 (2020) (describing the social model as "the notion that disability is not a condition . . . inherent to the disabled person, but is instead one that results from the interaction between a person's physical or mental attributes and the contingent social decisions that make particular opportunities or environments incompatible with those attributes"); Doron Dorfman, Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process, 42 Law & Soc. Inquiry 195, 197 (2017) ("The social model views disability as a social rather than a purely medical or tragic phenomenon."); see also Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1670 (2021) ("Ableist norms create and reinforce standards of behavior or social expectations that privilege able bodies and neurotypical minds while subordinating disabled bodies and neurodivergent minds.").

38. Lorr, Unaccommodated, supra note 11, at 1325.

In fact, even knowing the specific constellation of a given individual's "symptoms" or the details of their diagnosis may reveal little about what their disability means to them or their life.[39] Within the community of adults who have IDD, the variation of life experience, education, personality, adaptive behaviors,[40] and how the disability presents and is experienced makes generalization nearly impossible.[41] Add to that the range of other human identities—race, class, gender, sexual orientation—and the true breadth of the community on which this Essay focuses starts to become clear.[42]

Nonetheless, a grounding definition offers a place to begin. According to the American Association of Intellectual and Developmental Disabilities (AAIDD), a diagnosis of intellectual disability involves "[s]ignificant limitations in intellectual functioning" and "[s]ignificant limitations in adaptive behavior" that begin before the age of twenty-two.[43] Developmental disabilities are a "broader category," that can include both

39. See id. (noting that adults with IDD are a "heterogenous" group "with members having very different strengths and needs for supports" and discussing the racialized history of the diagnosis).

40. Adaptive behavior encompasses three areas of "skills": "[c]onceptual skills," which include "language[,] reading and writing[,] . . . and number concepts"; "[s]ocial skills," which encompass areas like "interpersonal skills, social responsibility, . . . and social problem solving"; and "[p]ractical skills," which include "daily living" tasks, vocational skills, and scheduling. Am. Ass'n on Intell. & Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 44 (2010) [hereinafter AAIDD Manual] (emphasis omitted).

41. See Comm. to Evaluate the Supplemental Sec. Income Disability Program for Child. With Mental Disorders, Mental Disorders and Disabilities Among Low-Income Children 176 (Thomas F. Boat & Joel T. Wu eds., 2015) [hereinafter Mental Disorders and Disabilities] ("As a diagnostic category, IDs include individuals with a wide range of intellectual functional impairments and difficulties with daily life skills. The levels of severity of intellectual impairment and the need for support can vary from profound to mild.").

42. See Subini Ancy Annamma, David J. Connor & Beth A. Ferri, Touchstone Text: Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability, *in* DisCrit: Disability Studies and Critical Race Theory in Education 9, 19 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016) ("DisCrit values multi-dimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on."); see also Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1407 (2021) (describing the "relational, contingent, fluid, and subjective nature" of disability (citing Rabia Belt & Doron Dorfman, Response, Reweighing Medical Civil Rights, 72 Stan. L. Rev. Online 176, 186–87 (2020), https://www.stanfordlawreview.org/online/reweighing-medical-civil-rights/ [https://perma.cc/Y9A4-63NW]).

43. FAQs on Intellectual Disability, Am. Ass'n on Intell. & Developmental Disabilities, https://www.aaidd.org/intellectual-disability/faqs-on-intellectual-disability [https://perma.cc/7WRP-KJ33] (last visited Oct. 17, 2025). Prior definitions of intellectual disability classified the end of the developmental period as eighteen. AAIDD Manual, supra note 40, at 3–12, 44.

intellectual and physical disabilities.[44] These can include conditions impacting the nervous system, like cerebral palsy, Down syndrome, and autism spectrum disorders.[45] Developmental disabilities can also impact the "[s]ensory system" (the five senses) and metabolism.[46] Other definitions exist, including in the *Diagnostic and Statistical Manual of Mental Disorders*[47] and in various state and federal laws.[48] While none are conclusive, they offer a sense of the how the diverse set of adults who might be identified as having IDD are understood by medical, legal, and psychiatric communities.

The broad community of people diagnosed with IDD is a "heterogeneous group" with "different strengths and needs."[49] Rather than being an "unchanging condition," "abilities and needs can vary based on several factors, including life stressors and the availability of accommodations and supports that maximize independence."[50] Indeed, in 2023, the Law School Admissions Council found that twenty-eight percent of students reported having a developmental or intellectual disability.[51] While one person with IDD may have difficulty reading maps and be more comfortable relying on verbal directions, another might be comfortable with reading and navigating maps but struggle with math.

This Essay focuses on adults with IDD because it is a diagnosis often used to question or undermine a person's capacity.[52] Though psych-

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44. About Intellectual and Developmental Disabilities (IDDs), Eunice Kennedy Shriver Nat'l Inst. Child Health & Hum. Dev., https://www.nichd.nih.gov/health/topics/idds/conditioninfo [https://perma.cc/F8AA-HNCC] (last updated Nov. 9, 2021).

45. Id.

46. Id.

47. DSM-5-TR, supra note 34, at 37 (defining "[i]ntellectual developmental disorder (intellectual disability)"). The *DSM-5-TR* notes that "attention-deficit/hyperactivity disorder; depressive and bipolar disorders; anxiety disorders; autism spectrum disorder; stereotypic movement disorder (with or without self-injurious behavior); impulse-control disorders; and major neurocognitive disorder" are "common co-occurring neurodevelopmental" and mental disorders for people with IDD. Id. at 45.

48. See, e.g., N.Y. Surr. Ct. Proc. Act Law § 1750 (McKinney 2025) (defining a person who is intellectually disabled as "a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with [IDD]"); Gina A. Livermore, Maura Bardos & Karen Katz, Supplemental Security Income and Social Security Disability Insurance Beneficiaries With Intellectual Disability, 77 Soc. Sec. Bull., no. 1, 2017, at 17, 18–19 (discussing the criteria that individuals with IDD must meet under certain federal benefits programs).

49. Maurice Feldman & Marjorie Aunos, Comprehensive, Competence-Based Parenting Assessment for Parents With Learning Difficulties and Their Children 7 (2011).

50. Id.

51. Debra Langer & Anna Russian, First-Year Law School Class: A Focus on Students With Disabilities, 2023 Update 2 (2025), https://www.lsac.org/sites/default/files/research/Disability-Brief-2023-Final.pdf [https://perma.cc/7U5X-2Y5X]. The Law School Admission Council includes attention deficit or hyperactivity disorder, autism spectrum disorder, and other developmental or intellectual disabilities in this category. Id. at 20.

52. See supra note 19 and accompanying text.

iatric-, age-, or accident-related disabilities, such as Alzheimer's and Traumatic Brain Injury (TBI), are also implicated in this discussion, these disabilities present challenges in the marriage-capacity context distinct from IDD. In the context of age-related disabilities, for example, these disabilities develop later in life such that courts and family members alike compare decisions made under disability with prior decisions, often with the goal of identifying whether the person is acting as one would expect or if the "decision is one that the 'real person' would never have made."[53] Psychiatric disabilities are often episodic, coming and going entirely depending on context and treatment.[54]

While age- and psychiatric-related cognitive disabilities can involve drastic change over the course of the lifetime, IDD is typically understood as involving a more stable set of characteristics.[55] Indeed, older stereotypes about IDD and incapacity rest on the notion that people with IDD cannot learn and are effectively perpetual children.[56]

IDD also presents different questions from physical disability, especially in the marriage or decision-making context. For example, an adult who uses a wheelchair to transport themselves because they are paralyzed from the neck down does not raise concerns about their ability to make decisions or form intimate relationships, even though some people who are paralyzed may not be able to have intercourse.

2. *Conceptualizing Capacity.* — Capacity is a polysemous term, speaking to philosophical ideas about agency and personhood, an

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53. See Toomey, supra note 21, at 1077–78.

54. Courts have acknowledged these challenges in the context of marriage-capacity decisions. See, e.g., DeMedio v. DeMedio, 257 A.2d 290, 297 (Pa. Super. Ct. 1969) ("The problem confronting us arises from the nature of schizophrenia itself, which admits of certain relatively lucid periods between acute attacks." (internal quotation marks omitted) (quoting the July 5, 1968 annulment decree entered by the Court of Common Pleas of Montgomery County)).

55. See Mental Disorders and Disabilities, supra note 41, at 176 ("The functional impairments associated with [IDD] are generally lifelong. However, there are functional supports that may enable an individual with [IDD] to function well and participate in society."). That IDD is comparatively more stable across the lifespan does not mean, as stereotypes and bias often suggest, that people with IDD are incapable of learning or growing during the scope of their lives. Indeed, research and lived experience both suggest that this stereotype is wrongheaded and false. See, e.g., Lorr, Unaccommodated, supra note 11, at 1330 & nn.69–70 (collecting sources on how parents with IDD best learn). For a haunting discussion of the ways understanding certain disabilities as static can lead to "a temporal framing of disability dovetailing with a developmental model of childhood," see Alison Kafer, Feminist, Queer, Crip 53–54 (2013).

56. Hannah A. Pelleboer-Gunnink, Jaap van Weeghel & Petri J.C.M. Embregts, Public Stigmatisation of People With Intellectual Disabilities: A Mixed-Method Population Survey Into Stereotypes and Their Relationship With Familiarity and Discrimination, 43 Disability & Rehab. 489, 494 (2021) (studying four primary stereotype-factors about people with IDD: "friendly," "in need of help," "unintelligent," and "nuisance" (internal quotation marks omitted)).

individual's abilities, and legal status.[57] Capacity is often understood through its inverse state, incapacity. As one court defines it:

> Incapacity is the legal status that occurs when a person's autonomy becomes either partially or totally impaired. A person lacks the ability to be autonomous . . . when he or she lacks the ability to absorb information, to understand its implications, to correctly perceive the environment, or to understand the relationship between his or her desires and actions.[58]

Capacity, then, is the ability to understand the nature and consequences of a decision, not evidence that one actually understands the nature and consequences of a particular decision.[59] There are numerous articulations of this test,[60] and it is far from a bright-line, unambiguous rule.[61]

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57. There are numerous ways to consider the concept of capacity. See, e.g., Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1210 (defining legal capacity as a condition of having the "requisite legal authority to engage in autonomous decision-making"); Glen, Not Just Guardianship, supra note 5, at 30 (describing legal capacity as bearing a "critical relationship" to one's personhood because people are, "in many ways, the sum total of all the decisions (both good and bad) [they] are able to make in [their] lives"); Toomey, supra note 21, at 1076 ("If you have the cognitive abilities demanded by the law, you may make any decision you want; if you do not, your decisions will not be acknowledged by the legal system.").

58. In re Conservatorship of Groves, 109 S.W.3d 317, 328–29 (Tenn. Ct. App. 2003) (footnote omitted) (citing Leslie Pickering Francis, Decisionmaking at the End of Life: Patients With Alzheimer's or Other Dementias, 35 Ga. L. Rev. 539, 542 (2001)). Notice that even in this definition of capacity, the court appears to be assuming that a person starts as capacitated and then "becomes" incapacitated.

59. For example, in the marriage context, Kentucky courts apply a general test as to whether the disabled person understood the nature of the marriage and the duties such a relationship imposes. See, e.g., Gellert v. Busman's Adm'r, 39 S.W.2d 511, 512 (Ky. Ct. App. 1931) ("A woman who takes in roomers . . . [and] performs her duties as a wife . . . without exhibiting further evidence of unsoundness of mind than a few occasional tears, is certainly capable of understanding the nature of the marriage contract and the duties and responsibilities which it creates."). A similar articulation appears in Illinois law. See Larson v. Larson, 192 N.E.2d 594, 597 (Ill. App. Ct. 1963) ("[I]f the party possesses sufficient mental capacity to understand the nature, effect, duties, and obligations of the marriage contract into which he or she is entering, the marriage contract is binding . . . ."). In the medical context, "[d]ecisional capacity is typically defined as 'communicating a choice, understanding relevant information, appreciating the current situation and its consequences, and manipulating information rationally.'" Megan S. Wright, Resuscitating Capacity, 63 B.C. L. Rev. 887, 897 n.51 (2022) [hereinafter Wright, Resuscitating Capacity] (quoting Paul S. Appelbaum & Thomas Grisso, Assessing Patients' Capacities to Consent to Treatment, 319 NEJM 1635, 1635 (1988)).

60. See supra note 59.

61. As a Tennessee court stated in 1857:

> It is difficult to describe any exact, palpable line between legal capacity and incapacity. Perhaps this is impracticable, as an abstract thing, in reference to the ability to make a valid contract, as insanity subsists in various degrees, and the line of separation between it and mere imbecility is often faint and imperceptible. The general test is the fitness of the person to be trusted with the management of himself and his own

Capacity can also be compared to the related but distinct concepts of competency[62] and consent.[63] "[C]ompetency refers to the mental ability and cognitive capabilities required to execute a legally recognized act rationally."[64] Whereas capacity is often a medical or psychological decision, competency is a judicial decision and traditionally understood as an on/off switch.[65] Capacity, as it relates to consent, is a threshold issue: capacity must be established before a person can be determined to have consented to a given act. Indeed, in areas of sexuality, medicine, and criminal law, for one to give valid consent, one must first be determined to have capacity to consent.[66]

The modern approach to determining an individual's capacity is a "functional" one.[67] Generally, when making findings of capacity, courts concern themselves both with the specific diagnosis that an individual has—if any—and areas of their life that may require additional support.

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> concerns. Such a person has a disposing, contracting mind, although it may be in a degree impaired.

Cole v. Cole, 37 Tenn. (5 Sneed) 57, 61 (1857).

62. For a concise and clear discussion of the relationship between competency and decision-making capacity in the medical context, see Megan S. Wright, More Choosers, Fewer Choices? Supported and Medical Decision-Making Law Post-*Dobbs*, 45 Pace L. Rev. 139, 142–43 (2024) [hereinafter Wright, More Choosers].

63. The primary meaning of consent is "to give assent or approval." Consent, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/consent [https://perma.cc/MH2S-8REC] (last visited Oct. 16, 2025).

64. Raphael J. Leo, Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians, 1 Prim. Care Companion J. Clinical Psych. 131, 131 (1999) https://www.psychiatrist.com/pcc/competency-capacity-treatment-decisions-primer-primary/ [https://perma.cc/9AB7-RKXH].

65. See Craig Barstow, Brian Shahan & Melissa Roberts, Evaluating Medical Decision-Making Capacity in Practice, 98 Am. Fam. Physician 40, 40 (2018) ("According to their strict definitions, lack of competence refers to global decision-making impairment (e.g., finances, property, wills), whereas lack of capacity refers to the inability to make decisions about proposed medical treatments and other aspects of care.").

66. See Elaine Craig, Capacity to Consent to Sexual Risk, 17 New Crim. L. Rev. 103, 104 (2014) (outlining factors that various jurisdictions' criminal laws consider when determining the "capacity to consent"); Martin Lyden, Assessment of Sexual Consent Capacity, 25 Sex. & Dis. 3, 5 (2007) ("An adult person has sexual consent capacity if the requisite rationality, knowledge, and voluntariness are present.").

67. Kristin Booth Glen, Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond, 44 Colum. Hum. Rts. L. Rev. 93, 94 (2012) [hereinafter Glen, Changing Paradigms] ("Under a functional approach, capacity is also seen as varying over time and with regard to specific decisions to be made."); id. at 98 (describing the functional approach as "lead[ing] to 'tailored' or limited guardianships, which represent the least restrictive means of protection, the promotion of greater autonomy for the incapacitated person, and robust procedural protections in the determination of incapacity and appointment of a guardian"). Note that, historically, capacity has been used as a form of social control for disfavored groups. For a strong analysis and argument about how this has been done, see generally Harris, Political Economy of Conservatorship, supra note 25.

Cognitive testing, such as IQ testing,[68] as well as psychological assessments play a role in a court's reasoning.[69] Courts also rely on the testimony of family members and others—often those involved in the lawsuit—to form their impressions of a given individual's maturity, relationships, and decision-making history.[70] Under the law, an adult's capacity should always be presumed.[71]

This fluid concept of capacity—understood to vary depending on context, adaptive skills, and situation—evolved in contrast to a more binary concept of capacity.[72] The distinction between the more binary, rigid rule of capacity and the more functional, fluid concept of capacity brings to mind the long-standing debate about the relative virtues of rules compared to standards.[73] Regardless of whether one considers capacity

68. Despite this reliance on IQ, a notion of capacity that is overly focused on measures of cognitive functioning may overvalue what we can learn from such measures. The American Association of Intellectual and Developmental Disability has clarified that while IQ "might be appropriate for a research study in which measured intelligence is a relevant variable," it is not meaningful when assessing how and where a person will best live and learn. AAIDD Manual, supra note 40, at 22. IQ—like other theoretically "objective" measures of intelligence or function—has been critiqued as unreliable and subjective. See, e.g., Harold W. Goldstein, Kenneth P. Yusko, Charles A. Scherbaum & Elliott C. Larson, Reducing Black–White Racial Differences on Intelligence Tests Used in Hiring for Public Safety Jobs, J. Intel., Apr. 2023, at 1, 2 ("While such tests are lauded in terms of predictive validity, they have also been disparaged for differential performance outcomes for racial/ethnic groups.").

69. See Smith & Stein, supra note 19 (noting ways that capacity assessments are used in court to disenfranchise people with IDD).

70. See infra notes 256, 268 and accompanying text. Families, of course, may not offer objective or full perspectives on some aspects of an individual's capacity. See Kevin Mintz, Ableism, Ambiguity, and the Anna Stubblefield Case, 32 Disability & Soc'y 1666, 1666–70 (2017) ("[I]t would not be unusual for the family of a man with a severe disability to have difficulty seeing him as a sexual being."). For a treatment of how similar evidence offered in the context of capacity to contract is often ableist, see Sean Scott, Contractual Incapacity and the Americans With Disabilities Act, 124 Dick. L. Rev. 253, 277–78 (2020).

71. See, e.g., Cal. Prob. Code § 810(a) (2025) ("For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions."); Haddad v. Haddad, 163 N.E.3d 406, 407 (Mass. App. Ct. 2021) (reciting the rule that, in the context of testamentary capacity, the testator is presumed to have capacity at time of will signing); In re Conservatorship of Groves, 109 S.W.3d 317, 329–30 (Tenn. Ct. App. 2003) ("Because of the importance of autonomy, it is well-settled that the law presumes that adult persons are sane, rather than insane, and capable, rather than incapable, to direct their personal affairs until satisfactory evidence to the contrary is presented." (footnotes omitted)); Glen, Not Just Guardianship, supra note 5, at 25 n.2 ("All adult persons are presumed to possess legal capacity unless and until a guardian is appointed for them.").

72. See Glen, Changing Paradigms, supra note 67, at 94 (describing earlier models of capacity as based on status, understanding "incapacity as a defect that deprived an individual of the ability—and consequently the legal right—to make choices").

