ELDER FINANCIAL ABUSE: CAPACITY LAW AND ECONOMICS

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Elder financial abuse is an alarming problem in this era of aging population. Baby boomers are entering retirement with a higher life expectancy and more wealth than any generation before them. The combination of mental decline and substantial wealth renders many seniors vulnerable to overreach. In private suits alleging elder financial abuse, courts often apply the mental capacity doctrine to avoid seemingly exploitative contracts, gifts, and many other lifetime transactions. The formal rationales for avoidance are that the elderly party to the impugned transaction lacked mental capacity, and that the transaction was inequitable.

This Article argues that the mental capacity doctrine in prevailing American law is ill-suited for the era of aging population. In theory, the doctrine grants mentally-incapable individuals a power to choose whether to avoid their transactions. In reality, that power is usually exercised by claimants who expect to inherit from incapable individuals. Prevailing doctrinal theories overlook the possibility that the claimant may seek to avoid a transaction to increase her expected inheritance, rather than to advance the interests of the incapable individual. As a result, the mental capacity doctrine may operate to avoid transactions that actually had benefited potentially incapable seniors and reflected their testamentary intent. This harms many seniors by unduly limiting their abil-

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ity to gift their close relatives and friends, reward informal caregiving, and recruit their preferred caregivers.

The mental capacity doctrine can nonetheless be reformulated to offer appropriate protection against elder financial abuse without undue intrusion into close families and personal relationships. In particular, when applied to transactions between close relatives and friends, the doctrine should be narrow, determinate, and respectful of individual will and preferences.

INTRODUCTION

Consider the following hypothetical based on *Daughton v. Parson*:[1] for decades, Cecil lived with his parents, Ollie and Thomas, and assisted them with operating their farm.[2] In their old age, Ollie and Thomas orally promised to pass the farm on to Cecil, but no one acted upon that promise until Thomas had passed away.[3] Having fallen in her health and moved to a nursing home, Ollie executed deeds to transfer the farm to Cecil for no consideration.[4] Ollie's other children, who expected to inherit a share of her estate upon her death, sued to avoid the transfer deeds and recover the family farm from Cecil.[5] They argued that Cecil took advantage of Ollie's mental incapacity.[6] This Article addresses the question of who should succeed in this and similar cases.[7]

Whether courts should be suspicious of persons, like Cecil, who benefit from significant transactions with the elderly is an important and controversial question in the present era of aging population. Mental and physical decline is common among seniors. The combination of severe cognitive limitations and substantial wealth renders many seniors vulnerable to overreach. Empirical studies suggest that elder financial abuse is

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1 423 N.W.2d 894 (Iowa Ct. App. 1988).

2 *Id.* at 895.

3 *Id.*

4 *Id.*

5 *Id.* at 896.

6 *Id.* Mental *incapacity* is a functional concept in law, see generally *infra* subpart I.A (discussing the theoretical foundations of mental capacity to contract), and is distinct from the medical concept of mental *disorder*. A mental disorder refers to "a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior . . . ." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS20 (5th ed. 2013). Having a mental disorder is neither sufficient nor necessary for an individual to lack mental capacity to transact in the eyes of the law. *See generally infra* subparts II.A, II.C (reviewing the historical development and current formulation of the mental capacity doctrine and how courts have applied the open-ended nature of the doctrine).

7 The Iowa court ruled against Cecil. *Daughton*, 423 N.W.2d at 898.

likely prevalent.[8] There is also no shortage of well-publicized cases.[9]

In private suits alleging elder financial abuse, courts often apply the *mental capacity doctrine* to determine whether to avoid seemingly exploitative contracts, gifts, and other lifetime transactions.[10] The doctrine is meant to protect individuals who lack sufficient mental ability to incur legal responsibility for their own transactional choices.[11] Yet allowing avoidance of transactions tainted with incapacity can discourage others from transacting with potentially-incapable individuals *ex ante*.[12] To resolve this dilemma, the widely-accepted *conflicting-policies theory* directs courts to balance the conflicting policies of protecting incapable individuals and protecting the security of transactions on a case-by-case basis.[13] A related *abnormality theory* holds that courts should be suspicious of transactions exhibiting substantive or procedural imbalance,

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8 *See generally infra* subpart I.B (citing multiple studies that conclude elder financial abuse is prevalent among family members, as well as by outsiders).

9 For example, the late Brooke Astor, who had dementia after a lifetime of philanthropy, had tens of millions of dollars stolen from her by her son and family lawyer. *See* Russ Buettner, *Appeals Exhausted, Astor Case Ends as Son Is Sent to Jail*, N.Y. TIMES (June 21, 2013), https://www.nytimes.com/2013/06/22/nyregion/astors-son-his-appeals-exhausted-goes-to-prison.html?auth=login-email&login=email [https://perma.cc/A4D5-9P7M]; John Eligon, *Settlement in Battle Over Astor Estate Is Reached*, N.Y. TIMES (Mar. 28, 2012), https://www.nytimes.com/2012/03/29/nyregion/settlement-reached-in-battle-over-brooke-astors-estate.html#:~:text=settlement%20in%20Battle%20Over%20Astor%20Estate%20Is%20Reached,-By%20John%20Eligon&text=brooke%20Astor's%20only%20son%20saw,dispute%20over%20the%20family's%20millions [https://perma.cc/SR9L-RD6S]. A more recent example concerns the late comic book legend Stan Lee, whose alleged business manager and caretaker was charged with multiple counts of financial and physical abuse. *See, e.g.*, *Stan Lee: Ex-manager of Comic Book Legend Charged with Elder Abuse*, BBC NEWS (May 14, 2019), https://www.bbc.com/news/entertainment-arts-48265450 [https://perma.cc/8PCN-CVC4].

10 *See generally infra* note 64 and accompanying text; the Online Appendix (surveying modern transactional capacity cases).