73. See Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 400 (1985) ("[W]hen a legal dispute pits a rule against a standard, we can expect the proponent of the rule to trot out arguments about the importance of such legal virtues as certainty and stability . . . . [T]he champion of the rule will add that these virtues are best served by

assessments as standards or rules, however, it is not likely possible to escape the context of these decisions: the broader culture, including paternalist and ableist views of disability.[74] Comporting with the more modern and flexible idea of capacity, the most recent Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) marks a move away even from the word "capacity." Indeed, the UGCOPAA purposefully excludes the word "capacity" from its language.[75] As noted in explanatory comments, pursuant to the UGCOPAA, "the court is called upon to make particularized findings about the adult's individual needs in light of what the adult can and cannot do" rather than assign a binary status of capacity and incapacity.[76]

There is also an increasingly prevalent view that capacity to make decisions can be shored up—or even expanded—by external supports.[77]

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rules."); see also Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 61 (1992) ("These distinctions between rules and standards, categorization and balancing, mark a continuum, not a divide.").

74. See Schlag, supra note 73, at 407 ("There is no reason to believe that a rule or a standard supplies the context in which it is applied free from the influence of concerns external to that context."); Cass R. Sunstein, Problems With Rules, 83 Calif. L. Rev. 953, 959–60 (1995) ("Everything depends on the understandings and practices of the people who interpret the provision. Interpretive practices can convert an apparently rule-like provision into something very unrule-like.").

75. See Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act § 301 cmt. (Unif. L. Comm'n 2017) ("Unlike Section 311(a) and (b) of the 1997 act, this section does not speak of capacity and incapacity.").

76. Id.; see also Third National Guardianship Summit Standards & Recommendations, 2012 Utah L. Rev. 1191, 1199 (recommending against the use of the term "incapacitated person").

77. See Megan S. Wright, Reconsidering Capacity Assessments, 52 Am. J.L. Med. (forthcoming 2026) (on file with the *Columbia Law Review*) (arguing that capacity assessments should not only include consideration of external supports but also a role for SDM). While this view is relatively new and continues to grow within the United States, it extends from the Convention of the Rights of Persons with Disabilities. See G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (CRPD), art. 12 (Dec. 13, 2006) (stating that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" and that parties to the convention must "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity").

SDM has a much longer history and practice internationally and "is law in many countries around the globe." Leslie Francis, Intimate Relationships and Supported Decision Making, 77 Okla. L. Rev. 31, 31 (2024) [hereinafter Francis, Intimate Relationships]; see also Chester A. Finn, Matthew S. Smith & Michael Ashley Stein, How Persons With Intellectual Disabilities Are Fighting for Decision-Making Rights, 121 Current Hist. 30, 32 (2022) (listing countries that have adopted laws that enable individuals with disabilities to "get decision-making help while avoiding legal capacity restrictions"). Even internationally, however, how and when to use SDM is still being studied and debated. For example, CRPD compliance requires "abolition" of substituted decision-making whereas Australia's law continues to allow substituted decisions "only where such arrangements are necessary, as a last resort and subject to safeguards." Ron McCallum, Royal Comm'n Into Violence, Abuse, Neglect & Exploitation of People With Disability, The United Nations Convention on the

SDM is a practice, increasingly enshrined in statutory law,[78] through which individuals with intellectual, cognitive, and psychosocial disabilities can—ideally—make their own, contemporaneous decisions[79] about their lives.[80] "With supported decision making, an individual with a disability selects someone they trust to help with making decisions about healthcare, living arrangements, and other matters of consequence."[81] Scholars often describe it as "a nearly universal human experience: individuals looking to others for help when making decisions."[82]

There are some basic contours that will help to understand the process in this context. Within an SDM relationship, the person with the disability remains the "decision-maker" and others involved are

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Rights of Persons With Disabilities: An Assessment of Australia's Level of Compliance 52 (2020), https://apo.org.au/node/308792 (on file with the *Columbia Law Review*) (quoting Convention on the Rights of Persons With Disabilities: Declarations and Reservations (Austl.), Mar. 30, 2007, 2515 U.N.T.S. 3).

78. Nearly half of the fifty states have now adopted legislation that legally recognizes decisions made pursuant to SDM agreements. See U.S. Supported Decision-Making Laws, Ctr. for Pub. Representation, https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions/ [https://perma.cc/6U4T-WDRG] (last updated Apr. 2025). For a discussion about the promise and perils of these laws, see generally Kohn, supra note 3. Some examples include La. Stat. Ann. §§ 13:4261.101–13:4261.302 (2025); N.Y. Mental Hyg. Law § 82.11 (McKinney 2025); Tex. Est. Code Ann. §§ 1357.001–1357.102 (West 2025); Wash. Rev. Code §§ 11.130.700–11.130.755 (2025).

79. Additional legal tools—including advance directive, power of attorney, medical proxy, and others—can often also assist with the autonomous decision-making, though such tools almost always involve advance planning. See Wright, Resuscitating Capacity, supra note 59, at 898. These tools can sometimes involve substituted decision-making. Id. at 919 (describing how a finding of incapacity in the healthcare setting "allows the physician to turn to a surrogate decision maker or a healthcare power of attorney to authorize a particular treatment").

80. Dinerstein, supra note 28, at 10 ("Supported decision-making can be defined as a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life."); Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, Supported Decision-Making: A Viable Alternative to Guardianship?, 117 Penn. St. L. Rev. 1111, 1120 (2013) ("As a general matter, supported decision-making occurs when an individual with cognitive challenges is the ultimate decision-maker but is provided support from one or more persons . . . .").

81. Wright, More Choosers, supra note 62, at 144. The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act defines SDM as "assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual's wishes." Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act § 102(31) (Unif. L. Comm'n 2017).

82. Kohn, supra note 3, at 319; see also Finn et al., supra note 77, at 33 ("The idea is that just about everyone at some point in their lives needs or wants help when making some kinds of decisions, and therefore it follows that society should not discriminate against people because their support needs or preferences are different from those of others.").

"supporters."[83] As the decision-maker, the person with the disability retains agency and is the ultimate arbiter of the decision.[84] Indeed, one of the primary goals of SDM is preserving the autonomy of the decision-maker.[85] SDM can be accomplished through both formal and informal means,[86] and there is wide variation and diversity in the state laws recognizing SDM in one form or another.[87] Formal SDM involves written agreements between the person with a disability and their supporters, which outline the process for making decisions under the agreement and the scope—or type—of decisions that can be made under the agreement.[88] Some states have also provided for facilitated agreements, which involve training for both the decision-maker and supporters.[89] Areas of assistance include communication, information gathering, financial decisions, health care, housing, and more.[90] SDM has been lauded as morally preferable to guardianship in that it allows greater autonomy and agency for individuals, and it "can be appealing to legislatures for multiple

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83. Kristin Booth Glen, Supported Decision-Making From Theory to Practice: Further Reflections on an Intentional Pilot Project, 13 Alb. Gov't L. Rev. 94, 96 (2020) [hereinafter Glen, Supported Decision-Making] (describing why the New York pilot program in particular uses the term "Decision-Makers" for the individuals making decisions pursuant to an SDM agreement); id. at 97 (referring to those who support Decision-Makers as "supporters"); see also Francis, Intimate Relationships, supra note 77, at 31 ("Supporters support; they do not supplant the principal as decision-maker.").

84. See Francis, Intimate Relationships, supra note 77, at 35 ("Fundamental to supported decision-making statutes is ensuring that the principal remains the decision-maker . . . ."); Wright, More Choosers, supra note 62, at 144 ("Importantly, the person with the disability exercises agency and is the legal decision maker.").

85. Francis, Intimate Relationships, supra note 77, at 35.

86. See Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act § 102 cmt. ("The act uses the term to apply to a variety of arrangements in which an individual is assisted by one or more persons of the individual's choosing in making and communicating decisions. These arrangements may be purely informal, or may be formalized by an agreement . . . ."); Rose Mary Bailly, Alb. L. Sch. Gov't L. Ctr., Supported Decision-Making and Supported Decision-Making Agreements 1 (2022), https://www.albanylaw.edu/sites/default/files/documents/Supported%20Decision%20Making%20Explainer%20Updated%20August%203%202022.pdf [https://perma.cc/JV8S-S679] ("Anyone who has have ever sought advice from a friend or family member before buying a car, a pair of running shoes, or even a jar of pasta sauce, has engaged in supported decision-making."); see also Kohn, supra note 3, at 317 (noting that SDM can be "entirely informal" or "formalized by an explicit agreement").

87. See Kohn, supra note 3, at 316 ("Supported decision-making can take a variety of forms. It can involve a single supporter or multiple supporters. Where multiple supporters are involved, they may work with the individual collaboratively as a group (sometimes referred to as a 'circle of support').").

88. Wright, More Choosers, supra note 62, at 145.

89. See, e.g., Kristin Booth Glen, Piloting Personhood: Reflections From the First Year of a Supported Decision-Making Project, 39 Cardozo L. Rev. 495, 496 (2017) [hereinafter Glen, Piloting Personhood] (describing a pilot program in New York state which subsequently became the basis of the New York SDM legislation).

90. Francis, Intimate Relationships, supra note 77, at 35–40.

reasons, including reducing the costs of guardianship or protecting the civil rights of persons with disabilities."[91]

Despite these benefits, the use of SDM is not without challenges. For example, one common form of support can be communicating on behalf of the decision-maker,[92] and "[a] persistent problem with support as communication is ensuring that the supporter accurately communicates what the principal wants to say."[93] In many cases in which communication support is needed, but especially in the context of cognitive disabilities, the question of whether the supporter is communicating the decision-maker's meaning may be difficult to verify.[94] The problem is more pronounced if there is the potential for a conflict of interest between the supporter and the decision-maker.[95] In the case of gathering information to assist with making a particular decision or solving a particular problem, the supporter may have biases or predispositions that lead them to focus on some information streams over others.[96] After all, "supporters are people, too, with their own desires, goals, and agency, potentially also realized in interdependence with others."[97] A related question is whether supporters should be focused on only the "means" of reaching a decision or whether, to some extent, their involvement in decisions about what "ends" is inevitable.[98] If involvement in the ends is at least sometimes unavoidable, to what degree is SDM upholding the autonomy of the decision-maker? These challenges may only be more complex in the context of intimate and sexual relationships.[99]

### B. *Marriage and Disability*

This section first assesses the legal foundations of marriage and the cultural norms surrounding the institution. It next explores the historical and contemporary relationship between marriage and people with

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91. Wright, More Choosers, supra note 62, at 146.

92. Francis, Intimate Relationships, supra note 77, at 36.

93. Id.

94. See id. (describing verification as "elusive").

95. Id.

96. See id. at 36–38 (discussing the complications that can arise when decisions also intimately affect supporters, as can be the case in healthcare, financial, and housing decisions).

97. Id. at 32.

98. Professor Leslie Francis argues convincingly that the "means" and "ends" of decisions cannot easily be disaggregated and that this presents especially challenging problems in the context of SDM. Francis, Intimate Relationships, supra note 77, at 40–42 ("A potential deficiency in a simple means/end model is the likelihood that ends may conflict and need to be reconciled or weighed against one another before reasoning about means can occur.").

99. Cf. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1239–40 (arguing for a rebuttable presumption against intimate partners providing support for principals in social or sexual relationships); Francis, Intimate Relationships, supra note 77, at 32 (arguing that unless they are spouses, sexual partners are inappropriate supporters in SDM relationships).

disabilities, particularly IDD, and surveys some of the present-day barriers to marriage faced by people with disabilities. Considering the role of marriage in organizing and branding the American family helps to better contextualize the meaning and impact of the statutes and judicial decisions focused on capacity and marriage explored in Part II. It also sheds light on the extent to which judicial findings of capacity may reflect idealized norms.

1. *Marriage as a Fundamental Right and Its Limits.* — Marriage is both a contract between two parties[100] and a hallowed fundamental right belonging to all citizens.[101] The Supreme Court has repeatedly discussed the import of marriage, most recently describing its "transcendent importance" and its promise of "nobility and dignity to all persons, without regard to their station in life."[102] In articulating that the right to

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100. See In re Marriage of Greenway, 158 Cal. Rptr. 3d 364, 374 (Ct. App. 2013) ("Marriage arises out of a civil contract, but courts recognize this is a special kind of contract that does not require the same level of mental capacity of the parties as other kinds of contracts.").

While it is true that marriage is a matter of contractual decision-making that allows "individuals to structure their own legal relationships," scholar Jill Elaine Hasday has critiqued the notion that family law "has shifted from status to contract." Jill Elaine Hasday, Family Law Reimagined 120–21 (2014). Hasday notes that the "normative premise of the story is that the move from status to contract is an improvement" where in fact there still exist many status rules in family law. Id. at 121, 124–28. For an early and formative view that family law provides a framework for adult bargains, see generally Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 951 (1979) ("Our primary purpose is to develop a framework within which to consider how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom.").

101. See Obergefell v. Hodges, 576 U.S. 644, 675 (2015). As explored more in section I.B.II, marriage can also be understood as a means of seeking "the blessing that the state can confer on relationships that meet its requirements for legitimacy." Katherine Franke, The Curious Relationship of Marriage and Freedom, *in* Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families 88 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (suggesting that the gay and lesbian community should have been more skeptical before seeking the state's recognition of legitimacy).

102. *Obergefell*, 576 U.S. at 656. Even before *Obergefell*, the Supreme Court had forcefully and repeatedly pronounced the rights to marriage, reproductive freedom, and family. See, e.g., Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that a Virginia law that prohibited interracial marriage violated the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 485–86, (1965) (finding that a Connecticut law forbidding the use of contraceptives by married couples violated the couple's right to marital privacy); Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942) (holding that an Oklahoma statute providing for sterilization of "habitual criminal[s]" involved rights "fundamental to the very existence" of humanity and violated the Fourteenth Amendment). More recently, in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022), the Court rolled back the previously recognized right to abortion. Justice Clarence Thomas wrote separately in *Dobbs* to suggest that the Court should "reconsider all of [its] substantive due process precedents, including *Griswold* . . . and *Obergefell*." Id. at 2301 (Thomas, J., concurring).

Feminist scholar Janet Halley, among other scholars, has raised significant critiques of marriage as a status. See generally Janet Halley, Behind the Law of Marriage (I): From Status/Contract to the Marriage System, Unbound, 2010, at 1 (arguing that marriage as a

marry applies with equal force to same-sex couples, the Court based its finding, in part, on the concept that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[103] Indeed, the Court went so far as to suggest that the freedom to marry is actually a gateway to "other freedoms, such as expression, intimacy, and spirituality."[104]

The Court's framing of marriage as an exemplar of personal choice and autonomy has had many legal and cultural impacts.[105] From a doctrinal perspective, such framing is central to how the *Obergefell* majority determined that same-sex marriage is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[106] From a normative perspective, it highlights how marriage—the choice of whether and whom to marry—is directly connected to an individual's autonomy and personhood.[107] By framing marriage as a "foundation of the family and of society,"[108] the decision also "reified" marriage as the center of

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status is problematically grounded in conservative, formalist logic that seeks to preserve tradition and the primacy of heterosexuality). Halley, who urges instead a vision of marriage as a set of effects, argues that the notion that marriage produces a status is an "ideological phantom." Id. at 58. Halley tells us that the insistence that marriage is a status "is not ideologically innocent," but "carries the idea that the market is free, while the family is entrenched in moral or natural command; it carries the idea that the market is the site of progress, while the family is or should be slow to change." Janet Halley, What Is Family Law?: A Genealogy Part I, 23 Yale J.L. & Humans. 1, 95 (2011).

103. *Obergefell*, 576 U.S. at 665–66 ("Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.").

104. Id. at 666.

105. The dissent, in contrast, would have found that while substantive due process might protect the right to marry, that right "does not include a right to make a State change its definition of marriage." Id. at 686 (Roberts, C.J., dissenting). For Chief Justice John Roberts, that marriage is a fundamental right does not mean that "anyone who wants to get married has a constitutional right to do so." Id. at 699. Instead, it means that states must "justify barriers to marriage *as that institution has always been understood*." Id. (emphasis added).

106. See id. at 663 (majority opinion) ("[T]hese liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."). But cf. Katherine Franke, Franke, J., Concurring in the Judgment., *in* What *Obergefell v. Hodges* Should Have Said: The Nation's Top Legal Experts Rewrite America's Same-Sex Marriage Decision 189, 189, 210 (Jack M. Balkin ed., 2020) (arguing that the Equal Protection Clause is the proper basis to uphold same-sex marriage equality); Clare Huntington, *Obergefell*'s Conservatism: Reifying Familial Fronts, 84 Fordham L. Rev. 23, 26–27 (2015) [hereinafter Huntington, *Obergefell*'s Conservatism] (characterizing the dissent's criticism of the majority "as a criticism of the Court choosing one social front over another" and arguing that *Obergefell* would have been better decided under the Equal Protection Clause).

107. See Glen, Piloting Personhood, supra note 89, at 496 ("[A]t its simplest, our personhood is the consequence of all the decisions we have made over our lives.").

108. *Obergefell*, 576 U.S. at 669 (internal quotation marks omitted) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)). The Court also focused on the unique importance of the two-person relationship at the heart of marriage, id. at 666, and the extent to which marriage "safeguards children and families," id. at 667.

family law, further entrenching marriage as a necessary, normative element to a strong family.[109]

Before marriage was understood as a personal right, marriage laws were once an open mechanism for controlling sex,[110] cohabitation,[111] the raising of children,[112] the propagation of religious ideals,[113] and other aspects of family life.[114] Indeed, Chief Justice John Roberts has described

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109. See Huntington, *Obergefell*'s Conservatism, supra note 106, at 28–29 ("Every statement that Justice Kennedy makes for the Court can be read as an implicit criticism: a nonmarital family is *not* the keystone of the social order; it does *not* embody the ideal of family; and it is *not* essential to profound hopes and aspirations."); Melissa Murray, *Obergefell v. Hodges* and Nonmarriage Inequality, 104 Calif. L. Rev. 1207, 1240 (2016) ("In *Obergefell*, the Court promotes marriage—and only marriage—as the normative ideal for intimate life."). Note that the *Obergefell* Court's vision of the centrality of marriage, and preference for the marital family, is not new. See Courtney Megan Cahill, Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life, 54 Ariz. L. Rev. 43, 49–52 (2012) (discussing the interaction between "central kinship," meaning the "traditional 'nuclear' family," and "marginal kinship," which encompasses all "non-traditional family" structures); Serena Mayeri, Marital Supremacy and the Constitution of the Nonmarital Family, 103 Calif. L. Rev. 1277, 1279–83 (2015), https://www.californialawreview.org/online/marriage-inequality-and-the-historical-legacies-of-feminism [https://perma.cc/B3TM-Z9L5] [hereinafter Mayeri, Marital Supremacy] (discussing the ways in which "marital supremacy" interacted with cases involving illegitimacy classifications); Serena Mayeri, Marriage (In)equality and the Historical Legacies of Feminism, 6 Calif. L. Rev. Cir. 126, 134 (2015) [hereinafter Mayeri, Marriage (In)Equality] (noting how many feared *Obergefell* "reinforce[d] and entrenche[d] the legal privileging of marriage at the expense of individuals and families who cannot, or do not wish to, marry"); Alice Ristroph & Melissa Murray, Disestablishing the Family, 119 Yale L.J. 1236, 1252–64 (2010) (reviewing U.S. Supreme Court cases that reveal the centrality of the "marital model" to the Court's vision of family law).