11 *See generally infra* subparts I.A, II.A (laying out that threshold concept in theory, which sets a standard for determining if an individual is sufficiently rational to choose a contract that enhances welfare or autonomy, as well as discussing the cognitive and volitional tests in doctrine, which determine if individuals can reasonably understand the consequences of their actions or act in a reasonable manner).

12 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 33 cmt. c (AM. LAW INST. 2011) ("Legal incapacity is legal disability, and a person who lacks the capacity to undertake a legally binding obligation is foreclosed from participating in transactions that may be advantageous or even vitally necessary."). *See generally infra* section III.A.3 (discussing various scenarios where others may forgo potential transactions with elders in part due to the risk of avoidance).

13 *See generally infra* subparts II.A, II.C.2 (recognizing the inherent conflict between protecting mentally incapable individuals and the security of their transactions and discussing how courts weigh these considerations).

and of any other factor indicating deviation from the norm.[14] Producing great indeterminacy, these theories direct courts to "weigh[ ] at each point the value of the protection secured against the cost of securing it."[15]

Against the weight of two modern Restatements,[16] I argue that the mental capacity doctrine in prevailing American law is ill-suited for the era of aging population. The previous hypothetical based on *Daughton v. Parson* can illustrate the main problem.[17] While the Iowa court applied contractual doctrines,[18] the case had the hallmarks of a dispute over inheritance. Ollie executed the suspicious deeds in her final years of life in order to pass the family farm on to Cecil[19]—the child who had labored on it for decades. Ollie's other children challenged those deeds to increase their expected inheritance.[20] Ollie's mental decline rendered it difficult for her to give evidence regarding her true intentions.[21] In theory, the mental capacity doctrine granted Ollie the power to choose whether to avoid her transactions.[22] In reality, that power was exercised by those children who did not want Cecil alone to inherit the family farm. The critical flaw of the prevailing theories is their failure to recognize that the claimant who seeks avoidance may do so

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14 *See generally infra* subparts II.A, II.C.2 (discussing the underlying rationale for the abnormality theory). Professor Milton D. Green introduced the conflicting-policies theory and abnormality theory. *See* Milton D. Green, *Fraud, Undue Influence and Mental Incompetency: A Study in Related Concepts*, 43 COLUM. L. REV. 176, 186–87 (1943) [hereinafter Green, *Related Concepts*]; Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 165 (1941) [hereinafter Green, *Judicial Tests*]; Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 298–306 (1944) [hereinafter Green, *Major Premise*]; Milton D. Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189, 1200 (1940) [hereinafter Green, *Public Policies*]; Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554, 588 (1943) [hereinafter Green, *Operative Effect*].

15 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 33 cmt. c (AM. LAW INST. 2011).

16 *See infra* Part III (arguing against the formulation of the mental capacity doctrine in RESTATEMENT (SECOND) OF CONTRACTS §§ 12 cmt. a, 15 (AM. LAW INST. 1981) and RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 15–16 (AM. LAW INST. 2011)).

17 423 N.W.2d 894 (Iowa Ct. App. 1988).

18 *Id.* at 898.

19 *Id.* at 896.

20 *Id.*

21 In typical transactional capacity cases, the potentially-incapable individual is unable to testify because she has passed away. *See generally infra* sections III.A.1–2 (identifying the "worst evidence" problem: the testimony of a deceased individual is unavailable).

22 RESTATEMENT (SECOND) OF CONTRACTS §§ 7 cmt. b, 12 cmt. a (AM. LAW INST. 1981).

against the interest of the incapable individual.[23] The real beneficiary of protective doctrine is often not the incapable individual herself, but those who expect to inherit from her.

Taking a law-and-economics approach, I propose to reformulate the mental capacity doctrine to promote the welfare of seniors who may lack mental capacity. Many transactions between seniors and their close relatives and friends are *estate-planning* instruments made to reward informal caregiving and pursue preferences for reciprocity fairness.[24] The mental capacity doctrine ought to offer safeguards against elder financial exploitation without undue intrusion into close families and personal relationships. When applied to transactions between close relatives and friends, the doctrine ought to be narrow, determinate, and respectful of individual will and preferences. I propose a simple doctrinal reform to achieve these goals.[25]

The types of transactions that fall within the scope of this Article are those to which courts habitually apply the doctrine governing mental capacity to *contract*.[26] These types of transactions include contracts in the strict sense of legally-enforceable promises,[27] deeds and conveyances,[28] irrevocable gifts,[29] and irrevocable trusts made in their makers' lifetimes.[30] For simplicity, I label all of these as "transactions" without regard to their doctrinal distinctions, and highlight the exact doctrinal category (for example, contract or gift) when it is relevant. This Article does not cover transactions between mentally-incapable individuals and their guardians, agents, or other fiduciaries. While the doctrine governing mental capacity to transact is broad and indeterminate, the doctrines that regulate the fiduciaries of incapable individuals are strict and inflexible. I have written separately on mental capacity in fiduciary law.[31]

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23 *See infra* section III.A.1.

24 *See infra* section III.A.2.

25 *See generally infra* Part IV (proposing a reform to loosen the restrictions on transactions between close relatives and friends).

26 *See generally* the Online Appendix (surveying modern cases in which courts applied the doctrine governing mental capacity to contract).

27 *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

28 *See* 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 10:1 (4th ed. 1993 & Supp. 1999).

29 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(c) (AM. LAW INST. 2003).

30 *See* RESTATEMENT (THIRD) OF TRUSTS § 11(3) (AM. LAW INST. 2003).

31 *See, e.g.*, Ben Chen, *Elder Financial Abuse: Fiduciary Law and Economics*, 34 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307 (2020); Ben Chen, *Family Fiduciaries in the Protective Jurisdiction*, 44 MELB. U.L. REV. 55 (2020).

This Article contributes to the theoretical and doctrinal literature on contract law, property law, remedies, and inheritance law. While there is a small literature on transactional capacity disputes predating the era of aging population,[32] recent scholarship focuses on capacity to make a will.[33] The closely-related scholarship on undue influence also focuses on wills.[34] Moreover, with some exceptions,[35] mental capacity to transact has escaped the attention of disability-rights scholars as well as lawyer-economists. This Article shows that transactional capacity disputes deserve scholarly attention and offers guidance on how best to resolve them.