110. See Mary Anne Case, Marriage Licenses, 89 Minn. L. Rev. 1758, 1769 (2005) ("[U]ntil quite recently, a valid marriage was the prerequisite to engaging lawfully in most any form of sexual activity: . . . criminal laws prohibited fornication and adultery[,] . . . homosexual and heterosexual oral and anal sex, bestiality, [and] even access to masturbatory aids and pornographic materials."); Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1, 5 (2012) (explaining the historical use of marriage as a "defense" and "punishment" for those charged with seduction of an unmarried woman).

111. See Elizabeth S. Scott, Marriage, Cohabitation and Collective Responsibility for Dependency, 2004 U. Chi. Legal F. 225, 234 (noting that "powerful moral and religious norms historically dictated that marriage was the only acceptable venue for intimacy and reproduction").

112. See Clare Huntington, Failure to Flourish: How Law Undermines Family Relationships 61 (2014) [hereinafter Huntington, Failure to Flourish] (describing the historical preference for children born within marriages and the "penaliz[ation] [of] 'illegitimate' children born to either extramarital or nonmarital partners").

113. See Case, supra note 110, at 1767 (describing the role of the established church in early English marriage laws).

114. "Without the state, there is no family, legally speaking . . . . [T]he state determines who can and cannot get married." Huntington, Failure to Flourish, supra note 112, at 59; see also Abrams et al., supra note 15, at 67 ("By limiting who may marry, lawmakers have sought to define and reinforce foundational social values relating to citizenship (including who is included and excluded from the status), morality, childrearing, race, gender, and sexuality.").

the historical right to marry as arising "to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship."[115]

In many regards, the state's use of marriage to dictate personal decision-making has changed.[116] As Professor Mary Anne Case writes,

> [A] married couple is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle their finances or keep them separate, to live together or separately, to differentiate roles or share all tasks, to publicize their relationship or be discreet about it, while still having their commitment to one another recognized by third parties including the state.[117]

Adults are also now understood to have free choice about who to marry, though the full picture is a bit more complex. The state still has many status-based rules about who can marry,[118] such as rules prohibiting marriages between more than two people, between relatives, and involving people below certain ages.[119] Indeed, "[s]tatus rules regulating the rights of mentally disabled or mentally ill people to marry" are an example of persistent status-based rules in family law and have received "even less scrutiny" than other status-based rules.[120] The inclusion of disability on this list of status-based prohibitions on marriage itself aligns with the understanding of people with disabilities as requiring protection or, alternatively, as likely to produce biologically suspect children.[121] Such status-based regulation of those with disabilities contributes to "the mutually reinforcing nature of state-sanctioned marriage and the social understanding of marriage."[122]

2. *Marital Norms and the Self-Sufficient Family.* — Alongside legal strictures on who can marry and what constitutes a legally valid marriage, there exist strong norms around what constitutes an ideal marriage.[123]

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115. Obergefell v. Hodges, 576 U.S. 644, 689 (2015) (Roberts, C.J., dissenting).

116. See Case, supra note 110, at 1765.

117. Id.

118. Hasday, supra note 100, at 124–28.

119. Id. at 124.

120. Id. at 125.

121. See infra notes 139–153 and accompanying text (describing the historical basis for prohibitions on marriage for people with IDD and the connection to the eugenics movement); infra notes 154–159 (describing protection-based concerns surrounding the marriage of people with IDD).

122. Huntington, Failure to Flourish, supra note 112, at 61.

123. See id. (describing the "norms of loyalty, sexual faithfulness, emotional and financial sharing, and commitment" as "deeply entrenched with our understanding of marriage" (citing Elizabeth S. Scott, A World Without Marriage, 41 Fam. L.Q. 537, 547–50 (2007))). These norms have long been recognized by family law scholars. For early, formative work identifying the "dual system of family law," one for privileged, married families, and one for others, see generally Jacobus tenBroek, California's Dual System of

These norms are part of what makes marriage a "potent site of 'social statecraft.'"[124] Indeed, while the nature, purpose, and consequence of marriage are dependent on cultural,[125] religious,[126] and political[127] beliefs, normative views of the ideal marital family persist.[128] "The marital, nuclear family is one that encourages monogamy, procreation, industriousness, insularity, and—seemingly paradoxically—a certain kind of visibility."[129] Insularity, as used here, refers to the idea that "the established family is understood as a closed unit" that is financially self-sufficient and independent from the government.[130] Dependency that reaches outside of

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Family Law: Its Origin, Development, and Present Status (pts. 1–3), 16 Stan. L. Rev. 257, 900 (1964), 17 Stan. L. Rev. 614 (1965).

124. Sarah L. Swan, Constitutional Backfires Everywhere, 25 J. Const. L. 311, 313 (2023) (quoting Alyosha Goldstein, The Threat of Poverty Without Misery, Feminist Formations, Spring 2021, at 117, 121). Halley has also understood marriage and the family as an often-hidden site of economic distribution. See Janet Halley, What Is Family Law?: A Genealogy Part II, Yale J.L. & Humans. 189, 288 (2011) ("One of the costs of [family law exceptionalism] for the field of family law is its implication that the state and the market are agencies for distribution and *the family is not*. [Family law exceptionalism] carries an antidistributive bias for analysis of the family and its law.").

125. Nancy D. Polikoff, Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law 11–12 (2008) (noting that "social and cultural changes" can alter the concept of marriage).

126. Hasday, supra note 100, at 116 (describing religion as among the reasons a woman might be disinclined to divorce); Polikoff, supra note 125, at 3 (listing, as possible reasons to marry, "the spiritual, cultural, or religious meaning of marriage in their lives"); id. at 80 (describing the Christian Right marriage movement, including its goal of making divorce harder to obtain).

127. See, e.g., June Carbone & Naomi Cahn, Red v. Blue Marriage, *in* Marriage at the Crossroads 9, 9 (Marsha Garrison & Elizabeth S. Scott eds., 2012) ("[I]n the United States today, marriage is increasingly a symbol of what divides us: regionally, economically, racially, politically, and ideologically."); see also Steven L. Nock, Marriage as a Public Issue, Future Child., Fall 2005, at 13, 14, 28 (discussing current "marriage-promotion efforts" and their relation to debates about marriage throughout time); Julie Kohler, JD Vance Puts an Extremist Marriage Agenda on the Ballot, Ms. Mag. (Aug. 15, 2024), https://msmagazine.com/2024/08/15/jd-vance-extremist-marriage-agenda-childless-women/ [https://perma.cc/6YA9-723T] (discussing the "marriage promotion agenda" that exists in current Republican politics).

128. Clare Huntington, *Obergefell*'s Conservatism, supra note 106, at 24 (describing the "performative" nature of family law); see also Clare Huntington, Staging the Family, 88 N.Y.U. L. Rev. 589, 590–95 (2013) ("[P]erformative family law too often leads legal actors to accept rather than interrogate the public meaning of familial categories.").

129. Ristroph & Murray, supra note 109, at 1256–57. Visibility here refers to the idea that "the state has encouraged the view that public recognition as a family is something to be prized." Id. at 1257.

130. Id.; see also Serena Mayeri, Marital Privilege: Marriage, Inequality, and the Transformation of American Law 189 (2025) (describing how, historically, "[t]he success of challenges to marital primacy often tracked their fiscal impact: the state safely could ignore marital status when doing so helped to privatize dependence in the family"). The notion that dependency on the state is a "[m]arker of [d]eviance" exists outside of the marriage context as well, especially for those marked with "[m]ental disability, broadly defined." See Harris, Political Economy of Conservatorship, supra note 25, at 1381–82 (describing the

the family is understood as deviance.[131] The marital family is also "a site of domestication" that "discourages nonconformity and rebelliousness by encouraging discipline through dependency among family members."[132]

The idealized self-sufficient marital unit reinforces "the ideology of family responsibility for care provision."[133] Under the ideology of family responsibility, "[c]aring for family members is understood as a natural or inherent moral obligation, superior to any other form of care, such as paid home health care or institutional care."[134] Two "corollaries in public policy"[135] follow from the idea that family is the proper locus for all family provision, both of which have significant implications for households headed by adults with support needs. The first is that the government should provide care "only in cases where there is no family" or families cannot afford it.[136] The second is that "only the minimal amount of support should be provided in order to reinforce—and avoid weakening—family-based care."[137] The idea that government support for families should be minimal runs parallel to the view that adults should not marry and reproduce unless they are self-sufficient, a theme that has appeared in statutes and case law.[138] Marriages involving adults with support needs, including those with IDD, thus directly confront notions of the idealized, self-sufficient family.

3. *Intellectual Disability, Intimacy, and the Right to Marry.* — American law reflects a long-standing view that IDD is incompatible with sexual, romantic, and familial relationships.[139] While early U.S. laws held those

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history and growth of legal doctrine connecting legal incapacity, disability, and dependence on the state).

131. See Martha L.A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev. 2181, 2182 (1995) [hereinafter Fineman, Masking Dependency] (observing that "members of society who openly manifest the reality of dependency—either as dependents or caretakers in need of economic subsidy—are rendered deviants").

132. Ristroph & Murray, supra note 109, at 1258–59.

133. Sandra R. Levitsky, Caring for Our Own: Why There Is No Political Demand for New American Social Welfare Rights 4 (2014). "The ideology of family responsibility . . . refers to a particular set of norms and beliefs about who should be responsible for the care of society's dependent members." Id. at 4–5.

134. Id. at 5.

135. Id.

136. Id.

137. Id.; see also June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family 30–32 (2014) (describing the work of political scientist Charles Murray who urged that the state cease offering economic support to single mothers as a means of restoring the consequences of marriage); Maxine Eichner, The Free-Market Family: How the Market Crushed the American Dream (and How It Can Be Restored) 178–92 (2020) (describing the history of policies and regulations that enact this ideology).

138. See infra Part II.

139. See, e.g., Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a law forcibly sterilizing people with IDD); Chin, Group Homes as Sex Police, supra note 10, at 381 (describing how structural discrimination cuts off group home residents with IDD from sex and intimacy); see also Leslie Joan Harris, June Carbone & Rachel Rebouché, Family Law 137 (7th ed.

with and without IDD to the same standard in the context of marriage,[140] the eugenics movement led to the significant curtailment of marriage and sexual rights for people with disabilities, especially IDD. Eugenics laws were passed based on the conviction that political leaders needed to prevent the reproduction of people with IDD—then called feebleminded, imbecilic, lunatic, or insane—who were considered "defective and delinquent."[141] The leaders of the eugenics movement, though far from a majority inside the United States, were convinced "that they had a deep responsibility to protect and promote the future of civilization" from the reproduction of people with IDD, among other disabilities.[142] In passing the Virgina Sterilization Act of 1924, for example, drafters and advocates of the law "asserted that sterilization was truly humane for the individual concerned" and advocated that "the country would be enhanced if specific classes of individuals did not bear children."[143] While these classes of people were not limited to people with disabilities—indeed they included the poor, alcoholics, and other subsets—they did explicitly include people with disabilities.[144]

This cultural understanding is enshrined in Supreme Court precedent in the case of *Buck v. Bell*.[145] Despite decades of precedent upholding and clarifying parents' fundamental right to raise their children,[146] *Buck* is the sole Supreme Court case relating to the rights of

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2023) ("State restrictions on marriage by the developmentally disabled and the mentally ill may reflect a eugenic concern that found strong support during the late nineteenth and early twentieth centuries.").

140. Marissa DeBellis, Comment, A Group Home Exclusively for Married Couples With Developmental Disabilities: A Natural Next-Step, 28 Touro L. Rev. 451, 455 (2012).

141. Paul A. Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court, and *Buck v. Bell* 31, 36, 47 (2008) (quoting Extends Work in Eugenics, N.Y. Times, Mar. 30, 1913, at 10); see also Harris, Political Economy of Conservatorship, supra note 25, at 1382 (describing that "[m]ost states preserved, in name at least, the distinction between idiocy, lunacy, and insanity until the early twentieth century," but that most courts used the terms "interchangeably and grouped them under one proceeding" (citing Comment, Appointment of Guardians for the Mentally Incompetent, 1964 Duke L.J. 341, 342–43)).

142. Michelle Oberman, Thirteen Ways of Looking at *Buck v. Bell*: Thoughts Occasioned by Paul Lombardo's *Three Generations, No Imbeciles*, 59 J. Legal Educ. 352, 359 (2010).

143. Id. at 361.

144. See id. at 359–61 (noting how the Act enabled the sterilization of multiple groups, including those with IDD).

145. See 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

146. See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (recognizing parents' rights to raise their children in their religion); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (reaffirming parents' right to "direct the upbringing and education of children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing parents' right to "establish a home and bring up children").

adults with disabilities to have and parent children.[147] The Court found that the involuntary sterilization of a "feeble minded white woman," who had been committed in the same institution as her mother and daughter, was constitutional.[148] The Virginia state law under which Carrie Buck was sterilized allowed sterilization when a doctor determined it was in "the best interest of the patients and of society that an inmate under [their] care should be sexually sterilized."[149] Under such circumstances, the doctor "may have the operation performed upon any patient afflicted with hereditary forms of insanity[] [or] imbecility."[150] In this way, *Buck* embodies long-standing eugenic anxieties about people with IDD reproducing and "tainting the human race."[151]

By 1930, forty-one states limited marriage "based on mental disability."[152] Laws prohibiting people with IDD from getting married were based on a similar logic as those supporting involuntary sterilization.[153] Advocates for these marriage prohibitions feared that marriages involving people with IDD would result in more disabled children and, relatedly, that refusing to legally sanction such marriages would "protect[]" society from their offspring.[154] And so began an era in which—in many states—adults with psychiatric disabilities and IDD were not allowed to marry.

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147. Lorr, Disabling Families, supra note 7, at 1271. This author has previously pointed out that one other case, Lehman v. Lycoming Cnty. Child.'s Servs. Agency, 458 U.S. 502, 503 (1982), decided on jurisdictional grounds, presented a missed opportunity to "raise[] the question of what a social services agency must prove when it seeks to terminate a parent's rights based on disability." Lorr, Disabling Families, supra note 7, at 1271 n.67.

148. *Buck*, 274 U.S. at 205. Carrie Buck herself was enmeshed in an earlier iteration of the family regulation system. See Emma, Carrie, Vivian: How a Family Became a Test Case for Forced Sterilizations, Hidden Brain, NPR (Apr. 23, 2018), https://www.npr.org/transcripts/604926914 [https://perma.cc/8LMU-KEH8]. Later in her life, Buck consistently maintained that she was raped by her foster mother's nephew. See id. ("Carrie said, [my foster mother's nephew] took advantage of me. He promised me he would marry me. He forced himself on me, and then he left."). It appears likely that the rape and subsequent pregnancy—not her IQ or cognitive ability—were the reason that her foster mother sent her to the institution. Id.

149. *Buck*, 274 U.S. at 206.

150. Id.

151. Emens, Intimate Discrimination, supra note 10, at 1325.

152. Allison C. Carey, On the Margins of Citizenship: Intellectual Disability and Civil Rights in Twentieth-Century America 52 (2009). At this same time, thirty states had passed sterilization laws, and those classified as "imbeciles" or "feeble-minded" could be deported under federal immigration law. Id. (internal quotation marks omitted) (quoting Immigration Act of 1907, Pub. L. No. 59-96, ch. 1134, § 2, 34 Stat. 898, 898–99 (repealed 1917)).

153. See DeBellis, supra note 140, at 455 (describing the eugenic ideals which inspired restrictions on the right of developmentally disabled persons to marry as well as forced sterilization laws).

154. Id. at 456; see also Jonathan Matloff, Comment, Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriages of Persons With Mental Disabilities, 17 Am. U. J. Gender Soc. Pol'y & L. 497, 501–02 (2009) (noting that

4. *Other Barriers to Marriage.* — While this Essay focuses on capacity-based barriers to marriage, explored more fully in Part II, there are other barriers that also merit mention. This section considers some of those barriers—social, legal, and practical.

Some of the societal barriers to marriage for people with IDD stem, in part, from how disabled persons are represented in culture. Frequently, culture represents disabled people—especially those with IDD—as either nonsexual or hypersexual,[155] and there is widespread concern about the need to protect individuals with IDD from sexual, financial, and other forms of abuse.[156] Rates of sexual abuse and exploitation within the community of people with IDD are indeed disproportionate to members of the broader community.[157] This reality, and related concerns that a person with IDD might be more easily coerced into a marriage or more likely to be subject to abuse in a romantic relationship, may motivate governments and family members to approach marriages involving adults with IDD with unique care.[158] Likewise, there are concerns that people with IDD may make "bad decisions" that cause "self-harm."[159]

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restrictions at this time reflected the belief that mental disabilities "could spread to children through procreation . . . and consequently diminish societal productivity").

155. See Chin, Structural Desexualization, supra note 10, at 1595 (describing the binary view of discourse on sexuality regarding people with intellectual and developmental disabilities); Emens, Intimate Discrimination, supra note 10, at 1325 (identifying the ways in which culture desexualizes disabled people, although noting that some representations depict disabled people as hypersexual); Garbero, supra note 6, at 601 (noting that the perceptions and opinions of the eugenics movement "find their roots in representations of disabled people as either non-sexual or hypersexual").

156. Prianka Nair, Surveilling Disability, Harming Integration, 124 Colum. L. Rev. 191, 229 & nn.210–211 (2024).

157. See Emily Ledingham, Graham W. Wright & Monika Mitra, Sexual Violence Against Women With Disabilities: Experiences With Force and Lifetime Risk, 62 Am. J. Prev. Med. 895, 897–99 (2022) ("After controlling for confounders, women with any disability type included in this study were significantly more likely to have experienced forced sex during their lifetime than nondisabled women . . . ."); Raluca Tomsa, Smaranda Gutu, Daniel Cojocaru, Belén Gutiérrez-Bermejo, Noelia Flores & Cristina Jenaro, Prevalence of Sexual Abuse in Adults With Intellectual Disability: Systematic Review and Meta-Analysis, 18 Int'l J. Env't Rsch. & Pub. Health 1980, 1989–91 (2021) (discussing the rates of sexual abuse among people with intellectual disability across different demographic groups).