Part I below introduces the concept of mental capacity to transact and explains its importance in the era of aging population. Part II elaborates upon the mental capacity doctrine in prevailing American law. Part III argues that the prevailing formulation of the doctrine is ill-suited for resolving typical capacity disputes in modern times. Part IV offers reform suggestions to promote the welfare of seniors. The Online Appendix provides a survey of modern transactional capacity cases to substantiate the positive claims to be advanced.

I
MENTAL CAPACITY TO TRANSACT: THEORY AND CONTEXT

This Part will introduce the conceptual foundations of mental capacity to transact and explain its practical importance in the era of aging population. The goal here is to make a

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32 *See, e.g.*, SUSANNA L. BLUMENTHAL, LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE chs. 5–7 (2016); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 763 (1982); Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 CASE W. RES. L. REV. 307, 342 (1988–89); *supra* note 14.

33 *See, e.g.*, Stephen R. Alton, *The Strange Case of Dr. Jekyll's Will: A Tale of Testamentary Capacity*, 52 TULSA L. REV. 263 (2017); Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 74–75 (2014); Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 299 (2017); Joshua C. Tate, *Personal Reality: Delusion in Law and Science*, 49 CONN. L. REV. 891, 895 (2017); *see also* BLUMENTHAL, *supra* note 32, at ch. 4 (discussing testamentary capacity cases in the nineteenth century).

34 *See, e.g.*, Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959 (2006); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997).

35 *See, e.g.*, George J. Alexander & Thomas S. Szasz, *From Contract to Status via Psychiatry*, 13 SANTA CLARA LAW. 537, 539 (1973) (arguing for the abolition of the mental capacity doctrine); David P. Weber, *Restricting the Freedom of Contract: A Fundamental Prohibition*, 16 YALE HUM. RTS. & DEV. L.J. 51, 67–68 (2013) (defending the mental capacity doctrine).

prima facie case for operationalizing an appropriately-formulated doctrine of mental capacity to combat elder financial abuse. Parts II and III below will consider whether the mental capacity doctrine in prevailing American law is appropriately formulated.

A. Theoretical Foundations

Mental capacity to transact is the threshold concept of mental ability to incur legal responsibility for one's chosen transactions, such as contracts and gifts of property.[36] A threshold concept of mental ability is present in all major theories of contract law and in theories of property law that enshrine donative intent.[37] In particular, economic theories of contract law have a threshold concept of mental ability to determine whether an individual is sufficiently rational to choose contracts that benefit herself.[38] If she is not sufficiently rational, then her chosen contract may not advance her individual welfare or the joint welfare of the contracting parties.[39] Autonomy theories of contract law also have a threshold concept of mental ability to determine whether, in the contractual sphere, an individual can be the author of her own goals and relationships.[40] Moreover, whether a contract or gift of prop-

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36 *See* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY & THE LAW 181–84 (4th ed. 2007); BLUMENTHAL, *supra* note 32, at chs. 1–2. *Cf.* Eisenberg, *supra* note 32, at 763 (defining "transactional incapacity" as lacking "the aptitude, experience, or judgmental ability to make a deliberative and well-informed judgment concerning the desirability of entering into a given complex transaction"). Compared with the notion of mental incapacity to transact in prevailing American law, *see infra* Part II.A, Professor Eisenberg's notion of "transactional incapacity" covers a much broader class of individuals and attracts less drastic legal consequences. *See* Eisenberg, *supra* note 32, at 765–66.

37 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. LAW INST. 2003).

38 *See* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 465–66 (5th ed. 2013).

39 *See generally* Benjamin E. Hermalin, Avery W. Katz & Richard Craswell, *Contract Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 3, 13–17 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (comparing economic and noneconomic theories of contract law); Avery W. Katz, *Economic Foundations of Contract Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 171, 175–80 (Gregory Klass, George Letsas & Prince Saprai eds., 2014) (discussing different modes of argument using contractual surplus).

40 *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 86 (2017); JOSEPH RAZ, THE MORALITY OF FREEDOM 372–73 (1988) ("If a person is to be maker or author of his own life then he must have the mental abilities to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties necessary to plan actions, etc."); SCOTT & KRAUS, *supra* note 38, at 465–66.

erty is likely to advance welfare or autonomy partially depends on the parties' mental abilities. Hence, pluralist theories also have some threshold concept of mental ability to assign value to welfare or autonomy, and compare such value with the protection of the vulnerable, anti-discrimination, and other relevant values.[41]

B. Deterrence and Sanction of Elder Financial Abuse

How best to formulate and operationalize a doctrine of mental capacity to transact is an important and controversial question in the era of aging population. Since the last century, the percentage of Americans age sixty-five or over [hereinafter seniors] has tripled.[42] The population of seniors is estimated at 52.4 million in 2018 (sixteen percent of the population), and is projected to reach 94.7 million in 2060.[43] Physical and mental decline is common among seniors. In particular, recent studies estimate that Alzheimer's dementia affects about 5.8 million (one in ten) seniors.[44] "[One in three] seniors dies with Alzheimer's or another dementia. It kills more than breast cancer and prostate cancer combined."[45]

Mental and physical decline can make it difficult or impractical for many seniors to safeguard their financial interests. Empirical studies suggest that elder abuse and neglect are likely prevalent. One nationwide survey reveals that every year, about 5.2 percent of Americans age sixty years or over potentially experience financial mistreatment by a family member.[46] Financial abuse is often found to be the most common form of elder abuse.[47] Moreover, family members are not the

41 *See, e.g.*, SCOTT & KRAUS, *supra* note 38, at 28–29.

42 U.S. ADMIN. CMTY. LIVING, 2019 PROFILE OF OLDER AMERICANS 5 (2020), https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2019ProfileOlderAmericans508.pdf [https://perma.cc/SLZ7-PCXB].