158. See, e.g., Smith v. Smith, 224 So. 3d 740, 748 (Fla. 2017) (explaining that court approval is required for marriages involving those found to lack capacity to prevent abuse and exploitation). Likewise, as Professor Alexander Boni-Saenz points out, for people "whose decision-making will lead to significant harm on a consistent basis" there may be a justification to limit the right to make choices. Alexander A. Boni-Saenz, The Right to Fail, 77 Okla. L. Rev. 11, 18 (2024) [hereinafter Boni-Saenz, The Right to Fail].

159. See Boni-Saenz, The Right to Fail, supra note 158, at 17 (describing, in the broader context of those with cognitive disabilities, that a "nervousness" to allow autonomous decisions "usually stems from a concern that providing too much choice to members of this group will inevitably lead to bad decisions and self-harm"); cf. Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement 90–91 (2009) ("[A]ll participants in the disability rights movement have united in their opposition to paternalism—to

Research suggests, however, that concerns about protecting people with IDD have resulted in undereducation that dampens sexual expression and may actually place individuals at greater risk of abuse.[160] Research also suggests that sexual education and greater education overall may help this population to protect itself.[161] Moreover, perceived vulnerability can, by itself, contribute to devaluing the decisions of people with IDD.[162] While those who argue for higher scrutiny of marital decisions of people with IDD do so based on articulated concerns for their wellbeing, there are questions as to whether such concerns might be more precisely and usefully addressed, at least in some cases, with greater sexual education and empowerment.[163]

Another potential concern is fear that people with IDD will create babies that they themselves cannot care for.[164] Research shows that parents

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nondisabled people acting to deny opportunities to people with disabilities 'for their own good.'").

160. See Chin, Structural Desexualization, supra note 10, at 1602–04 (describing problems related to assuming vulnerability and adopting a "victim–perpetrator binary" in the context of people with disabilities).

161. See, e.g., Willi Horner-Johnson, Angela Senders, César Higgins Tejera & Marjorie G. McGee, Sexual Health Experiences Among High School Students With Disabilities, 69 J. Adolesc. Health 255, 261 (2021) ("A growing body of evidence suggests comprehensive sexuality education programs can reduce or delay sexual activity, decrease the number of sexual partners, reduce STIs, and increase the use of condoms and contraception."); Tamar Taub & Shirli Werner, Perspectives of Adolescents With Disabilities and Their Parents Regarding Autonomous Decision-Making and Self-Determination, Rsch. Dev. Dis., May 2023, at 1, 8–10 (finding, in the context of adolescents with developmental disabilities, that opportunities for autonomous decision-making are positively associated with a child's perceived competence and greater capacity for self-determination); see also Nat'l P'ship for Women & Fams. & Autistic Self Advoc. Network, Access, Autonomy, and Dignity: Comprehensive Sexuality Education for People With Disabilities 6 (2021), https://nationalpartnership.org/wp-content/uploads/2023/02/repro-disability-sexed.pdf [https://perma.cc/47WV-2SYX] ("People with disabilities need and deserve access to comprehensive, culturally competent sex ed to exercise full autonomy over their own bodies and lives on their own terms.").

162. See Nair, supra note 156, at 232 ("Given the negative associations with vulnerability—immaturity, weakness, passivity, and exploitability—'the more vulnerable a disabled person is believed to be, the less likely it is that others will treat the choices [they] make[] or opinions [they] hold[] as worthy of respect.'" (alterations in original) (quoting Jackie Leach Scully, Disability and Vulnerability: On Bodies, Dependence, and Power, *in* Vulnerability: New Essays in Ethics and Feminist Philosophy 204, 209–210 (Catriona Mackenzie, Wendy Rogers & Susan Dodds eds., 2014))).

163. For a similar argument in the context of disability-selective abortion bans, see Khiara M. Bridges, The Dysgenic State: Environmental Injustice and Disability-Selective Abortion Bans, 110 Calif. L. Rev. 297, 338–43 (2022) (describing the view, held by critics of disability-selective abortion bans, that if people are "genuinely concerned about people with disabilities, they would support measures that are known to improve the quality of the lives of people with disabilities").

164. See M. Aunos & M.A. Feldman, Attitudes Towards Sexuality, Sterilization and Parenting Rights of Persons With Intellectual Disabilities, 15 J. Appl. Rsch. Intell. Disabil. 285, 289 (2002) ("Generally, about 75% of parents surveyed were against their children

of people with IDD, in particular, may harbor this concern.[165] Likewise, in one study assessing service workers' attitudes toward the marriage of people with IDD, "[s]ome workers felt that persons with intellectual disabilities should only be allowed to marry if they agree to be sterilized."[166] But studies show that a majority of adults with IDD seek to parent,[167] and that many can and do parent,[168] especially with appropriate support.[169]

Some states take a more direct approach and, instead of focusing on capacity, outright prohibit marriage for people with mental illness and IDD. In 1955, a Pennsylvania court opined that one of three preliminary requirements for a marriage license to issue in a case involving someone with a mental affliction was that "the court must be reasonably assured that if children are born of the marriage, such children will be normal, healthy children, free from the taint of mental illness or deficiency."[170] Until 2001, Michigan law prohibited any person "adjudged insane, feeble-minded or an imbecile by a court of competent jurisdiction" from marrying.[171] From 1900 to the 1930s, feeble-mindedness, a term roughly comparable to IDD today,[172] "was linked to notions of immorality, criminality, and/or sexual promiscuity and, in turn, used as justification for institutionalizing women."[173] Marriage restrictions based on feeble-mindedness thus connect directly to racist miscegenation laws and eugenic views about disability and sexuality. Some states continue to directly prohibit marriages

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marrying and raising children; the parents felt that their children would lack the capacity to parent on their own.").

165. Id. Personal and family dynamics can play a tremendous role in the growth and development of people with IDD, including whether a person marries. See supra note 70 and accompanying text. While future work will consider the role of family members more directly, this project focuses primarily on how courts assess capacity, including reliance on family member testimony. See infra notes 256, 268 and accompanying text.

166. Aunos & Feldman, supra note 164, at 291.

167. See id. at 286–92 (collecting and reviewing studies).

168. See Lorr, Unaccommodated, supra note 11, at 1329 & n.61 (collecting sources).

169. Id. at 1330 & nn.69–70 (collecting sources). One study reported that adults with IDD who seek to become parents "preferred having a small number of children because of the costs and effort needed in raising them." Aunos & Feldman, supra note 164, at 291 (citing Henry P. David, John D. Smith & Erwin Friedman, Family Planning Services for Persons Handicapped by Mental Retardation, 66 Am. J. Pub. Health 1053, 1053–57 (1976)).

170. In re F.A. for Marriage License, 4 Pa. D. & C.2d 1, 7, 9 (Orphans' Ct. 1955).

171. Mich. Comp. Laws § 551.6 (repealed 2001). In its original formation, from 1846, the law read: "No white person shall intermarry with a negro, and no insane person or idiot shall be capable of contracting marriage." Martha A. Churchill, Marriage Laws Discriminate Against the Disabled, Mich. Bar J., Mar. 2001, at 12, 12.

172. See Carey, supra note 152, at 231 n.1 ("While 'feebleminded' roughly corresponds with intellectual disability, it contains very different assumptions, including a broader defectiveness that frequently led to delinquency and sexual deviance.").

173. Jamelia Morgan, On the Relationship Between Race and Disability, 58 Harv. C.R.-C.L. L. Rev. 663, 706 (2023) (citing Michele Goodwin, Gender, Race, and Mental Illness: The Case of Wanda Jean Allen, *in* Critical Race Feminism 228 (Adrien Katherine Wing ed., 2d ed. 2003)).

for people with mental illness and IDD[174] while others prohibit people under guardianship from marriage.[175]

Other financial barriers are baked into current law. Many of these practical barriers are often collectively described as the disability marriage penalty.[176] The disability marriage penalty refers to the set of financial penalties built into benefits programs that can connect marital status to a loss of benefits.[177] For example, people who receive Social Security Income (SSI) and Social Security Disability Insurance (SSDI)—both of which include asset limits—are penalized by marriage because, if married, their spouse's assets will be counted as their own, and they may lose access to needed benefits.[178] A similar penalty extends to people classified as

174. As of 2014, "at least ten states impose[d] statutory prohibitions or restrictions on marriages involving a mentally disabled or mentally ill person that go beyond a basic requirement that the person be capable of consent and want to marry." Hasday, supra note 100, at 125; see also Matloff, supra note 154, at 498–99, 508 (noting that Pennsylvania, Tennessee, Vermont, West Virginia, and Guam had, as of Matloff's writing, statutes prohibiting the marriage rights of certain individuals with disabilities and arguing that marriage restrictions could serve to deter people with disabilities from attempting to apply for a license). While the laws in two of these states—Vermont and West Virginia—have been amended, others (at least Kentucky, Pennsylvania, and Tennessee) continue to directly prohibit marriages involving people with certain disabilities. See Ky. Rev. Stat. Ann. § 402.020 (West 2025) (pronouncing "prohibited and void" marriages involving "a person who has been adjudged mentally disabled by a court of competent jurisdiction"); 23 Pa. Stat. and Cons. Stat. Ann. § 1304 (2025) ("No marriage license may be issued if either of the applicants for a license is weak minded, insane, of unsound mind or is under guardianship . . . ."); Tenn. Code Ann. § 36-3-109 (2025) ("No license shall be issued when it appears that the applicants or either of them is at the time drunk, insane or an imbecile.").

175. See infra section II.B.

176. Sara Luterman, Marriage Could Mean Losing Life-Saving Benefits for People With Disabilities. So They're Protesting., The 19th (Sep. 13, 2023), https://19thnews.org/2023/09/disability-advocates-marriage-equality-commitment-ceremony/ [https://perma.cc/FK25-6W8M].

177. Id.; see also Belt, supra note 6, at 1 (describing marriage for people with disabilities as "the last marriage equality frontier"). Supplemental Security Income (SSI) is the primary program with a marriage penalty. Luterman, supra note 176. Couples can have no more than $3,000 collectively in their bank accounts to continue receiving SSI. Id. This means if one person on SSI marries someone who is financially stable and has more than $3,000 to their name, the individual with SSI will lose the benefit. Id. If two people on SSI marry, they will experience a significant restriction on their assets. Id. While a married couple can have no more than $3,000, individuals can have up to $2,000. Id. In that way, marriage requires a 25% decrease in assets. Id. Note that there was a bill before the Senate Finance Committee to increase the limits to $10,000 for an individual and $20,000 for a married couple. See SSI Savings Penalty Elimination Act, S. 2767, 118th Cong. (2023).

Note that this problem persists outside of disability law as well, with marriage penalties in existing assistance programs. See Huntington, Failure to Flourish, supra note 112, at 105 (describing the "so-called marriage penalty" built into the Earned Income Tax Credit and the Supplemental Nutrition Assistance Program). These penalties are most significant for low-income families. Id.

178. Robert E. Rains, Disability and Family Relationships: Marriage Penalties and Support Anomalies, 22 Ga. St. U. L. Rev. 561, 567 (2006) (describing how SSI recipients

Disabled Adult Children (DAC), who lose their benefits if they marry someone who does not receive SSI.[179] The same is true of people dependent on Medicaid, who may also lose their benefits after marriage.[180] These penalties discourage not only marriage but also saving money, pushing disabled people toward poverty.[181]

## II. THE RELATIONSHIP BETWEEN MARRIAGE AND CAPACITY

The classic test for mental capacity to marry is similar to tests for legal capacity in other circumstances: "whether the person has the ability to understand the rights and duties of marriage."[182] But "concerns, including protecting vulnerable people from exploitation, doubts about the ability of disabled people to raise children, and eugenics are also sometimes in play in the cases."[183] And, what constitutes the "rights and duties" of marriage is deeply contested and depend upon an individual's views, goals, culture, and many other factors that are difficult to generalize.[184] Implicit in nearly every decision about whether one has capacity to marry, then, is a question of whether the persons seeking to marry share with broader society, and perhaps even the specific judge assigned to their case, the same understandings and beliefs about what constitutes "the rights and duties of marriage."[185] This opens the door to classist, racist, religious, and ableist visions of marriage each time the question of marriage capacity is raised.

Evaluating capacity in the clinical context involves a different but related set of tasks.[186] At least one set of doctors has outlined a possible means of evaluating capacity to enter a marriage contract.[187] Noting that

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who marry will face a one-third reduction in benefits; this does not apply to cohabiting couples).

179. Id. at 563–64.

180. See Garbero, supra note 6, at 603 ("Medicaid . . . eligibility is partially determined by marital status.").

181. See Joseph Shapiro, Supplemental Security Income Rules Can Limit the People the Program Is Meant to Help, NPR (June 5, 2024), https://www.npr.org/2024/06/05/nx-s1-4665841/supplemental-security-income-rules-can-limit-the-people-the-program-is-meant-to-help [https://perma.cc/PD6W-4TG2] ("One of the biggest traps is Supplemental Security Income's limit on how much you can own—$2,000. That's it. If you have a dollar more than that in savings or possessions—other than one car or your own home—you get kicked off the program.").

182. Harris et al., supra note 139, at 133.

183. Id.

184. See supra notes 126–128 and accompanying text.

185. See Harris et al., supra note 139, at 133.

186. Clinical evaluations of capacity—marital and otherwise—are useful to understand because they are frequently relied on by courts seeking to determine capacity. See, e.g., Hooten v. Jensen, 227 S.W.3d 431, 433 (Ark. Ct. App. 2006) (relying on two different medical experts to determine and define capacity to marry).

187. Anna Glezer & Jeffrey J. Devido, Evaluation of the Capacity to Marry, 45 J. Am. Acad. Psych. & L. 292, 295–96 (2017).

"there are no explicitly stated guidelines that describe an individual's decisional capacity to choose to get married," Doctors Anna Glezer and Jeffrey Devido put forward one such model to assess capacity, analogizing to the process used to evaluate capacity to make medical decisions.[188] Glezer and Devido suggest medical clinicians use "four basic elements to assessing capacity": (1) ability "to express a clear and consistent choice"; (2) ability "to understand the risks and benefits of the decision, as well as the alternatives"; (3) ability to "apply those risks, benefits, and information regarding the decision" to the specific marriage being contemplated; and (4) ability to "manipulate the relevant information rationally," meaning that there is no "cognitive or information-processing barrier preventing the patient from grasping the gravity of the decision at hand."[189] Under this proposed framework, a person "must meet all four criteria" if they are to have capacity to marry.[190] In Glezer and Devido's view, the more financial or familial implications to a given marriage, the higher the "capacity threshold" should be.[191]

There are some significant limitations to this framework's adoption in or related to court proceedings. First, Glezer and Devido are clear that their assessment is clinical, not legal.[192] Second, unlike medical procedures in which doctors are experts in the risks and benefits, knowing the panoply of risks and benefits of marriage is nearly impossible. Indeed, Glezer and Devido acknowledge such, at least as it relates to the spiritual and religious contexts.[193] Likewise, financial and familial implications may not form a fair or reasonable basis to require a higher capacity threshold. After all, when a fundamental right is concerned, is it appropriate to hinge the ability to engage the right—even in part—to one's financial background or the extent to which it may implicate other family members? Such considerations are not taken into account when assessing the ability of the vast majority of individuals seeking to marry.[194] Moreover, Glezer and

188. Id. at 292 (citing Marlynn Wei, The Low Legal Threshold to Say "I Do", Psych. Today (Feb. 4, 2015), https://www.psychologytoday.com/us/blog/urban-survival/201502/the-low-legal-threshold-say-i-do (on file with the *Columbia Law Review*)). The criteria typically assessed for capacity to make medical treatment decisions include communication, understanding, appreciation, and reasoning. Paul S. Appelbaum & Thomas Grisso, Assessing Patients' Capacities to Consent to Treatment, 319 NEJM 1635, 1635 (1988).

189. Glezer & Devido, supra note 187, at 295–96.

190. Id. at 296.

191. Id.

192. See id. at 297 (noting the need for skilled clinicians in the assessment but recognizing that a multidisciplinary approach may work).

193. Id.

194. See, e.g., Joanna L. Grossman & Lawrence M. Friedman, Inside the Castle: Law and the Family in 20th Century America 42 (2011) (describing how in New York State "all it takes to get married is a $40 marriage license and a twenty-four-hour wait after the license is issued" and noting that "[i]n many states there is no waiting period; a couple can rush out and get married immediately").

Devido do not make mention of how SDM might change what is required for a "capacity threshold" or otherwise influence a capacity assessment.

At a more doctrinal level, the relationship between capacity and marriage is determined by statute and, when challenged, made meaningful by judicial decision. Given our federalist system, the vast majority of these decisions are governed by state statutes and made by state courts.[195] This Part first provides a broad overview of the varied—but substantially similar—state statutes governing the role of capacity in marriage.[196] It then discusses how guardianship can impact the right to marry. Next, it turns to an analysis of select judicial decisions applying those statutes. These cases provide a more meaningful sense of what marital capacity means in the situations where it has been challenged and show trends in the judicial understanding of the relationship between marriage and capacity.

### A. *Statutory Rules of Marriage Capacity*

Though all fifty states link capacity and marriage, at least fifteen states understand capacity as an affirmative requirement for an entry into marriage.[197] For example, in New Jersey, "[n]o marriage license shall be issued when, at the time of making an application therefor, either applicant is a person currently adjudicated incapacitated."[198] Minnesota states the requirement in opposite terms: "A person who has attained the full age of 18 years is capable in law of contracting into a civil marriage, if otherwise competent."[199]

Statutes in the majority of states—approximately thirty-five—and Washington, D.C., consider incapacity to render a marriage void[200] or

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195. Professor Courtney Joslin has argued that despite the myth of "family law localism," the federal government can and does, as a doctrinal matter, weigh in on family status. Courtney G. Joslin, Federalism and Family Status, 90 Ind. L.J. 787, 789 (2015). While this Essay acknowledges the profound role of federal legislation in shaping modern family law, id. at 805–11, it is bound by the reality that the majority of decisions related to marital capacity are issued by state courts.

196. This section is based on a review of marriage statutes in all fifty states and Washington, D.C.

197. See Ala. Code § 30-1-9.1(b)(2)(c) (2025); Ga. Code Ann. § 19-3-2(a)(1) (2025); Ind. Code Ann. § 31-11-4-11(1) (West 2025); Iowa Code § 595.3(5) (2025); Ky. Rev. Stat. Ann. § 402.020(1)(a) (West 2025); La. Civ. Code Ann. arts. 87, 93 (2025); Minn. Stat. § 517.02 (2025); Mo. Ann. Stat. § 451.020 (2025); Nev. Rev. Stat. § 122.010(1) (2025); N.J. Stat. Ann. § 37:1-9 (West 2025); N.M. Stat. Ann. § 40-1-1 (2025); Okla. Stat. tit. 43, § 1 (2025); 23 Pa. Stat. and Cons. Stat. Ann. § 1304(c) (2025); 15 R.I. Gen. Laws § 15-1-5(2) (2025); Tenn. Code Ann. § 36-3-109 (2025).

198. N.J. Stat. Ann. § 37:1-9.

199. Minn. Stat. § 517.02.

200. The following statutes consider a marriage void if a party was mentally incompetent at the time of contracting the marriage: Ga. Code Ann. § 19-3-5(a); Ind. Code Ann. § 31-11-8-4(4); Ky. Rev. Stat. Ann. § 402.020(1)(a); Mich. Comp. Laws § 552.1 (2025); Neb. Rev. Stat. § 42-103 (2025); N.C. Gen. Stat. § 51-3 (2025); 15 R.I. Gen. Laws § 15-1-5(2); Wyo. Stat.

voidable[201] or a basis to pursue a divorce or annulment.[202] For example, Illinois law states that when "a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity," that can be a ground for a declaration of invalidity.[203] This is also true in Minnesota, though courts there have been clear that regardless of any alleged cause of incapacity or disability, "as long as the understanding and reason remain so far unaffected and unclouded that the afflicted person is cognizant of the nature and obligations of a contract entered into by him or her with another, the case is not one authorizing a decree avoiding the [marriage] contract."[204] The specific categorization of a marriage as void or voidable may not be mutually exclusive,[205] and some states that describe a marriage as void for want of capacity also specifically note it as a basis for annulment.[206] While

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Ann. § 20-2-101(a)(ii) (2025); see also Mo. Ann. Stat. § 451.020 (presumptively prohibited unless permission from court received).

201. The following statutes declare that a marriage is voidable if a party was mentally incompetent at the time of contracting the marriage: Alaska Stat. § 25.24.030(2) (2025); Ark. Code Ann. § 9-12-201 (2025); Cal. Fam. Code § 2210(c) (2025); D.C. Code § 46-403(1) (2025); Haw. Rev. Stat. Ann. § 580-21(4) (West 2025); Ind. Code Ann. § 31-11-9-2; Ky. Rev. Stat. Ann. § 403.120(1)(a); Minn. Stat. § 518.02(a); Mont. Code Ann. § 40-1-402(1)(a)(2025); N.Y. Dom. Rel. Law § 7(2) (McKinney 2025); Okla. Stat. tit. 43, § 128; Or. Rev. Stat. § 106.030 (2025); Vt. Stat. Ann. tit. 15, § 512 (2025); Va. Code § 20-45.1(B) (2025); Wash. Rev. Code § 26.04.130 (2025); W. Va. Code § 48-3-103(3)(A) (2025); see also Colo. Rev. Stat. § 14-10-111(1)(a) (2025) (allowing a declaration of "invalidity"); 750 Ill. Comp. Stat. Ann. 5/301(1) (West 2025) (same).

202. Ala. Code § 30-2-1(a)(1) (divorce); Alaska Stat. § 25.24.050(8) (divorce); Cal. Fam. Code § 2310(b) (dissolution or separation); Del. Code tit. 13, § 1506(a)(1) (2025) (annulment); D.C. Code § 16-904(d)(4) (annulment); Ga. Code Ann. § 19-5-3(2) (divorce); Idaho Code Ann. § 32-501(3) (2025) (annulment); 750 Ill. Comp. Stat. Ann. 5/301(1) (declaration of invalidity); Iowa Code § 598.29(4) (annulment); Kan. Stat. Ann. § 23-2701(a)(3) (West 2025) (divorce); Mich. Comp. Laws §§ 552.1, 552.3 (annulment); Miss. Code Ann. §§ 93-5-1, 93-7-3(b) (2025) (divorce or annulment); Nev. Rev. Stat. § 125.330(1) (annulment); N.J. Stat. Ann. § 2A:34-1(1)(d) (annulment); N.D. Cent. Code § 14-04-01(3) (2025) (annulment); Ohio Rev. Code Ann. § 3105.31(C) (2025) (annulment); 23 Pa. Stat. and Cons. Stat. Ann. §§ 3304(a)(3), 3308 (annulment or divorce); S.D. Codified Laws § 25-3-2 (2025) (annulment); Tex. Fam. Code Ann. §§ 6.108(a)(1), 6.108(b)(1) (West 2025) (annulment); Vt. Stat. Ann. tit. 15, §§ 512, 631 (annulment and divorce); Va. Code § 20-45.1(B) (divorce or annulment); Wis. Stat. & Ann. § 767.313(1)(a) (2025) (annulment); Wyo. Stat. Ann. §§ 20-2-101(a)(ii), 20-2-101(c) (annulment). Divorce and annulment have different impacts; an annulment may make a marriage void from its inception whereas a divorce does not. For a technical explanation of the difference between a divorce and annulment, see Abrams et al., supra note 15, at 201.

203. 750 Ill. Comp. Stat. Ann. 5/301(1).

204. Lewis v. Lewis, 46 N.W. 323, 323 (Minn. 1890) (denying a husband's request to annul his marriage based on his wife's alleged insanity due to kleptomania and finding no proof that she was otherwise insane or that her condition rendered her incapable of understanding or assenting to the marriage contract).

205. For example, Indiana lists marriages involving "mental incompetency" to be voidable, Ind. Code Ann. § 31-11-9-2, and those involving a "mentally incompetent" party as void, Ind. Code Ann. § 31-11-8-4.

206. See, e.g., Mich. Comp. Laws §§ 552.1, 552.3.

this review of capacity statutes focuses on incapacity related to disability, there are other bases for incapacity.[207]

Eighteen state statutes and the Washington, D.C., Code allow a third party—that is, someone outside of the marriage contract—to seek a declaration that an individual marriage is invalid.[208] Some other states make clear that only a party to the marriage, and not a third party, can seek to annul a marriage for want of capacity.[209] Regardless of the particular method, a review of statutes reveals that there are two primary threats based on incapacity to the stability of a marriage: An allegation of incapacity can be used to prevent a marriage in the first instance or as grounds to pursue some form of dissolution. These two paths to ending a marriage, embedded in marital capacity statutes, offer a unique means of disrupting a marriage permanently.

Definitions of marriage that render a marriage void or voidable based on a lack of capacity can be understood as vehicles for "[p]otential [i]mmediate and/or [d]eferred [d]eprivations" of capacity rights.[210] As scholar and former Judge Kristen Booth Glen has described:

> Laws may require a certain defined "capacity" to permit an individual to enter particular legal transactions, that is, to contract. These laws may result in an immediate deprivation of

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207. For example, capacity can be age related in that minors of differing ages lack capacity to marry. Interestingly, when incapacity is age related, marriage can end incapacity in certain states. See Fla. Stat. Ann. § 743.01 (West 2025) ("The disability of nonage of a minor who is married or has been married or subsequently becomes married, including one whose marriage is dissolved, or who is widowed, or widowered, is removed."); Tex. Fam. Code Ann. § 1.104 ("Except as expressly provided by statute or by the constitution, a person, regardless of age, who has been married in accordance with the law of this state has the capacity and power of an adult, including the capacity to contract.").

208. Colo. Rev. Stat. § 14-10-111(2)(a) (2025); Del. Code tit. 13, § 1506(b)(1) (2025); D.C. Code § 46-404 (2025); Ga. Code Ann. § 19-4-3 (2025); Haw. Rev. Stat. Ann. § 580-26(West 2025); Kan. Stat. Ann. § 23-2701(b) (West 2025); Mich. Comp. Laws § 552.35; Minn. Stat. § 518.05(a) (2025); Miss. Code Ann. § 93-7-3(b) (2025); Neb. Rev. Stat. § 42-375 (2025); N.Y. Dom. Rel. Law § 140(c) (McKinney 2025); N.C. Gen. Stat. § 50-22 (2025); Ohio Rev. Code Ann. § 3105.32(C) (2025); Okla. Stat. tit. 43, § 128 (2025); S.D. Codified Laws § 25-3-2 (2025); Tex. Fam. Code Ann. § 6.108(a)(1); Vt. Stat. Ann. tit. 15, § 514(b) (2025); Wis. Stat. & Ann. § 767.313(1)(a) (2025); see also Minn. Stat. § 517.03 subdiv. 2 (requiring people under guardianship to obtain "written consent of the commissioner" to marry); Wyo. Stat. Ann. § 20-2-101(e) (2025) (providing that a guardian or "next friend" may bring an action to annul a marriage on the grounds of mental incompetency on behalf of the person deemed to lack mental capacity). Tennessee, though not by statute, also allows guardians and even next friends to intervene for the purpose of seeking an annulment. See Hunt v. Hunt, 412 S.W.2d 7, 12 (Tenn. Ct. App. 1965) (allowing a sister, as a self-appointed "next friend," to seek annulment where a guardian declined to do); see also Brown v. Watson, No. E2004-01229-COA-R3-CV, 2005 WL 1566541, at *1 (Tenn. Ct. App. July 5, 2005) (affirming annulment of marriage based on request from conservator).

209. See, e.g., Estate of Wild v. Wild, No. 12–1525, 2013 WL 2371190, at *3 (Iowa Ct. App. May 30, 2013) (unpublished table decision) (finding estate cannot sue to annul marriage because it was not a party to the marriage).

210. Glen, Not Just Guardianship, supra note 5, at 41–44 (internal quotation marks omitted).

> legal capacity by a person with [IDD], because the other party to the transaction may not be willing to deal with [them]. They may also place the long-term validity of the transaction in question, because it could subsequently be voided by a finding that the person lacked the relevant capacity at the time the transaction occurred.[211]

One benefit of marriage is lifelong commitment and stability. The very fact of voidability based on capacity denies people the right to benefit from that aspect of the institution even if they are successfully able to marry. As an example of this threatened instability in the marriage context, Glen describes how, under New York law, definitions of marriage may infringe on the rights of people with disabilities to exercise autonomy and obtain the right to marry.[212] New York law makes marriages voidable if one party is "mentally incapable of understanding the nature, effect and consequences of the marriage."[213] It also requires capacity for a marriage license to issue.[214] Thus, one party to the marriage may seek a declaration that the marriage is invalid based on an alleged prior inability to understand the marriage, or a licensing official may refuse to issue a license if the official suspects incapacity.[215] Together, these rules not only render capacity and the right to marry heavily intertwined but also destabilize the marriages of people with IDD who do marry.

### B. *The Role of Guardianship*

Guardianship—itself a proceeding aimed at challenging capacity—presents special and complex circumstances for marriage.[216] Guardianship is a "legal process where a court removes some or many of the legal and decision-making rights from an individual and transfers all or some of them to another person, called a guardian or conservator."[217] Guardianship has been described as "the single and overarching legal vehicle by which a person's legal capacity may entirely—and potentially

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211. Id. at 42.

212. See id. at 54–56 (describing how New York's Domestic Relations Law can function as a deprivation of the right to marry).

213. Id. (internal quotation marks omitted) (quoting Weinberg v. Weinberg, 8 N.Y.S.2d 341, 345 (App. Div. 1938)).

214. Id.

215. See id.

216. See May v. Leneair, 297 N.W.2d 882, 885 (Mich. Ct. App. 1980) (finding that marriage of a person under guardianship or a person who has been deemed incompetent is void).

217. Nat'l Council on Disability, supra note 12, at 23; see also What Is Guardianship?, Nat'l Guardianship Ass'n, https://www.guardianship.org/what-is-guardianship/ [https://perma.cc/4CGK-PTGS] (last visited Oct. 17, 2025) ("Guardianship . . . is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence.").

forever—[be] denied."[218] It can also be understood as a form of public governance, specifically "[r]isk [m]anagement."[219]

Many states require additional levels of review for individuals under guardianship to marry. For example, in Minnesota, "[d]evelopmentally disabled persons committed to the guardianship of the commissioner of human services[,] . . . in which the terms of the conservatorship limit the right to marry, may marry on receipt of written consent of the commissioner."[220] While the statute requires the commissioner to "grant consent unless it appears from the commissioner's investigation that the civil marriage is not in the best interest of the ward or conservatee and the public," it still creates an additional hurdle for those under guardianship.[221] This rule can also be understood as a safety valve for a person under guardianship whose guardian objects to a marriage for inappropriate reasons such as control or simple dislike of the intended spouses. Maine, like Minnesota, has special rules for people under guardianship to marry; there the individual under guardianship must have permission from their guardian to marry.[222] In Florida, a person under guardianship who lacks the capacity to contract must obtain court approval to marry.[223] Other states have laws that require judges who intend to take away the right to marry from an individual under guardianship to affirmatively grant the guardian power over marital decisions in a court order.[224]

Some states, such as California, have case law reflecting that a person under guardianship is not in the position of a minor and retains the right

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218. Glen, Not Just Guardianship, supra note 5, at 35 (footnote omitted).

219. Harris, Political Economy of Conservatorship, supra note 25, at 1461 (describing guardianship, referred to as conservatorship, "as a legitimate state tool within their police powers to manage difficult populations that threaten public safety").

220. Minn. Stat. § 517.03 subdiv. 2 (2025); see also In re Guardianship of Mikulanec, 356 N.W.2d 683, 688 (Minn. 1984) (noting that an individual "who has been adjudged an incompetent may contract a valid marriage if he has in fact sufficient mental capacity for that purpose" (internal quotation marks omitted) (quoting Johnson v. Johnson, 8 N.W.2d 620, 622 (Minn. 1943))).

221. Minn. Stat. § 517.03 subdiv. 2.

222. See Knight v. Radomski, 414 A.2d 1211, 1214–16 (Me. 1980) ("Because the marriage of a ward can have great impact on matters for which the guardian of his person is responsible under our statutes, it would be inconsistent . . . to permit an incompetent ward to enter effectively a contract of marriage that is not approved by the[ir] duly appointed guardian . . . .").

223. Fla. Stat. Ann. § 744.3215(2)(a) (West 2025); see also Smith v. Smith, 224 So. 3d 740, 751 (Fla. 2017) (holding that a marriage of an incapacitated person entered into without court approval is neither void nor voidable but is invalid and consent obtained retroactively will validate the marriage).

224. See, e.g., D.C. Code § 21-2047.01(6) (2025) ("A guardian shall not have the power . . . [t]o prohibit the marriage or divorce, or consent to the termination of parental rights, unless the power is expressly set forth in the order of appointment or after subsequent hearing and order of the court . . . .").

to enter into a marriage or a domestic partnership.[225] Similarly, Ohio courts recognize that "[t]he mere fact that [one] was under a guardianship would not render the marriage contract void"[226] but still find the fact that someone is under guardianship to be prima facie evidence of incapacity.[227] In Ohio, the marriage of an individual under guardianship will terminate that guardianship as to the person.[228] Likewise, in Illinois, guardianship is not an automatic bar to marriage,[229] but at least one court has required that a guardian give their consent for a ward to marry and, even if consent is given, the court will still hold a hearing to determine that the marriage is in the ward's best interest.[230] This could have the effect of leading courts to refuse marriages that seem otherwise built on genuine love and commitment based on a concern that the individual would then be without the protective care of a guardian. On the other hand, it suggests that marriage may be understood as a viable form of support for someone who might otherwise lack capacity. Still other jurisdictions find that once a court finds a person legally incapacitated and in need of guardianship, marriage is among the legal contracts that can no longer lawfully be entered.[231]

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225. Cal. Prob. Code § 1900 (2025) ("The appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry or to enter into a registered domestic partnership."); see also Conservatorship of Navarrete, 273 Cal. Rptr. 3d 86, 95 (Ct. App. 2020) (stating that determining whether a "conservatee has capacity to marry is determined by the [same] law that would be applicable had no conservatorship been established" (internal quotation marks omitted) (quoting In re Marriage of Greenway, 158 Cal. Rptr. 3d 364, 374 (Ct. App. 2013))).

226. Dozer v. Dozer, 8 Ohio Law Abs. 507, 507 (Ct. App. 1930); see also Seabold v. Seabold, 84 N.E.2d 521, 523 (Ohio Ct. App. 1948) (noting that a guardianship alone does not make a marriage void).

227. *Dozer*, 8 Ohio Law Abs. at 507. Arkansas also follows this rule. Lovett v. Lovett, 493 S.W.2d 435, 437 (Ark. 1973). In South Carolina, an adjudication of incompetency has a similar effect; it is prima facie evidence of incapacity to marry, but the court must look at the facts at the time of the marriage to determine whether there was actual incapacity to marry. Church v. Trotter, 299 S.E.2d 332, 333 (S.C. 1983).

228. Ohio Rev. Code Ann. § 2111.45 (2025) ("The marriage of a ward shall terminate the guardianship as to the person, but not as to the estate, of the ward.").

229. Pape v. Byrd, 582 N.E.2d 164, 168 (Ill. 1991).

230. In re Estate of McDonald, 201 N.E.3d 1125, 1139 (Ill. 2022). Similarly, in Kentucky, guardians are allowed a role in divorce proceedings but must seek permission in a formal hearing to do so. Brooks by Elderserve, Inc. v. Hagerty, 614 S.W.3d 903, 914 (Ky. 2021).

231. See, e.g., Martin v. Martin, 240 A.2d 363, 365 (D.C. 1968) ("Clearly a marriage contracted by a person who has been adjudged mentally incompetent is illegal under the provisions of [the D.C. Code] . . . ."); May v. Leneair, 297 N.W.2d 882, 885 (Mich. Ct. App. 1980) (finding that the marriage of a person under guardianship or who has been deemed incompetent is void). But note the tension between the older D.C. case law and D.C.'s more recent statutory law. See D.C. Code § 21-2047.01(6) (2025) ("A guardian shall not have the power . . . [t]o prohibit the marriage or divorce . . . unless the power is expressly set forth in the order of appointment or after subsequent hearing and order of the court . . . .").

### C. *Judicial Decisions on Marriage Capacity*

Relying on a limited set of publicly available cases from the last sixty years,[232] this section identifies two distinct ways that courts have approached the relationship between marriage and capacity. The cases primarily involve people with IDD rather than adults with age-related cognitive decline or psychiatric disability.[233] In the first judicial approach, described in section II.C.1, courts rely on paternalistic views of disabled adults and their decision-making—specifically in considering their prior romantic and sexual relationships, financial decision-making, and independent acts of daily living—to find a lack of capacity to marry. These cases reflect certain normative assumptions about the purpose and goals of marriage presented in Part I of this Essay, particularly the view that marital families should be self-sufficient and embody a standardized, monogamous romantic and sexual relationship between two individuals.[234] In these cases, when the couple does not live up to such norms, courts refuse to validate the existing relationship as legitimate.[235]

In contrast, in a small number of other cases, described in section II.C.2, courts have determined that because of a preexisting marriage, an adult does not require a guardianship. That is, because of support offered through a marriage, a person need not be subject to a substituted decision-making regime and can maintain their capacity as an individual. Here, too, we see courts understanding marriage as a legitimizing institution but this time as one that can actually enhance the capacity of an individual person. Comparing these two judicial approaches reveals the complex relationship between capacity and marriage, suggesting that while some courts understand the need for support as a marital disqualification, an alternative approach understands marriage as a form of support that will actually protect a person from vulnerability and expand their individual capacity.