43 *Id.* at 5–6.

44 *Facts and Figures*, ALZHEIMER'S ASS'N, https://www.alz.org/alzheimers-dementia/facts-figures [https://perma.cc/SZ3E-W937] (last visited July 22, 2020).

45 *Id.*

46 Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292, 292, 296 (2010). These authors broadly defined "financial mistreatment by family" to mean that the family member "spent money," "did not make good decisions," "did not give copies," "forged signature," "forced respondent to sign a document," or "stole money." *Id.* at 294; *see also id.* at 292 (summarizing similar results from earlier surveys).

47 *Id.* at 296; *see also* LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MED. CTR. OF CORNELL UNIV. & N.Y.C. DEP'T FOR THE AGING, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 17, 35 (2011), http://ocfs.ny.gov/main/reports/

only abusers. A survey restricted to Arizona and Florida suggests that every year, nearly 60 percent of residents age sixty or over were the target of consumer fraud.[48] Studies often attribute the prevalence of elder financial abuse to large net worth and diminished cognitive abilities, as well as dementia and other brain diseases.[49]

If appropriately formulated and applied, a doctrine of mental capacity to transact can contribute to efforts to deter and sanction elder financial abuse. The doctrine grants a power to avoid transactions arising from the exploitation of diminished cognitive abilities or other forms of mental weaknesses.[50] An exercise of such power of avoidance can hold the financial abuser liable to return her ill-gotten gain. Thus, the doctrine can partially remedy financial exploitation after the fact. By so doing, the doctrine may also deter potential abusers from committing financial abuse in the first place.[51]

A numerical example can illustrate this point. Suppose a potential abuser may overreach to purchase a house for a cheap price from a senior who lacks mental capacity.[52] The potential abuser is sophisticated and self-interested. Her expected gain from committing the abuse is $G million, which is her profit from purchasing the house cheaply. If effectively enforced, a doctrine of mental capacity can avoid the sale of the house and require restitution of the ill-gotten gain—$G million. More precisely, an exercise of the power of avoidance would attract restitutionary remedies that effectuate the return of the house to the senior and, at the same time, the return of the purchase price to the abuser.[53] This would eliminate the abuser's profit, leaving her with $0. She would no longer be

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Under%20the%20Radar%2005%2012%2011%20final%20report.pdf [https://perma.cc/S3R8-PDKR] (reporting, based on a survey of seniors residing in New York, that financial abuse is the most common form of elder abuse, and that spouses/partners and adult children are the most likely abusers).

48 KRISTY HOLTFRETER, MICHAEL D. REISIG, DANIEL P. MEARS & SCOTT E. WOLFE, FINANCIAL EXPLOITATION OF THE ELDERLY IN A CONSUMER CONTEXT 2, 128 (2014), https://www.nij.gov/publications/pages/publication-detail.aspx?ncjnumber=245388 [https://perma.cc/2GTE-W59F]; *see also id.* at 21–26 (summarizing similar results from earlier surveys).

49 *Id.* at 2–3, 32.

50 *See infra* subpart II.A.

51 *See infra* subpart III.B (discussing how the mental capacity doctrine can deter financial abuse by businesses).

52 This example is a stylized modification of *Farnum v. Silvano*, 540 N.E.2d 202 (Mass. App. Ct. 1989). For discussion of the case, *see infra* text accompanying notes 71–77.

53 *See infra* subparts II.A, IV.B.

incentivized to commit the abuse because her expected gain from doing so would be removed.

C. Supplementing Tort Law and Criminal Law

Recent legislative efforts to tackle elder financial abuse tend to make use of criminal law and tort law rather than transactional law. Many states have introduced criminal sanctions for financial exploitation of seniors and people with mental disorders; "financial exploitation" is often defined as undue influence[54]—a functionally-similar concept to mental incapacity.[55] A growing number of states have also adopted statutes to disinherit abusers who commit undue influence against seniors and people with mental disorders.[56] In addition, many states have introduced a tort of interference with inheritance or gift.[57]

The law of capacity offers safeguards that are different from, but can supplement, the safeguards provided by tort law and criminal law. Criminal and tort statutes may deter and sanction a financial abuser, but she may still have an incentive to engage in misconduct if her ill-gotten gain exceeds her expected tortious or criminal liability. An appropriately-formulated doctrine of mental capacity facilitates restitution of the ill-gotten gain.[58] This restitutionary remedy can deter and sanc-

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54 *See* LORI STIEGEL & ELLEN KLEM, AM. BAR ASS'N COMM'N L. & AGING, TYPES OF ABUSE: COMPARISON CHART OF PROVISIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE 1–6 (2007), https://www.americanbar.org/content/dam/aba/administrative/law_aging/Abuse_Types_by_State_and_Category_Chart.authcheckdam.pdf [https://perma.cc/53S7-H2DY]; LORI STIEGEL & ELLEN KLEM, AM. BAR ASS'N COMM'N L. & AGING, UNDUE INFLUENCE: CONTEXT, PROVISIONS, AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE 1–5 (2007), http://www.americanbar.org/content/dam/aba/administrative/law_aging/Undue_Influence_Context_Provisions_and_Citations_Chart.authcheckdam.pdf [https://perma.cc/7TG8-RCPW]; *see also* David Horton & Reid K. Weisbord, *Inheritance Crimes*, 96 WASH. L. REV. (forthcoming 2021) (arguing that states should abolish criminal undue influence, align the civil test of incapacity with the criminal concept of estate theft, and create exceptions for rules that disinherit elder abusers); Nina A. Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 10–11 (2012) (criticizing statutes that criminalize elder financial abuse).

55 *See infra* subpart II.B.

56 *See* Jennifer Piel, *Expanding Slayer Statutes to Elder Abuse*, 43 J. AM. ACAD. PSYCHIATRY L. 369, 369 (2015).

57 *See* RESTATEMENT (SECOND) OF TORTS § 774B (AM. LAW INST. 1979); John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 337–40 (2013) (criticizing the tort of interference with inheritance or gift).