The cases presented here come from a broad search for cases assessing whether an individual with IDD who is under guardianship has capacity to marry, as well as cases challenging one's capacity to marry. Despite the breadth of the search, research uncovered only a small number of cases. The limited number of uncovered cases is likely related to several factors. Primarily, it is nearly impossible to obtain a comprehensive view of how courts apply the marriage-capacity standards described above because so many decisions regarding the rights of people with IDD are made outside of public view. Courts frequently make capacity

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232. See supra note 22 for an explanation about the selection of this time period.

233. See supra notes 19–21 and accompanying text (explaining the decision to focus primarily on people with IDD). The decision to focus on cases involving IDD further limited the set of cases available for assessment.

234. See supra notes 123–137 and accompanying text.

235. Cf. Franke, Wedlocked, supra note 30, at 143 ("Surely, exclusion from the institution of marriage inflicts a subordinating harm on those excluded.").

decisions in closed proceedings, often in the name of privacy or the "best interests" of the person alleged to lack capacity.[236] For example, one study of guardianship statutes found that twenty percent of states have presumptively closed proceedings.[237] Even when statutes may allow for open proceedings, such decisions are often not published or occur without notice to even the subjects of the proceeding.[238] While concerns about privacy protection may appear appropriate, inaccessible proceedings and case law lack transparency and accountability.[239] Second, numerous marriage and capacity decisions are likely decided informally among family members and guardians without ever reaching court. After all, it requires both the motivation and relative sophistication of at least one party to reach court and people with disabilities often face additional hurdles.[240]

Notwithstanding the extreme difficulty of uncovering what courts are doing in these situations[241] and the paucity of information about judicial

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236. See Harris, Processing Disability, supra note 12, at 504–07 (providing a detailed analysis of how, in states where guardianship proceedings are not entirely closed, claims of privacy, protection, and "best interests" work to maintain closed court rooms in these proceedings).

237. In 2014, scholar Jasmine Harris found that "[a] majority of states appear to presumptively close minor guardianship proceedings" and that, as to "authority over the adult as opposed to conservatorship or minor guardianship proceedings," there is "[a] clear presumption of closure" in approximately twenty percent of states. Id. at 504 n.195; see also Harris, Political Economy of Conservatorship, supra note 25, at 1448 ("One major barrier to better understanding the nature of guardianship today is the absence of data and publicity . . . .").

238. See Harris, Processing Disability, supra note 12, at 504–07 ("In fact, most guardianship hearings proceed uncontested, with the majority of guardians appointed without the respondent present."). In addition, multiple practitioners in different states confirmed their experience with closed courts and unpublished decisions. See, e.g., Telephone Interview With Will Hack, Staff Att'y, Mo. Prot. & Advoc. Servs. (Aug. 7, 2024) (on file with the *Columbia Law Review*) (discussing that there are very few published guardianship cases); Telephone Interview With Sharon Krevor-Weisbaum, Managing Partner, Brown Goldstein & Levy (Aug. 6, 2024) (on file with the *Columbia Law Review*) (noting that many guardianship cases are closed and most decisions are unpublished); Telephone Interview With Morgan Whitlatch, Dir. Supported Decision-Making Initiatives, Ctr. for Pub. Representation (Aug. 9, 2024) (on file with the *Columbia Law Review*) (noting the lack of reported cases).

239. See Harris, Processing Disability, supra note 12, at 504 & n.195 (comparing the "significant presumption of openness" in most state court proceedings with the reality of guardianship); id. at 511 (describing "significant opportunities for an antistigma agency" in open guardianship proceedings).

240. See Qudsiya Naqui, Advancing Equal Access to Justice for Americans With Disabilities: Moving Towards Closing the Justice Gap on the 33rd Anniversary of the ADA, Off. for Access to Just., DOJ (July 26, 2023), https://www.justice.gov/archives/atj/blog/advancing-equal-access-justice-americans-disabilities-moving-towards-closing-justice-gap [https://perma.cc/UBU9-GCCL] (last updated Jan. 20, 2025) (describing various barriers faced by people with disabilities in accessing the courts).

241. The secrecy surrounding these decisions contrasts with the surveillance many of these same individuals with disabilities are likely to experience. See generally Nair, supra

approaches to these questions, the small number of publicly available cases that do exist reveal two strains of decisions that shed light on how courts and litigants understand the relationship between capacity and marriage. Understanding what courts consider when making a capacity determination helps to elucidate why the law requires "capacity to marry" and what, in the institution of marriage, the law seeks to protect by requiring entrants have a capacity to marry. The cases discussed here reveal how judicial decisions arising from the marriage context both idealize the value of marriage and hold people with certain disabilities to unrealistic and unattainable standards before allowing them to marry.

1. *Lack of Capacity as Barrier to Marriage.* — In some cases, courts rely on prior behavior or evidence about decision-making skills that appear disconnected from the question of whether the person alleged to lack capacity understood the nature and consequences of a decision to marry. These decisions rely on stereotypes and dwell on concerns that would never be raised in marriages in which capacity has not been challenged. They reveal courts in a protective posture in which their goal appears to be to *protect people from* the institution of marriage or, alternatively, to *protect the institution of marriage from these participants*. The decisions are notable especially in contrast to the view of capacity identified in section II.C.2, which appears to understand the institution of marriage as a *means of protection* for the people involved.

One strain of cases involves findings or allegations that hold people with IDD to ideal marriage norms—standards never applied to most couples seeking to marry. For example, in *In re Guardianship of Kindell*, a 2022 case, the Ohio Court of Appeals used a person's history of romantic infidelity and poor money management to preclude her from marrying.[242] The court found that the petitioner lacked the understanding of what it means to enter into a marriage and therefore was precluded from entering into a marital contract.[243] In reaching this conclusion, the court noted that "Kindell testified that she understood what marriage means. She explained that she could not cheat on her husband, they would combine their money, and they would support each other when one of them was sick."[244] Additionally, "[b]oth she and Tackett noted that they wanted to be consistent with the Bible's teachings."[245] Nonetheless, because Kindell had also testified to previously cheating on her proposed spouse, Tackett, not managing money well, and having trouble maintaining a clean home (to the point of eviction) when previously living with Tackett, the appellate court agreed with the trial court's finding that Kindell "failed to establish

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note 156 (critiquing the surveillance and scrutiny to which people with disabilities are often subject).

242. 197 N.E.3d 1004, 1013 (Ohio Ct. App. 2022).

243. Id.

244. Id.

245. Id.

that she has the capacity and understanding to enter into a marriage contract."[246]

In *Juhl v. Jacobsen*, the Iowa Court of Appeals also relied on marital norms, along with prior sexual and romantic decisions. Though Juhl did not have a lifelong diagnosis of IDD, he was diagnosed with "frontal lobe syndrome and organic brain syndrome" after experiencing hypoxia during an open-heart surgery.[247] In *Juhl*, the court affirmed a specific finding that Milford Juhl lacked the capacity to marry.[248] In reaching this conclusion, the court did not offer a statement about the appropriate legal standard to be used in determining capacity to marry. Instead, the court considered that "Milford [Juhl] appears to enjoy reasonably good cognitive ability" but that he has "frequently exercised very poor and sometimes inappropriate judgment [in] decisions concerning personal relationships with others, and the spending of money."[249] In its fact-intensive decision, the court focused on Juhl's low executive functioning, inability to learn from mistakes, and inability to dispense and manage his own medication.[250] Regarding romantic relationships, the court noted, "Juhl has also pursued relationships with various women, asking three different women to cohabitate with him over the past three or four months. Apparently, Juhl's loneliness and impairment of his good judgment result in him making quick decisions to cohabitate with women acquaintances."[251]

The *Juhl* case is also an example of how courts rely on concerns related to financial and medical decision-making.[252] In finding that Juhl lacked capacity to marry, the court considered both prior financial decisions and Juhl's inability to dispense his own medication.[253] This is notable especially when one considers that spouses can frequently play a moderating

246. Id. (internal quotation marks omitted) (quoting In re Guardianship of Krista Kindell, No. 80434, at *2 (Ohio Com. Pl. Feb. 28, 2022)).

247. Juhl v. Jacobsen, Nos. 0-644, 00-0195, 2001 WL 22919, at *1 (Iowa Ct. App. Jan. 10, 2001). The case is included here because the court's capacity decision came after Mr. Juhl "was given several different tests to examine different types of intellectual functioning" and because, as in cases involving IDD, the court was concerned primarily with "problem solving and judgment" rather than comparing Mr. Juhl's present decision-making to his past self. See id. at *1–2.

248. Id.

249. Id.

250. Id.

251. Id.

252. Id.; see also Conservatorship of Johnson, No. C0-94-2227, 1995 WL 321365, at *1 (Minn. Ct. App. May 30, 1995) (appointing guardian and finding lack of capacity to marry based on financial reasons in a case not involving IDD). There are also much older cases showing a history of considering financial decision-making as a reason to disallow marriage. See Johnson v. Kincade, 37 N.C. (2 Ired. Eq.) 470, 472 (1843) (highlighting Johnson's ignorance of the dollar as one consideration in determining competency); cf. Crump v. Morgan, 38 N.C. (3 Ired. Eq.) 91, 95 (1843) (highlighting a woman's inability to conduct household affairs as a reason for her incompetency).

253. *Juhl*, 2001 WL 22919, at *2.

influence in spending decisions and can very likely assist with medication management as well. If a spouse could not assist with medication management, other supports—including, for example, Medicaid Home and Community-Based Services waiver programs—could help to play these roles.[254] A representative payee can monitor finances for Supplemental Security Income recipients.[255]

Arguments appearing in other cases reflect similar logic. In *In re Guardianship of O'Brien*, appellant Michael O'Brien, a twenty-seven-year-old man, sought to marry against the wishes of his guardians, who were also his parents.[256] O'Brien, who had been diagnosed with "Fetal Alcohol Syndrome (FAS), ADHD, Bipolar Disorder, Mild Mental Retardation," and an unspecified cognitive disorder, moved for a judgment that he had the right to marry his girlfriend.[257] O'Brien's IQ was seventy-one, and it was reported that he "functions day-to-day at a level that is below his IQ . . . because of his other cognitive deficits, difficulties with judgment, poor learning from experience, etc."[258]

A psychiatrist reported that O'Brien had "very low adaptive capacity" and was "largely unable to function independently."[259] The report further noted that O'Brien had "an increased likelihood of engaging in dangerous behavior" and "placed himself in compromising situations during which he [became] sexually aggressive towards women."[260] His parents testified that they believed their son didn't comprehend what marriage was, that

254. See 42 U.S.C. § 1396n(c) (2018). The HCBS waiver program allows states to provide home and community-based services so that people can live within the community rather than in an institution. Home & Community-Based Services 1915(c), Medicaid.gov, https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/ [https://perma.cc/9Z72-DPWN] (last visited Oct. 18, 2025).

255. Understanding Supplemental Security Income Representative Payee Program: 2025 Edition, SSA, https://www.ssa.gov/ssi/text-repayee-ussi.htm [https://perma.cc/DE9Q-V3Q2] (last visited Oct. 18, 2025).

256. 847 N.W.2d 710, 712 (Minn. Ct. App. 2014). For a similar case in which a court rejected allegations of lack of capacity to marry based, in part, on the individual's diagnoses, his tendency to "dress[] with carelessness," his "clothing . . . often [being] covered with particles of undigested food and spilled drink," his physical disability, and other detailed allegations, see Hunt v. Hunt, 412 S.W.2d 7, 12–14 (Tenn. Ct. App. 1965). The court in *Hunt* reasoned that "[e]ven though the complainant below, Charles E. Hunt, Jr. was handicapped both physically and mentally, we are convinced that he did understand the nature of the marital contract, the benefits, obligations and respon-sibilities ensuing therefrom; that he entered into the contract knowingly and willingly." Id. at 17.

257. *In re O'Brien*, 847 N.W.2d at 711–12 (internal quotation marks omitted).

258. Id. (alteration in original) (internal quotation marks omitted) (quoting an undated psychiatrist's letter).

259. Id. at 713 (internal quotation marks omitted) (quoting 2011 Psychiatric Evaluation of Michael O'Brien).

260. Id. (internal quotation marks omitted) (quoting 2011 Psychiatric Evaluation of Michael O'Brien).

he lacked the maturity to make conscious decisions to that effect, and that his medication might have interfered with his capacity to get married.[261]

This case is remarkable because, though the court considered these arguments against capacity, and O'Brien's parents based their arguments on his diagnosis and prior romantic behavior, the court found that there were not sufficient findings to demonstrate that O'Brien lacked capacity to marry.[262] In reversing and remanding to the trial court, the court noted that "Minnesota law explicitly protects the right of wards to marry, unless barred by specific provisions of their guardianship."[263] The appellate court found error in the lower court's focus on O'Brien's behavioral history, as opposed to his "mental capacity to comprehend the meaning, rights, or obligations of marriage."[264] In this way, O'Brien's case offers an example of a court pushing back against some of the apparently unrelated behaviors that the courts in *Juhl* and *Kindell* relied on to find a lack of marital capacity.[265]

Together, though, the cases show the way diagnosis and sexual history can be used in tandem to argue against marital capacity in ways that would surely never arise in the context of typical marriages. Indeed, in the majority of cases in which permission to marry is obtained by application for a license to marry,[266] there would be no opportunity to raise questions of prior sexual or romantic history.

2. *Marriage as Capacity Enhancing*. — Some courts take a different approach to questions about marriage and capacity. These courts have declined to implement and even terminated guardianships because an individual's alleged lack of decision-making capacity was mitigated by the fact that they were married. The consistent presence of their spouse in their daily life meant that their daily affairs could be managed without the need for a guardian.

The New York case of *In re Guardianship of Dameris L.* exemplifies how a court can use the support a person with IDD can obtain through marriage to avoid imposing a guardianship.[267] Dameris's mother, Cruz

261. Id. at 712–13.

262. See id. at 716.

263. Id. at 714. The court went on to say that "[a]ny limitation on a ward's right to marry must therefore be supported by findings focused specifically on whether 'a person clearly is incapacitated *with respect to choosing a spouse*.'" Id. at 715 (quoting In re Guardianship of Mikulanec, 356 N.W.2d 683, 688 (Minn. 2014)).

264. Id. at 715–16.

265. An older Missouri court, in *Sheffield v. Andrews*, relied on similar logic to that of *O'Brien*. The *Sheffield* court articulated that "[i]t is possible for an individual to be able to understand that he is being married and to be knowledgeable as to the effects and consequences of such a relationship, and still not be able to wisely manage his property and business affairs." Sheffield v. Andrews, 440 S.W.2d. 175, 179 (Mo. Ct. App. 1969).

266. See supra note 194 and accompanying text.

267. 956 N.Y.S.2d 848, 853, 855–56 (Sur. Ct. N.Y. Cnty. 2012). Dameris L.'s case has been cited widely in legal scholarship, more frequently as an example of how international and "human rights norms" can shape courts' decisions. See, e.g., Eilionóir Flynn & Anna

Maria S., filed a petition for guardianship in March 2009.[268] At the time, Dameris was twenty-nine years old, had a diagnosis of "mild to moderate mental retardation," and was described as having "poor receptive and expressive skills" and being "highly dependent" on others for medical and financial decision-making.[269] Twenty days later, and before the court could make a determination on the guardianship case, Dameris married Alberto R.[270] Cruz did not approve of Alberto—he had "a history of drug and substance abuse, mental illness and criminal charges."[271]

About two months later, Cruz returned to court seeking expedited resolution of her case because Dameris was pregnant. After a day-long mediation that the court characterized as a "struggle over control of Dameris," the parties agreed that Alberto and Cruz would be appointed co-guardians.[272]

Dameris had a baby girl, and, for a time, she and Alberto lived in transitional housing where they received support from a homemaker service.[273] Soon, however, the family faced eviction and relocated—with the authorization of the court but without the consent of Cruz—to Pennsylvania.[274] At this time, the court temporarily suspended Cruz's role as guardian.[275] After the move, Alberto and Dameris developed relationships with Alberto's cousin and his wife and connected with social

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Arstein-Kerslake, The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?, 32 Berkeley J. Int'l L. 124, 138–39 (2014) (explaining the court's decision in *Dameris* as a method of upholding and promoting international human rights norms); Kristen Booth Glen, Introducing a "New" Human Right: Learning From Others, Bringing Legal Capacity Home, Colum. Hum. Rts. L. Rev., Spring 2018, at 1, 10–11 & n.36 (2018) (mentioning *Dameris* as an early adoption of supported decision-making in United States case law); Michael L. Perlin & Naomi M. Weinstein, "There's Voices in the Night Trying to Be Heard": The Potential Impact of the Convention on the Rights of Persons With Disabilities on Domestic Mental Disability Law, 84 Brook. L. Rev. 873, 891 & n.114–115 (2019) (using *Dameris* as evidence that the Convention on the Rights of Persons with Disabilities has been given persuasive weight in New York state courts).

268. *Dameris L.*, 956 N.Y.S.2d at 849.

269. Id. at 849–50 (internal quotation marks omitted).

270. Id. at 850.

271. Id.

272. Id.

273. Id. at 850–51. Homemaking is defined as "a short-term specialized service provided to families in their homes to support their efforts to maintain household operations during periods of stress or crisis. A homemaker can teach child care and household management techniques . . . to strengthen the family and prevent the need for foster care placement or re-placement." Admin. for Child.'s Servs., City of N.Y., Homemaking Services Authorization Procedure 4 (2016), https://www.nyc.gov/assets/acs/policies/init/2016/G.pdf [https://perma.cc/NW6B-V9R5].

274. *Dameris L.*, 956 N.Y.S.2d at 851.

275. Id.

services agencies in their new community.[276] They lived with their baby and another child of Alberto's and even became pregnant again.[277]

Nearly three years later, the parties again appeared before the New York Surrogate's Court. Based on the network of support surrounding the family, particularly Alberto and his sister-in-law, the court terminated Alberto's guardianship over Dameris.[278] The court described: "[T]here is now a system of supported decision making in place that constitutes a less restrictive alternate to the Draconian loss of liberty entailed by a plenary . . . guardianship."[279]

In reaching this decision, the court discussed Dameris's connections to her broader community, including family, neighbors, and a social worker. Significantly, it also invoked Dameris's relationship to her husband: "Alberto had shown remarkable resiliency and perseverance settling his family . . . . His relationship to Dameris, while always loving, had clearly evolved, and they now presented as far more of a partnership than as a guardian and his ward."[280] Doctrinally, the decision was based both on substantive due process principles[281] and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.[282]

An Iowa case, *In re F.W.*, offers another example.[283] There, in a case involving age-related decline, the court terminated a guardianship partly because the court recognized that the allegedly impaired decision-making capacity of F.W. was mitigated by the fact that he was married and able to rely on additional supports.[284] The presence of his spouse in his daily life meant that his daily affairs could be managed without the need for a guardian.[285] Though the *F.W.* court did not rely on international law, Iowa law does require courts to "consider credible evidence as to whether there are other less restrictive alternatives, including third-party assistance, that would meet the needs" of the person alleged to require a guardian.[286]

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276. Id.

277. Id. at 851–52.

278. Id. at 853.

279. Id. A detailed discussion of New York's guardianship regime under S.C.P.A. Article 17-A is beyond the scope of this Essay, but it has been the subject of substantial and sustained critique. See generally Mental Health L. Comm. & Disability L. Comm. of the N.Y.C. Bar Ass'n, Revisiting S.C.P.A. 17-A: Guardianship for People With Intellectual and Developmental Disabilities, 18 CUNY L. Rev. 287 (2015) (critiquing the Article 17-A guardianship framework and proposing reforms informed by disability rights principles).

280. *Dameris L.*, 956 N.Y.S.2d at 852.

281. Id. at 853–54.

282. Id. at 855–56; see also supra note 28.

283. No. 11-1574, 2012 WL 5355801, at *1 (Iowa Ct. App. Oct. 31, 2012) (unpublished table decision).

284. Id. at *6–7.

285. See id. at *6 ("B.W. has failed to prove that F.W. is not able to care for his personal safety or provide his necessities for life, particularly with the assistance available to him from his wife and employees.").

286. Iowa Code § 633.551(4) (2025).

Relatedly, other courts have considered the overall supports in a person's life, along with a future desire to marry, as a reason to deny guardianship.[287]

Cases like *Dameris L.* and *F.W.* view the relationship of marriage and capacity from a nearly opposite perspective as those in which a lack of capacity lead a court to block a marriage. Rather than focusing on the ways an individual requires support or deviates from normative expectations about participants in marriage, *Dameris L.* and *F.W.* show courts looking at the supportive potential of marriage and the extent to which the marital relationship itself can expand an individual's personhood and autonomy.

## III. TOWARD A MORE EXPANSIVE NOTION OF CAPACITY

This Part begins by analyzing and critiquing the judicial decisions that connect capacity to marry with prior behavior related to sexuality, relationships, or financial or medical decision-making. These decisions, described in section II.C.1, tend to rely—often implicitly—on normative views of marriage and IDD rather than on one's actual ability to understand the nature and consequences of the decision to marry. Next, this Part offers pathways for litigators and courts to limit the role of ableism and the imposition of normative views of marriage in capacity decisions. Finally, this Part discusses the importance of moving towards an understanding of marriage as a potential means of expanding capacity. In this regard, it offers SDM as a potential tool to expand notions of marital capacity. Courts, litigators, and those who work with and support adults with IDD must offer sexual and romantic education to people with IDD and connect them to circles of support such that safe, meaningful, and capacity-expanding marriages can be available to those adults who want them.

### A. *Critiquing Normative Conceptions of Capacity*

This section explores the impact of a marital capacity doctrine that considers sexual and romantic relationships, or medical and financial decision-making, as indicia of one's "ability to understand the rights and duties of marriage."[288] It argues that when courts consider factors beyond an individual's ability to understand the nature and consequences of a marriage, courts render capacity a vehicle for biased and subjective views

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287. See, e.g., In re Eli T., 89 N.Y.S.3d 844, 847 (Sur. Ct. King's Cnty. 2018) (considering the alleged incapacitated person's desire to marry as a factor in rejecting a guardianship application); In re D.D., 19 N.Y.S.3d 867, 875 (Sur. Ct. King's Cnty. 2015) ("The loving and supportive environment in which D.D. is enveloped has enabled him to thrive despite his limitations."). *In re D.D.* is notable because the potential guardian of D.D. objected to the marriage on the concerning grounds that any child born to D.D. and his girlfriend would have Down Syndrome and because she did not believe that they would be capable of caring for the child. Id. at 873.

288. See Harris et al., supra note 139, at 133.

about people with IDD. This view of marital capacity is especially problematic given that courts are only called upon to apply it when third parties or guardians avail themselves of state statutes to challenge an existing or desired marriage of someone alleged to lack marital capacity.[289] Indeed, there is no parallel test for the vast majority of people entering marriage.[290]

*Kindell* is an example of a court holding a person with IDD to the normative ideal of monogamy in marriage and disqualifying her from marriage based on a prior history of nonmonogamy,[291] despite her ability to evince an understanding of marriage consistent with even the most traditional terms.[292] Similarly, in determining that Juhl lacked capacity to marry, the court focused not on Juhl's "cognitive ability," which the court described as "reasonably good," but rather on prior romantic and financial decisions.[293] The court's focus on how many women he had previously pursued,[294] and the speed of these decisions,[295] appears to be based on an understanding of the marital family as monogamous and conforming to romantic social norms.[296] And the notion that Juhl's prior financial decisions should be a factor in assessing capacity, connects to the notion that a family should have "financial independence" and function "relatively autonomously of the state."[297]

In *O'Brien*, the court appropriately focused on O'Brien's understanding of marriage, even though his family—those seeking a finding that he lacked capacity—focused on his diagnosis and, again, on prior sexual decisions. The focus on diagnosis and IQ suggests reliance on older tropes that IDD is inconsistent with marriage and intimacy.[298] His parents also focused on his numerous support needs, relying again on the notion that marriage requires self-sufficiency and suggesting that a marriage should not be allowed if one member will require significant external support.[299]

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289. See supra note 194 (describing a New York marriage licensure process).

290. See supra note 194 and accompanying text.

291. In re Guardianship of Kindell, 197 N.E.3d 1004, 1008 (Ohio Ct. App. 2022).

292. "She explained that she could not cheat on her husband, they would combine their money, and they would support each other when one of them was sick. Both she and Tackett noted that they wanted to be consistent with the Bible's teachings." Id. at 1013.

293. Juhl v. Jacobsen, Nos. 0-644, 00-0195, 2001 WL 22919, at *1–2 (Iowa Ct. App. Jan. 10, 2001).

294. Id. at *2.

295. Id.

296. See Ristroph & Murray, supra note 109, at 1256–57 ("The marital model that emerges in the case law reflects several specific—and contestable—normative preferences.").

297. Id. at 1257.

298. See supra section I.B.3.

299. An examining psychiatrist reported that O'Brien had "very low adaptive capacity" and was "largely unable to function independently." *In re Guardianship of O'Brien*, 847 N.W.2d 710, 713 (Minn. Ct. App. 2014).

In addition to upholding norms of marital self-sufficiency and monogamy, these decisions have the effect of excluding people with disabilities from the institution of marriage. These cases also have the unfortunate impact of screening out potentially supportive and meaningful partnerships based on practical concerns that would not be raised or considered but for the disability status of the individual(s) involved.[300] Indeed, "both individuals with and without cognitive impairments make irrational choices that bring harm to themselves, making the line between people with and without cognitive impairments blurry."[301] And while there are domains in which adults with IDD are more likely to need support than other adults,[302] courts that prevent people with certain disabilities from marrying are paradoxically denying them a primary form of support. While marriage itself is not a necessary part of a supportive relationship, nor does it per se offer unique capacity enhancing qualities, it is prized as a particularly stable and protected form of intimate relationship.

While there may indeed be reasons for caution when certain persons with IDD seek to marry or begin an intimate relationship,[303] the broad range of experiences for people with IDD cautions against considering this group uniformly. This vision of capacity appears to be protecting the institution of marriage as much as, if not more than, the individuals alleged to lack capacity. Moreover, there is a large gap between a person who cannot express volition or communicate a desire to partner and marry, that is, someone who might truly lack the capacity to marry, and a person who has behaved in a way that a court or family member understands to be contrary to marital ideals, but who is able to describe why and whom they would like to marry.

### B. *Limiting Ableism in Capacity Decisions*

This section offers a modest proposal to limit the most harmful effects of the current application of the capacity doctrine. Rather than focusing on prior behavior or medical diagnosis, courts should ask only the narrowest question when it comes to capacity—does this person understand the nature and consequences of the decision to marry? This

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300. See Boni-Saenz, The Right to Fail, supra note 158, at 17–18 (discussing how common "bad choices" are treated differently and hold greater consequences when made by someone with a cognitive disability).

301. Id. at 18.

302. RahKyung Kim & Stacy K. Dymond, What Skills Are Critical for Living in Supported Apartments and Small Group Homes?, 32 J. Dev. & Phys. Dis. 665, 665–66 (2020) ("While many individuals [with IDD] live independently with support from family and friends, some require additional support from paid service providers. It is estimated that approximately 17% of individuals with IDD in the United States receive long-term services and supports from state IDD agencies.").

303. See supra notes 155–159 and accompanying text (describing motivations to approach marital and romantic choice for people with IDD with caution).

inquiry should use the same approach as the *O'Brien* court and look at an individual's understanding, rather than an assessment of an individual's disability or prior behavior.[304]

Courts, family members of people with IDD, and advocates must not reflexively conclude that an individual's prior nonmonogamous behavior means they lack understanding of the meaning or import of marriage.[305] This will doubtless require nuanced, time-intensive consideration by courts and careful advocacy by lawyers for individuals with disabilities, but it is exactly the sort of analysis courts are well positioned to make. It is also the kind of fact-sensitive inquiry that courts are already engaged in, albeit with a narrower focus.[306] When an individual alleges that another person lacks marital capacity based on prior nonmonogamous behavior, courts need to be rigorous in focusing only on what someone can communicate regarding their own comprehension. Whether someone has previously been unfaithful—or indeed may be unfaithful again in the future—has little bearing on whether they understand the fidelity demanded in a traditional, idealized marriage, or whether they share that conception of marriage in the first place. Moreover, in a country where an estimated twenty to forty percent of married individuals engage in extramarital relationships of one kind or another,[307] to insist that individuals with IDD must be faithful, and must always have been faithful, is to hold these adults to a standard not imposed on other adults.[308]

The consideration of financial decision-making and comprehension presents a harder question. After all, it is difficult to disentangle the role of marriage in protecting and enshrining property rights,[309] and failing to consider the many financial impacts of marriage would be an oversight.[310] Denying marriage to those who are not financially literate or who have

304. See 847 N.W.2d at 715 ("[W]e hold that the standard for a ward's competency to marry is that he understands the meaning, rights, and obligations of marriage.").

305. Cf. Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. Rev. L. & Soc. Change 277, 281 (2004) (engaging with, among other questions, "the larger puzzle of why mainstream culture seems to accept the numerosity requirement of marriage without question, even while so many people practice alternatives to lifelong monogamy either secretly (adultery) or serially (divorce and remarriage)").

306. See supra section II.C.

307. Rebeca A. Marín, Andrew Christensen & David C. Atkins, Infidelity and Behavioral Couple Therapy: Relationship Outcomes Over 5 Years Following Therapy, 3 Couple & Fam. Psych. 1, 1 (2014). For more analysis, see generally Edward Stein, Adultery, Infidelity, and Consensual Non-Monogamy, 55 Wake Forest L. Rev. 147 (2020) (discussing the frequency of infidelity and the problems inherent to maintaining clear data). For example, the accuracy of the many different studies regarding infidelity can be affected by factors such as age and societal attitudes towards infidelity more broadly. Id. at 165–66.

308. See supra note 300 and accompanying text.

309. See Emily J. Stolzenberg, The New Family Freedom, 59 B.C. L. Rev. 1983, 2018 (2018) (comparing "marital property distribution" to cohabitant property distribution).

310. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 669–70 (2015) (listing the benefits and obligations of marriage, including those connected to property and finance).

made financially dubious decisions in the past, however, is obviously overbroad. Instead, when a fundamental right such as marriage is at issue, we must make only those incursions that are narrowly tailored to protect a state's compelling interest.[311] Thus, rather than making blanket determinations as to the capacity or incapacity to marry, courts should be considering the least restrictive alternative to the actual right to marry. In this vein, courts should consider the use of prenuptial agreements, powers of attorney, and other vehicles that would allow an individual to plan for additional support in the context of their marital union. Powers of attorney and other advance planning documents are often used as part of or in addition to SDM agreements or as less restrictive alternatives to guardianship.[312] The use of prenuptial agreements would be more novel and would allow for advance, supported planning for people with IDD while mitigating some—if not all—of the financial risks inherent to marriage.[313] Such alternatives must be used with great care and only sparingly, as marriage is a fundamental right and should be allowed to occur without impositions of any kind in the great majority of cases, especially in the absence of a compelling state interest to the alternative.

Another option for courts who face genuine concern about an individual's cognitive understanding of the decision to marry, as well as

311. See O'Connor v. Donaldson, 422 U.S. 563, 575–76 (1975) (recognizing the state's interest in "providing care and assistance to the unfortunate" but holding that the state must do so in light of an individual's "constitutional right to freedom"); see also Mental Health L. Comm. & Disability L. Comm. of the N.Y.C. Bar Ass'n, supra note 279, at 302 ("Central to the substantive, as opposed to procedural due process required for the deprivation of liberty caused by the imposition of guardianship, and resonating throughout the discussion of [S.P.C.A. Article] 17-A which follows, is the concept of least restrictive means.").

312. See Megan S. Wright, Planning for Cognitive Decline: Combining Formal Supported Decision-Making Agreements and Healthcare Power of Attorney, 35 Health Matrix 225, 236–38 (2025) ("[T]hose planning for incapacity may also want to appoint someone to decide on their behalf . . . . [A] new legal document could be created that combines a formal supported decision-making agreement and appointment of a healthcare power of attorney."); Guardianship: Less Restrictive Options, DOJ, https://www.justice.gov/elderjustice/guardianship-less-restrictive-options [https://perma.cc/7DX4-X7G4] (last visited Oct. 18, 2025) (listing SDM, health care advance directives, and power of attorney as less restrictive alternatives to guardianship); see also Whitlatch & Diller, supra note 21, at 201 (describing use of power of attorney forms in the context of SDM); Megan S. Wright, Dementia, Autonomy, and Supported Healthcare Decision Making, 79 Md. L. Rev. 257, 270–71 (2020) (discussing the use of advance directives to avoid substituted decision-making in the context of dementia).

313. There is much evidence as to the efficacy of prenuptial agreements in protecting the financial statuses of spouses in a failing marriage, though such agreements are not without critics. See Allison A. Marston, Note, Planning for Love: The Politics of Prenuptial Agreements, 49 Stan. L. Rev. 887, 893–97 (1997) (discussing common critiques of prenuptial agreements and noting many reasons they are nonetheless valuable planning tools); see also Elizabeth R. Carter, Are Premarital Agreements Really Unfair?: An Empirical Study, 48 Hofstra L. Rev. 387, 429 (2019) ("[Critics'] key premise—the assumption that premarital agreements are unfair—was never supported by reliable empirical data because no such data existed.").

the consequences of that decision, might be to explore SDM as an alternative to a finding of incapacity. Indeed, as in the guardianship context,[314] SDM can be a less restrictive alternative to a finding of marital incapacity. It can also be a means of maintaining and fostering space for autonomous choice while providing support to ensure that the decisions will be as safe and "successful" as possible.[315] The following section will look at models of SDM, research on sexual intimacy and capacity, and forms of family creation to support the notion that SDM can be a means of finding or creating marital capacity.

### C. *The Radical Potential of Supported Decision-Making*

The increasing recognition of SDM as a means of protecting the civil rights and autonomy of people with disabilities suggests vast potential in terms of accessing marriage. "[SDM] is a legally recognized method that augments the capacities of people with fluctuating, diminishing, or limited capacity to continue to act as their own decision-makers."[316] In practice, SDM can involve assisting with decisions across all areas of life,[317] including parts of the decision-making process such as gathering information, negotiating, discussing pros and cons, and communicating a decision-maker's position or view.[318] With SDM, there is the possibility that someone who otherwise lacks the legal capacity to enter into contracts can gain "the legal competence to do so with support."[319] Unlike guardianship, or other more limited forms of substituted judgment, SDM "recognizes the interdependence of people as reasoners."[320]

SDM's potential to enhance access to marriage is particularly clear when one considers that at least some courts have already understood marital and other intimate relationships to be capacity enhancing and mitigate the need for guardianship.[321] Moreover, "[p]eople with disabilities are likely to want to select intimate partners as supporters and partners may well want to play these roles."[322] When applied to the context

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314. See, e.g., In re Guardian for Michelle M., 2016 WL 3981204, at *4 (N.Y. Sur. Ct. King's Cnty. 2016) (unpublished table decision) (recognizing SDM as a less restrictive alternative to guardianship); Ross v. Hatch, No. CWF120000426P-03, slip op. at 5 (Va. Cir. Ct. Aug. 2, 2013) (noting that the ultimate goal was to transition from a limited guardianship to an SDM model).

315. Boni-Saenz, The Right to Fail, supra note 158, at 18 (describing "the proper long-term solution—and the one that respects the human dignity of people with cognitive impairments" as "creating individualized conditions that promote the capabilities for choice and that allow for a meaningful chance of success in decision-making, if possible").

316. Francis, Intimate Relationships, supra note 77, at 31.

317. See supra note 81 and accompanying text.

318. Francis, Intimate Relationships, supra note 77, at 35.

319. Id. at 32.

320. Id.

321. See supra note 314 and accompanying text (describing cases).

322. Francis, Intimate Relationships, supra note 77, at 52.

of these cases, SDM appears a natural and appropriate means of expanding marriage access for people who might otherwise be found to lack capacity to marry.

There are several ways that SDM could support access to marriage. An individual with an active SDM agreement or informal SDM network could rely on supporters to assist with considering the pros and cons of a specific and general marital relationship and even to continue to help make decisions within a marriage.[323]

Courts called to assess the validity of such decisions in this arena can also be guided by the "network consent" test,[324] pioneered by Professor Alexander Boni-Saenz in the context of sexual decision-making.[325] In addition to modifying aspects of the traditional assessments of sexual consent,[326] Boni-Saenz, who developed the model with both age-related and IDD cognitive capacity challenges in mind, suggests not limiting assessments of capacity for sexual decision-making solely to evidence of an individual's cognitive abilities but including what they can understand with the help of an SDM network.[327] This model also offers promise in the realm of marriage because it would allow courts to focus not only on an individual person's cognitive abilities but also on what they are capable of doing and understanding with appropriate support.[328] Key to the test is that it includes an assessment as to whether the decision-making support system, if there is one, is adequate.[329] Boni-Saenz recognizes that "[m]embers of the decision-making support system will often be spouses or other loved ones, who may be primary targets of sexual interest by the person with cognitive impairments."[330] Because of the potential for conflicts, however, he suggests that such partners "should be subjected to a rebuttable presumption of network inadequacy, which can be overcome

323. Wright, More Choosers, supra note 62, at 146–48 (discussing the use of SDM in medical decision-making). A similar intervention has been suggested in the context of parenting with disabilities. See Leslie Francis, Maintaining the Legal Status of People With Intellectual Disabilities as Parents: The ADA and the CRPD, 57 Fam. Ct. Rev. 21, 23–26, 30–33 (2019) (describing the concept of "supported parenting" as a potential solution to the disparate impact of termination of parental rights in the family regulation system).