58 *See generally* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 16, 33 (AM. LAW INST. 2011) (addressing liability in restitution following avoidance of transfers for want of mental capacity).

tion the abuser by taking away what motivated her to engage in the misconduct in the first place.

A modification of the numerical example introduced in subpart I.B can illustrate how restitution can supplement tort (or criminal liability).[59] Suppose the potential abuser—who may overreach to purchase a house cheaply from an incapable senior—would be exposed to tortious liability if she were to so overreach. Her expected tortious liability is $1 million, while her expected gain is $G million. If effectively enforced, then tort law would deter the potential abuser from committing the abuse if $1 million > $G million: her expected cost in terms of tortious liability exceeds her expected gain. However, if $1 million < $G million, then her expected gain exceeds her expected tortious liability, so she would still have an incentive to commit the abuse. In contrast, by avoiding any sale of the house and requiring restitution of any ill-gotten gain, an appropriately-formulated doctrine of mental capacity can deter the potential abuser *even* if $1 million < $G million. Restitution of her ill-gotten gain would leave her with $0. She would no longer have an incentive to commit the abuse because her gain from doing so would be removed.

II
MENTAL CAPACITY TO TRANSACT IN AMERICAN LAW

Part I has laid out the theoretical basis for using an appropriately-formulated doctrine of mental capacity to deter and sanction elder financial exploitation. This Part explains how such a doctrine is formulated in prevailing American law. Part III below will argue that the prevailing formulation is ill-suited for resolving typical capacity disputes in the era of aging population.

A. Prevailing Formulation

In prevailing American law, the mental capacity doctrine balances the conflicting policies of protecting incapable individuals and protecting the security of transactions.[60] To determine whether to avoid an impugned transaction, the doctrine directs the court to take two steps:

(1) ascertain whether a transacting party lacked mental capacity at the time of making the transaction;

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59 *See supra* notes 52–53 and accompanying text.

60 *See infra* section II.C.2.

(2) consider any imbalance in the substantive and procedural aspects of the transaction.

There are several tests for answering the first question of whether a transacting party lacked mental capacity. The traditional test is *cognitive*, asking whether a mental disorder or defect results in an inability to understand in a reasonable manner the nature and consequences of the transaction.[61] To cover non-cognitive forms of mental inability, the Restatement (Second) of Contracts adopts an additional *volitional* test: whether a mental disorder or defect results in an inability to act in a reasonable manner in relation to the transaction.[62] The modern Restatements on property and trusts do not adopt the

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61 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(c), cmt. d (AM. LAW INST. 2003); RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(a), cmt. a (AM. LAW INST. 1981); *see, e.g.*, Humble Oil & Ref. Co. v. DeLoache, 297 F.Supp. 647, 653 (D.S.C. 1969) (rejecting an incapacity challenge to options for the lease of a service station); Shoals Ford, Inc. v. Clardy, 588 So. 2d 879, 881 (Ala. 1991) (avoiding a sale of a truck on the basis of the buyer's incapacity); Pappert v. Sargent, 847 P.2d 66, 68 (Alaska 1993) (remanding the case to the trial court to consider whether the capable transacting party to a contract to exchange real property for a mobile home had knowledge of the incapable party's incapacity); Bd. of Regents v. Davis, 141 Cal. Rptr. 670, 674 (Ct. App. 1977) (rejecting an incapacity challenge to a pledge agreement); Davis v. Colo. Kenworth Corp., 396 P.2d 958, 961 (Colo. 1964) (refusing to avoid purchases made by a purchaser who was previously found not guilty by reason of insanity in a criminal proceeding); McPheters v. Hapke, 497 P.2d 1045, 1046 (Idaho 1972) (avoiding a contract for the sale of real property on the basis of the vendor's mental incapacity); Gallagher v. Cent. Ind. Bank, N.A., 448 N.E.2d 304, 307 (Ind. Ct. App. 1983) (refusing to avoid a mortgage given by the potentially-incapable individual and his wife to secure their son's and daughter-in-law's debts); Costello v. Costello, 186 N.W.2d 651, 654 (Iowa 1971) (avoiding a contract and a deed conveying interests in real property executed by an incapable individual); DeBauge Bros., Inc. v. Whitsitt, 512 P.2d 487, 490 (Kan. 1973) (rejecting the vendors' incapacity challenge to their contract for the sale of a business); Ridings v. Ridings, 286 S.E.2d 614, 633 (N.C. Ct. App. 1982) (rejecting a husband's incapacity challenge to his separation agreement); Matthews v. Acacia Mut. Life Ins. Co., 392 P.2d 369, 373 (Okla. 1964) (rejecting a widow's incapacity challenge to her deceased husband's designation of their children as the beneficiaries of his death and retirement benefits); *In re* Marriage of Davis, 89 P.3d 1206, 1210 (Or. Ct. App. 2004) (rejecting an incapacity challenge to set aside a stipulated dissolution judgment governing the agreed terms of her divorce); Estate of McGovern v. State Emps.' Ret. Bd., 517 A.2d 523, 526 (Pa. 1986) (rejecting an incapacity challenge to a retirement benefit election which reduces benefits to the surviving beneficiary); Brown v. Resort Devs., 385 S.E.2d 575, 576 (Va. 1989) (rejecting an incapacity challenge to a deal conveying real properties); Harris v. Rivard, 390 P.2d 1004, 1006 (Wash. 1964) (avoiding an earnest money agreement on the basis of one of the seller's incapacity); Hauer v. Union State Bank of Wautoma, 532 N.W.2d 456, 461 (Wis. Ct. App. 1995) (avoiding a loan agreement on the basis of the borrower's incapacity).

62 RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(b) (AM. LAW INST. 1981). Intoxication amounts to incapacity if it satisfies the cognitive or volitional test. *See id.* § 16.

volitional test.[63] In the last twenty years, the majority rule among American courts supports application of the volitional test (in addition to the cognitive test) to contracts, gifts of property, and many other forms of lifetime transactions.[64] Another form of mental incapacity arises from a need to engage a guardian or conservator to manage one's personal or financial affairs.[65]

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63 *Compare id.* § 15(1) (adopting the cognitive and volitional tests), *with* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(d), reporter's note 3 (AM. LAW INST. 2003) (adopting the cognitive test but omitting the volitional test), *and* RESTATEMENT (THIRD) OF TRUSTS § 11(3), cmts. a–b (AM. LAW INST. 2003) (adopting the cognitive test but omitting the volitional test).

64 *See, e.g.*, Biggs v. Eaglewood Mortg., LLC, 582 F. Supp. 2d 707, 719 (D. Md. 2008) (rejecting an incapacity challenge to loan agreements); Hernandez v. Banks, 65 A.3d 59, 65–66 (D.C. 2013) (holding that a lease entered into by an incapable individual is voidable instead of void); *In re* Estate of Marquis, 822 A.2d 1153, 1157–59 (Me. 2003) (avoiding a change of beneficiary designation on the incapable individual's annuity policies); Sparrow v. Demonico, 960 N.E.2d 296, 302 (Mass. 2012) (rejecting an incapacity challenge to a settlement agreement); LaBarbera v. Wynn Las Vegas, LLC, 422 P.3d 138, 139, 141 (Nev. 2018) (reversing the lower court's exclusion of evidence that the potentially-incapable individual, who had a gambling addition, entered into gambling contracts while he was intoxicated); Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 297 (Tenn. Ct. App. 2001) (rejecting an incapacity challenge to avoid a power of attorney and a change of insurance beneficiary); *see also* Gore v. Gadd, 522 P.2d 212, 213 (Or. 1974) (rejecting an incapacity challenge to a contract for the sale of real property). *Contra* Dillin v. Alexander, 576 P.2d 1248, 1251 (Or. 1978) (rejecting an incapacity challenge to a deed granting interest in real property); *In re Marriage of Davis*, 89 P.3d at 1207 (rejecting an incapacity challenge to a stipulated dissolution judgment governing the agreed terms of a divorce) ("[I]n some cases, Oregon courts may have applied certain aspects of the [volitional] test in determining competency. Nevertheless, the cognitive test appears to be the law of this state . . . .").

65 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. h (AM. LAW INST. 2003) (explaining that the appointment of a conservator or a guardian of property raises a rebuttable presumption of incapacity to make an irrevocable gift); RESTATEMENT (SECOND) OF CONTRACTS § 13 cmt. a (AM. LAW INST. 1981) (explaining that the public is deemed to have constructive notice of the guardianship or conservatorship proceedings, and that the guardian's or conservator's control of the incapable person's property and the court's supervisory role should not be impaired or avoided). A *guardian* is a person who is appointed by a court to make decisions on behalf of another person. An alternative name for guardian of property is *conservator*. *See, e.g.*, UNIF. PROB. CODE § 5-102 (1), (3) (amended 2010) (defining "conservator" and "guardian"); *id.* § 5-401 (2)(A) (allowing a court to appoint a conservator to an individual if the individual is unable to manage property because of an impairment); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 102 (5), (9) (UNIF. LAW COMM'N 2017) (defining "conservator" and "guardian"); *id.* § 401(b) (allowing a court to appoint a conservator to an individual if the individual is unable to manage property because of a limitation in ability, the appointment is necessary, and there is no less-restrictive alternative); *see also* APPELBAUM & GUTHEIL, *supra* note 36, at 181–82 (discussing clinical evaluation of disorders giving rise to guardianship); Ralph C. Brashier, *Conservatorships, Capacity, and Crystal Balls*, 87 TEMP.

A finding of mental incapacity gives rise to a prima facie power to avoid the impugned transaction, and only the incapable transacting party or her representative may exercise such power.[66] However, the power of avoidance is subject to equitable qualifications. The second step in applying the mental capacity doctrine requires the court to consider any imbalance in the substance of the transaction and in the conduct of the parties. The court may limit or deny the power of avoidance if the capable transacting party did not know about the incapacity, had acted in good faith, and could not be restored to the status quo ante.[67] In some jurisdictions, a lack of knowledge of the incapacity would qualify the power of avoidance arising from a volitional basis of incapacity, but not from a cognitive basis.[68] An unreasonable delay in attempting to avoid the transaction also may prevent its avoidance or limit the resulting remedy.[69] Moreover, courts often limit or deny avoidance of contracts for necessities of life, such as food, clothing, and housing.[70]

Farnum v. Silvano can illustrate how the mental capacity doctrine operates in practice.[71] In that case, Viola—a ninety-year-old woman who suffered from dementia and seizure disorder—sold her house for about half of its fair market value to Joseph—a twenty-four-year-old friend who mowed her lawn. Viola "trusted [Joseph] and had confidence in him,"[72] even though he "was not a member of her family or someone who had cared for her for long duration."[73] Viola was hospitalized

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L. REV. 1, 14–15 (2014) ("A conservatorship order that limits the decedent's ability to contract is very common . . . .").

66 *Cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 7 cmt. b, 15 cmt. e (AM. LAW INST. 1981) (explaining that only the incapable party or their representative can avoid the contract for want of capacity); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmt. c (AM. LAW INST. 2011) (same).

67 RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. f (AM. LAW INST. 1981); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmts. e, g, reporter's note e (AM. LAW INST. 2011).

68 These are the jurisdictions that follow RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(b) (AM. LAW INST. 1981). *See supra* note 64 and accompanying text. Even in cases concerning cognitive incapacity, courts may still frame the remedy to account for a lack of knowledge of the incapacity. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmt. e, reporter's note e (AM. LAW INST. 2011).

69 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54(6), cmt. k, reporter's note k (AM. LAW INST. 2011).

70 *Id.* § 16 cmt. e; RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. e (AM. LAW INST. 1981).

71 *See generally* 540 N.E.2d 202 (Mass. App. Ct. 1989) (applying the mental capacity doctrine to avoid a sale of land between friends).