324. Alexander A. Boni-Saenz, Advance Consent and Network Consent, *in* The Routledge Handbook of Disability and Sexuality 222, 228–31 (Russell Shuttleworth & Linda R. Mona eds., 2021). This was previously called the "cognition-plus test." Id. at 231 n.2.

325. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1234.

326. Specifically, Boni-Saenz proposes requiring a "threshold" showing of volition, id. at 1234, and a simplified version of the "nature and consequences" test that asks whether the person has the cognitive capacity to reason about a specific sexual decision but would not require a demonstration that the individual understood the morals or consequences of their decision. Id. at 1216–22.

327. Id. at 1230.

328. Id.

329. Id. at 1237. "This is essentially an inquiry into the health of the decision-making apparatus as a whole, similar to the inquiry into the individual's mental capacities." Id. at 1238.

330. Id. at 1239.

if sufficient evidence of loyalty and care is supplied to the court."[331] Boni-Saenz has thus envisioned a model of sexual decision-making "in which a judicial inquiry would include both an analysis of the volitional capacity of the person with cognitive impairments and an evaluation of the adequacy of a support network."[332] Extending this kind of logic to the sphere of marital relationships is a small but significant step.

As in the context of assessing the sexual consent capacity of adults with IDD, utilization of the "cognition-plus" test in the context of capacity to marry will likely require some adaptation.[333] In particular, in cases involving communication impairments, lawyers for people with IDD will likely need to engage in creative advocacy to establish volition—that is, interest in marriage.[334] Likewise, advocates, family members, and people with IDD will need to continue to advocate for appropriate sexual and psychosocial education so that they can compellingly demonstrate an understanding of the moral and practical consequences of the decision to marry.[335]

In the context of sexual decision-making, SDM "involves communicating with the individual with cognitive impairments to discern what her sexual desires are and helping her make the connections between those interests and potential choices."[336] Supporting a person who is nonverbal "may involve observing the individual in context and paying attention to subtle cues of desire or displeasure."[337] In the marriage context, one can imagine a similar role for supporters to help identify and consider desires related to romance or partnership and think through the ramifications of the decision to partner or marry a specific person. Discussion of the legal ramifications of marriage—as opposed to a mere expression of volition to marry or desire to be married—will likely be a major source of discussion and counsel between a decision-maker seeking to marry and their supporter(s). When the supporter in question seeks to become a spouse, additional supporters should be involved in the decision to marry whenever possible. Additionally, the decision-maker and supporter should—before marriage—"delineate as clearly as possible [the supporter's] roles in the support agreement" going forward.[338] One can also imagine a similar role for courts, should they need to become

331. Id. at 1239–40.

332. Boni-Saenz, The Right to Fail, supra note 158, at 28–29.

333. See Harris, The Role of Support, supra note 10, at 95 (suggesting that application of "cognition-plus" to people with IDD might require adaptations to the "design or application" of the test).

334. Id. at 96–98.

335. Id. at 100 (noting that, especially in institutional or group homes, "there is an absence of formal and informal opportunities to amass knowledge about sex and its biological consequences or to exercise sexual decision-making" for people with IDD).

336. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1230.

337. Id.

338. Francis, Intimate Relationships, supra note 77, at 51.

involved. Courts would assess both the volition and volitional capacity of the person with IDD and evaluate the adequacy of their support network. If a putative spouse is part of the support network, courts and advocates must be wary of the potential for conflicts of interest; courts should hold such supporters to a higher standard when assessing the adequacy of their support. Boni-Saenz has suggested the courts hold spousal intimates to a rebuttable presumption that they are not adequate supporters and that can only be overcome with "sufficient evidence of loyalty and care."[339]

There is already at least one example in which both partners in a marriage benefited from SDM, though there is little information about their relationship or the role that SDM played within it. Earnest and Essie Walker were both disability rights advocates who lived together in a group home in Brooklyn, New York.[340] Earnest met Essie after he successfully fought to leave an institution, and the two married in 1989.[341] Both Essie and Ernest received support as decision-makers through SDM-NY.[342]

SDM is not, however, a panacea.[343] For example, many people with IDD lack adequate or meaningful support networks.[344] Moreover, in many of the cases involving challenges to marital capacity, it is a member of a former support network that is challenging the desired marriage.[345] Even

339. Boni-Saenz, Sexuality and Incapacity, supra note 10, at 1239–41.

340. For a video of Essie and Earnest talking briefly about their marriage, see SDMNY, Supported Decision-Making Is for Everyone (Vimeo, Nov. 10, 2020), https://vimeo.com/477658828?fl=pl&fe=ti (on file with the *Columbia Law Review*). Since this video was made, Essie, unfortunately, passed away. For an earlier example of the couple's advocacy efforts and for information about their community living experience, see Denise Romano, Parents "Mad as Hell" Over Proposed Cuts to the Developmentally Disabled, Brooklyn Reporter (Mar. 6, 2013), https://brooklynreporter.com/2013/03/parents-mad-as-hell-over-proposed-cuts-to-the-developmentally-disabled/ [https://perma.cc/WHL4-KSQC].

341. SDMNY, supra note 340, at 5:15–6:21.

342. Id.

343. See Francis, Intimate Relationships, supra note 77, at 32 ("Respecting boundaries between supporting and supplanting the principal as the decision-maker is not easy, and it may prove especially difficult when principals and supporters have been or continue to be involved in an intimate relationship. Intimate partners—from new lovers to long-term spouses—likely have intertwining desires and goals."); Wright, More Choosers, supra note 62, at 147–48 (describing open questions regarding the use of SDM in medical decision-making).

344. Boni-Saenz, The Right to Fail, supra note 158, at 23–25 (describing problems with actualizing SDM, including lack of adequate support networks, though noting that those with adequate means can often purchase support through the market); see also Harris, The Role of Support, supra note 10, at 101–04 (describing anticipated challenges with utilizing SDM in the sexual consent capacity context).

345. See supra notes 248–287 (citing cases involving parents, siblings, and other potential supports challenging a person with IDD's capacity to marry). Boni-Saenz also points out that members of a given support network are not themselves immune from the consequences of decisions made in the network. See Boni-Saenz, The Right to Fail, supra note 158, at 22 ("We exercise choice not in a vacuum, but in a social world in which we are connected to countless others. Thus, it may be the case that we have a moral responsibility to address the radiating consequences of our decisions.").

in a situation with adequate and willing support, one might wonder how adding a supporter into the mix of a two-person relationship would impact the traditional marital dynamics.[346] For example, does this open the path for undue influence or pressure from a third party? Or might the non-supported partner, such as there may be, feel that there are too many people involved in the marriage if supporter(s) played a significant role in the decision-making process? Nor does SDM answer many of the trenchant and challenging questions that can arise in cases of people of starkly disparate abilities forming intimate relationships.[347] This issue is complicated by what scholar Kevin Mintz has characterized as "society's discomfort with the notion that people with disabilities are sexual beings who might be appealing romantic partners to those without disabilities."[348] If a marital partner were to become a supporter (or vice versa), the question of whether and when the supporter should be focused on the "ends" versus the "means" of reaching a decision may become especially complex.[349] This is just one example of issues that might arise related to potential conflicts of interests between spouse-supporters.[350] Likewise, there are unresolved questions about how, exactly, an SDM agreement "grants legal capacity" to the decision-maker.[351] There is also the economic reality that provision of high-quality, individualized SDM support, in and

346. See Boni-Saenz, The Right to Fail, supra note 158, at 22 ("[A] general turn to life decision by committee seems to be in tension with the individualized decision-making that is core to the right to fail.").

347. For a sense of the most extreme questions that can arise in this context, consider the case of Anna Stubblefield and the many articles spawned in reaction. See, e.g., Mintz, supra note 70, at 1667 (arguing that the case—and coverage—was inflected heavily with ableism); Daniel Engber, The Strange Case of Anna Stubblefield, N.Y. Times Mag. (Oct. 20, 2015), https://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html (on file with the *Columbia Law Review*) (describing the trial and surrounding investigation into the case). Stubblefield was a philosophy professor at Rutgers University who developed a relationship with D.J., a younger, Black man with cerebral palsy. Id. While the nature of the relationship is contested, it is clear Stubblefield and D.J. engaged in sexual intercourse at least once. Id. She was initially convicted of sexual assault, but the conviction was overturned on appeal. Id.

348. Mintz, supra note 70, at 1668; see also id. ("The prosecution highlighted the fact that D.J. wears diapers. This in itself is not a sign of intellectual impairment, but even if it were, he should not have been infantilized, especially in light of how briefly he was paraded to the jury.").

349. See supra note 98 and accompanying text.

350. See supra text accompanying note 331. Cases about the relationships between guardianship and marriage do exist and give us some sense of the many complex problems to be solved. See, e.g., Payton v. Payne, 414 N.E.2d 33, 36–37 (Ill. App. Ct. 1980) (finding it a conflict of interest to be guardian and wife); Ex parte Chace, 58 A. 978, 981–82 (R.I. 1904) (reasoning that once a ward enters a marriage, their guardianship should terminate or, if the guardianship still exists, its interest would be subordinate to the marital partner).

351. Wright, More Choosers, supra note 62, at 148–49 ("Is it the provision of decisional support that can . . . help [the supported person] demonstrate that they are competent? Or is it the declaration . . . that the supported person can act independently of the agreement and that the supported person is the legal decision maker and not their supporters?" (footnote omitted)).

out of the marital context, requires the expenditure of government resources.[352]

Notwithstanding these unresolved questions, the two capacity-expanding decisions explored in this Essay offer legal precedent for the idea that SDM can expand marital capacity for people with certain disabilities. Supporters could play a role in the decision of whether to pursue a serious, committed, and legal marital relationship at the outset, and their role would likely be known to the other member of the relationship. Supporters might also be able to facilitate safe, healthy dating opportunities. Indeed, in a world in which family is an increasingly elastic concept, the inclusion of a network of supporters to assist with decision-making may not be terribly radical.[353]

### D. *Supported Decision-Making as Marriage Reform?*

By embracing SDM in this context, courts and advocates may do more than expand access to individual marital relationships; indeed, they may actually begin the herculean task of recasting marriage not as an institution separate and apart from the community, in which couples are expected to support themselves and their children in isolation, but as one that is interconnected with and reliant upon the broader world around them.

Feminist scholars—particularly Martha Albertson Fineman—have argued that true autonomy is a "myth" that "[t]he ideal of family is essential to maintaining."[354] Disability studies scholars have also critiqued

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352. See Boni-Saenz, The Right to Fail, supra note 158, at 18–19 ("[C]reating individualized conditions that promote the capabilities for choice and that allow for a meaningful chance of success in decision-making . . . undoubtedly requires the expenditure of societal resources."); Costanzo et. al, supra note 19, at 134 (acknowledging the need for state governments to invest significant money to ensure access to highly individualized SDM services). For a sense of the cost of SDM pilots, see Radoslava Lalcheva & Miryana Malamin, De Pasarel Bulgaria, Cost Benefit Analysis of Supported Decision-Making 27–28, 30–34 (2014), https://sdmny.org/wp-content/uploads/2020/09/WebPage.pdf%20 [https://perma.cc/M8LV-32G6]; Elizabeth Pell & Virginia Mulkern, Hum. Servs. Rsch. Inst., Supported Decision Making Pilot: Pilot Program Evaluation Year 2 Report 40 tbls. 4 & 5 (2016), https://supporteddecisions.org/wp-content/uploads/2019/05/CPR-SDM-HSRI-Evaluation-Year-2-Report-2016.pdf%20 [https://perma.cc/WE7D-C4SX].

353. See Alexander Chen & Christina Mulligan, Parafamily, 105 B.U. L. Rev. 385, 402 (2025) (explaining how reliance on varied networks of support can be found even "in the most traditional nuclear family arrangements"); Alexander Chen & Christina Mulligan, Opinion, Polyamorous Relationships Are a Good Thing, Bos. Globe (Sep. 27, 2024), https://www.bostonglobe.com/2024/09/27/opinion/polyamory-relationships-legal-discrimination/ (on file with the *Columbia Law Review*) ("Extended family, platonic friends, and nonmarital romantic partners all can be critical components of a rich and fulfilling life . . . .").

354. Fineman, Masking Dependency, supra note 131, at 2182; see also Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency 37 (2004) ("Each individual family is ideally responsible for its own members' dependency, and resort to collective resources is considered a failure, deserving of condemnation and stigma."); Eva Feder

the overvaluation of independence in society on the grounds that it "tends to diminish the esteem of people who cannot live without a great deal of help from others, and to ignore or undervalue relationships of dependency or interdependence."[355] Indeed, some scholars see demands for independence and self-sufficiency as inherently dehumanizing to those with disabilities who rely on support systems.[356]

Normative views of the marital family justify the privatization of dependency, further marginalizing people with support needs by suggesting that, in ideal families, there should be no need for governmental or external support.[357] Accepting SDM's potential to enhance capacity for marriage is a move towards embracing dependency as "inevitable and universal."[358] Whereas normative conceptions of the family insist that neither "the market [n]or the state will directly contribute to or assist in the necessary caretaking" because "that is done in the privacy of the family,"[359] marriages supported by SDM acknowledge precisely the opposite—that a two-person unit necessarily will require the support of others. Judicial recognition of marriages supported by SDM would thus strengthen an alternative vision of "collective responsibility and an appreciation of the generalized interdependence among all members of society."[360]

Applying SDM to the question of marital capacity would also open the family form to a significant subsection of those traditionally excluded from family, opening more narrow conceptions of family to a broader set of people and recasting the marital relationship in a more communal,

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Kittay, Love's Labor: Essays on Women, Equality and Dependency 34 (2d ed. 2020) ("Dependency is inescapable in the life history of each individual."). Significantly, marriage itself has also been a site of domination, not only of women but also children and other family members who have, historically and all too often contemporarily, lacked power outside of the home. See Mayeri, Marital Supremacy, supra note 109, at 1340 (describing the benefits and limitations to changes set in motion when the Supreme Court "str[uck] down most distinctions between 'legitimate' and 'illegitimate' children"); Mayeri, Marriage (In)Equality, supra note 109, at 127 ("Historically, as a matter of formal law if not always social reality, marriage prescribed gender-differentiated and unequal roles for husbands and wives and the subordination of wives' legal identity through coverture."). Recasting marriage as a place for interdependence has the potential to recast what remains of these dynamics as well, though awareness of such dynamics also suggests caution when exploring marriage as a site of true interdependence.

355. Susan Wendell, The Rejected Body: Feminist Philosophical Reflections on Disability 145 (1996).

356. See Akemi Nishida, Just Care: Messy Entanglements of Disability, Dependency, and Desire 128, 131–34 (2022) ("[Independence] has been deployed as the measurement to categorize and hierarchize people along the human and dehumanization spectrum that undergirds social oppressions enacted in the United States.").

357. See supra section I.B.2 (exploring marital norms of self-sufficiency and independence from government support).

358. Fineman, Masking Dependency, supra note 131, at 2181.

359. Id. at 2187.

360. Id. at 2194.

pluralistic form. This can happen on two levels. First, practically speaking, if more judges, legislators, and families accept SDM to be capacity enhancing, certain marital families will be expanded through the actual engagement of supporters, including third parties and expanded social safety nets. Second, if SDM allows a greater number of people with IDD to marry, then the institution of marriage itself will be rendered more accessible to people with IDD and potentially others with support needs. Together, these changes might push scholars, legislators, and judges to "engage in realistic explorations of how family functions might be successfully performed by nontraditional family units if they were adequately assisted by public subsidies and support now reserved for the nuclear family."[361] While this vision of marriage as a unit supported by and within the broader community doesn't necessarily lead to the total rejection of privatized dependency, it does potentially invite a broader public into the marital home, perhaps offering a path towards many and more varied forms of support.

While a key contribution of this Essay is to acknowledge and highlight the potentially capacity-expanding role of marriage for people with IDD, it is crucial to acknowledge that SDM as a form of support remains in its early stages. Indeed, though SDM is practiced internationally, the U.S. statutes are comparatively new,[362] the case law is relatively sparse, and the empirical evidence about SDM in practice is just beginning to be collected.[363] At this stage, SDM offers potential for the future rather than a certain path. Likewise, this Essay should not be understood as an argument promoting marriage. "[T]he expressive value of access to marriage is tremendous and fundamental to equality, yet constitutional recognition of marriage rights has proven insufficient to independently bring about that equality."[364] In fact, access to marriage for many historically marginalized groups has led to an "anemic version of dignity . . . in which dignity is not inherent, but must be earned by marrying."[365] Therefore, while this Essay seeks to critique the limits of the right to marry currently placed on people with IDD, it does not suggest that all or even more people with IDD should seek to marry. It suggests instead that marriage should be an institution that is as accessible to people with IDD as to others and that by expanding access to this diverse and varied group of adults, marriage itself can be recast as one among

361. Id. at 2192.

362. See supra note 78 and accompanying text (describing and collecting statutes).

363. See Glen, Supported Decision-Making, supra note 83, at 104 (describing the nascent study of New York's SDM legislation and comparing it to the far greater extent of SDM research that has been done in Australia).

364. Swan, supra note 124, at 317 (citing Franke, Wedlocked, supra note 30, at 10–11).

365. Id. at 318; see also Kaiponanea T. Matsumura, A Right Not to Marry, 84 Fordham L. Rev. 1509, 1510 (2016) (explaining that legalizing gay marriage emboldened states to restrict access to civil unions and domestic partnerships).

many forms of support for American adults and families, with and without disability.

## CONCLUSION

Marriage—as an institution and system of normative ideals—is central to how American law and society organize and govern themselves. Historically, marriage has been a means both of shaping the moral foundation of the American citizenry and of providing for privatized dependency of its citizens. Access to marriage has also been a means by which marginalized groups have gained greater equality. For people with IDD, it is one more area in which courts, law, and society have regarded them as marginal and inferior, unfit for participation in the general rights and institutions of personhood. Modern statutes and case law reveal two different ways to conceive of the relationship between marriage and capacity: one in which those with IDD are more likely be excluded from the exalted status of marriage because of a judicial finding of incapacity and one in which marriage itself can become a means of expanding capacity and increasing the social and relational connectedness of a person with IDD to the broader world. When marriage itself is understood as a form of social support, and comes to include individuals who require support outside of the rigid, two-person relationship, there appears a path to recognizing more and greater forms of external support for the marital family. In turn, marriage itself can be recast as one among many forms of appropriate social supports, from government to care webs and kin networks, potentially transforming marital norms in the process.