72 *Id.* at 203.

73 *Id.* at 205.

several times around the time of the sale. Joseph selected and paid for Viola's lawyer in connection to the sale.[74] Viola's nephew, who was also her guardian, challenged the sale on grounds of mental incapacity, fraud, undue influence, and constructive trust.[75] The Massachusetts court ruled against Joseph on the mental incapacity ground without resolving the other grounds.[76] The court found that Viola lacked mental capacity according to the cognitive test, and considered Joseph's knowledge of her incapacity a "decisive factor."[77]

B. Close Affinity with the Doctrine of Undue Influence

Claimants who seek to avoid transactions for want of mental capacity usually also rely on the doctrine of undue influence.[78] In most jurisdictions, a presumption of undue influence arises if the following two questions are answered in the affirmative:[79]

(1) Whether there were suspicious circumstances in the formation of the transaction, for example, a transacting party "was in a weakened condition, physically, mentally, or both";
(2) Whether the transaction took place in a relationship of domination or confidence, for example, a relationship "between a hired caregiver and an ill or feeble donor or between an adult child and an ill or feeble parent."[80]

If it arises, then the presumption of undue influence renders the transaction voidable, and places the burden on the stronger transacting party to prove her good faith and the weaker party's free will and voluntariness.[81]

In cases alleging elder financial abuse, the undue influence doctrine is functionally indistinguishable from the mental ca-

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74 *Id.* at 204.

75 *Id.* at 203–05.

76 *Id.* at 205.

77 *Id.*

78 *See infra* notes 160–161 (discussing my survey of modern transactional capacity cases).

79 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. h, reporter's note 5 (AM. LAW INST. 2003) (citations omitted); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 289–90 (10th ed. 2017).

80 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmts. g, h (AM. LAW INST. 2003); *see, e.g.*, Starr v. Starr, 116 Cal. Rptr. 3d 813, 819 (Ct. App. 2010) ("[Undue influence's] hallmark is high pressure that works on mental, moral, or emotional weakness . . . .").

81 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. f (AM. LAW INST. 2003).

pacity doctrine.[82] In theory, mental capacity is a concept of mental ability to incur legal responsibility, while undue influence is a concept of unfair conduct. In practice, these two doctrines raise the same two issues: (1) whether the elderly transacting party lacked sufficient mental ability, and (2) whether equitable considerations justify avoidance. In particular, similar equitable considerations inform the resolution of issue (2) for both doctrines.[83] Moreover, both doctrines employ vague standards of mental inability and inequitable conduct.

Hence, how the mental capacity doctrine operates in practice is a good proxy for how the undue influence doctrine is applied to "mentally-weak" seniors. In this light, I will make arguments regarding the mental capacity doctrine, noting that the same arguments also apply to the undue influence doctrine in cases alleging elder financial abuse.[84]

C. Gradual Expansion of Scope and Judicial Discretion

Subpart II.B above shows that the mental capacity doctrine is formulated in terms of vague standards rather than sharp rules. Courts thus have substantial discretion to determine whether a transacting party lacked mental capacity, and whether to avoid the impugned transaction. Moreover, upon successful avoidance, the parties incur liabilities in restitution to return to each other any benefits that they have already received pursuant to the avoided transaction.[85] Vague equita-

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82 *See, e.g.*, Noland v. Noland, 956 S.W.2d 173, 179 (Ark. 1997) (using the same evidence to evaluate both undue influence and mental capacity). The undue influence doctrine also covers transactions not involving a "mentally weak" party. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. a (AM. LAW INST. 1981) (explaining that undue influence can be found when the victim is justified in assuming that the influencer acts consistently with the victim's welfare); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. e (AM. LAW INST. 2003) (explaining that undue influence can be the product of the victim's age, inexperience, or dependence).

83 *See* Sid L. Moller, *Undue Influence and the Norm of Reciprocity*, 26 IDAHO L. REV. 275, 290 n.72 (1990); *infra* notes 130–134 and accompanying text.

84 The mental capacity doctrine also informs the development of several other private-law concepts, such as consent, *see, e.g.*, Jennifer A. Drobac & Oliver R. Goodenough, *Medical Myths: Exploring Effectiveness, Misinformation and Scientific Rigor*, 12 IND. HEALTH L. REV. 471, 473 (2015) (explaining that the presumption of consent changes at certain stages of life relative to our understanding of mental development), and unconscionability, *see, e.g.*, Eisenberg, *supra* note 32, at 766, 799–800 (arguing that transaction incapacity should not lead to a finding of unconscionability unless the alleged wrongdoer has knowledge of the incapacity, and has exploited it); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294–95, 300–01, 303 (1975) (arguing that courts should find unconscionability in cases of incapacity).

85 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 15(2), 16(1), 33(1) (AM. LAW INST. 2011).

ble standards continue to guide judicial formulation of the exact remedies.[86] In sum, the mental capacity doctrine employs vague standards to resolve three issues:

(1) whether a transacting party lacked mental capacity;
(2) whether to limit or deny the power to avoid the impugned transaction; and
(3) the remedial consequences of successful avoidance.

I will not object to the tests of mental capacity that apply to resolve the first issue. The vagueness of these tests reflects the reality that promulgating sharp rules *ex ante* would have been too complex and too costly.[87] The social and medical conceptions of mental disorders have evolved significantly in the last two centuries.[88] It would have been too complex and too costly to promulgate rule-like legal tests to determine which subset of the large, diverse, and growing set of mental disorders should lead to avoidance of transactions.[89] Moreover, in the modern economy, the stereotype that seniors are "frail, out of touch, burdensome or dependent" is inaccurate and outdated.[90] Seniors approaching traditional retirement age often do not want to retire, notwithstanding any physical or mental decline. Many start their own businesses or work part-time. Advances in transportation and communication technologies also have eased the physical obstacles to utilizing knowledge, skills, and financial flexibility.[91] Hence there is no obvious age cutoff that

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86 *See id.*; *see also id.* §§ 49(3), 50, 52 (providing different measures of restitutionary liability depending on whether the recipient is "innocent" or a "conscious wrongdoer").

87 *See* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1569 (2016) (arguing against efforts to create substantive default rules that are transcontextual). *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568-69 (1992) ("[R]ules are more expensive to promulgate than standards.").

88 *See generally* BLUMENTHAL, *supra* note 32, ch. 2; CAROL S. NORTH & SEAN H. YUTZY, GOODWIN AND GUZE'S PSYCHIATRIC DIAGNOSIS 1–8 (6th ed. 2010) (discussing the history of psychiatric diagnosis); Jennifer Radden, *Mental Disorder (Illness)*, *in* The Stanford Encyclopedia of Philosophy (2019), https://plato.stanford.edu/archives/win2019/entries/mental-disorder/ [https://perma.cc/VD99-X753] ("Although now widely judged to be forms of disorder (or illness), some conditions . . . have not always been so understood.").

89 *See* AM. PSYCHIATRIC ASS'N, *supra* note 6, at xiii–xl (providing a standard list of mental disorders). Equating mental capacity in the legal sense with mental disorder in the psychiatric sense may offend international human rights law. *See* Eliza Varney, *Redefining Contractual Capacity? The UN Convention on the Rights of Persons with Disabilities and the Incapacity Defence in English Contract Law*, 2017 LEGAL STUD. 1, 1–5 (2017).

90 WORLD HEALTH ORG., WORLD REPORT ON AGEING AND HEALTH 10 (2015), http://apps.who.int/iris/bitstream/10665/186463/1/9789240694811_eng.pdf [https://perma.cc/L6N9-RDX9].

91 *Id.* at 12.

can objectively determine a senior's mental capacity to transact.

However, a finding of mental incapacity does not necessarily justify avoidance of the impugned transaction. I will challenge the prevailing doctrinal theories that govern the second and third issues identified above: the limitations on the power of avoidance and the remedial consequences of successful avoidance. The rest of this Part will show that over the centuries, the mental capacity doctrine has steadily expanded in scope and become less determinate in application. As a result, there is a substantial judicial discretion to decide transactional capacity disputes, and the theoretical underpinnings of the doctrine are meant to guide the exercise of that discretion. Part III will challenge these theoretical underpinnings.

1. *Historical Origins*

Compared with its modern form in prevailing American law, the mental capacity doctrine was significantly narrower in medieval English law.[92] Early common law denied transactional capacity to individuals who were *non compotes mentis*—a term of art meaning of unsound mind. Writing in the first half of the seventeenth century, Sir Edward Coke divided individuals with an unsound mind into four categories: "idiots," "lunatics" who lost their memory and understanding by accidents such as sickness or grief, "lunatics" with lucid intervals, and "drunkards."[93] "Idiots" were born with an inability to read, count, tell their age, or name their parents, while "lunatics" had understanding.[94] The process of establishing "idiocy" or "lunacy" commenced with a petition for the appointment of a commission to engage in a fact-finding mission.[95] A finding that the individual was an "idiot" or a "lunatic" at the time of making the impugned transaction provided a basis to avoid

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92 Mental incapacity appears in one of the oldest treatises on English common law. *See* BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND vol. 2 at 134-35, vol. 3 at 28, vol. 4 at 308 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968), https://amesfoundation.law.harvard.edu/Bracton/Unframed/calendar.htm [https://perma.cc/RH9X-FPF9].

93 2 EDWARD COKE, COMMENTARY UPON LITTLETON § 246.a (Robert H. Small ed., 1853); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 230 (5th ed. 1849).

94 LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 2–4 (1833) (citations omitted).

95 *Id.* at 82–83 (citations omitted).

it.[96] The formal rationale for avoidance was a lack of rational and deliberate consent.[97]

In medieval common law, the mental capacity doctrine aimed not to further the interests of the incapable individual, but the interests of his expectant heir and family. A finding of "idiocy" or "lunacy" could result in the appointment of a guardian to take control of the individual and his property; the guardian was typically a relative.[98] Moreover, there was a fundamental maxim that a person could *not* plead his own unsoundness of mind. The original rationale for that "absurd and mischievous" maxim was that the person could not remember what he did when he was mentally unsound.[99] Instead, it was up to his guardian, expectant heir, executor, or administrator of his estate to plead his mental unsoundness.[100]

Dissatisfied with the narrow definitions of "idiocy" and "lunacy" and with the slow and costly fact-finding commission, common law courts in the long eighteenth century began to avoid transactions upon a jury's finding of cognitive deficiency. *Ball v. Mannin* was a leading case.[101] That case concerned a John Shinton Ball—an heir of land who was of "weak capacity" from minority but had not been found an "idiot" or a "lunatic."[102] As soon as he reached majority, John executed a deed to create a family trust with his inheritance. The trust conferred substantial benefits on his mother and father-in-law at the expense of his brothers from his mother's previous marriage with his deceased father.[103] After John had passed away, his nephew sought to set aside the trust deed on the basis of incapacity.[104] Instead of the narrow test of "idiocy," the trial judge instructed the jury to decide "whether [John] was capable of *understanding* what he did by executing the deed in question, when its general purport was fully explained to him."[105] The final appellate court upheld this jury instruction.[106] The jury's finding regarding John's cognitive ability thus determined the validity of the trust deed.

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96 *Id.* at 266; 1 STORY, *supra* note 93, §§ 223–24.

97 1 STORY, *supra* note 93, § 223.

98 SHELFORD, *supra* note 94, at 130–33.

99 1 STORY, *supra* note 93, § 225.

100 SHELFORD, *supra* note 94, at 409–11; 1 STORY, *supra* note 93, § 225.

101 (1829) 4 Eng. Rep. 1241; 3 Bligh N.S. 1.

102 (1829) 4 Eng. Rep. at 1241–42, 1248; Bligh N.S. at 1, 3, 19.

103 (1829) 4 Eng. Rep. at 1241; Bligh N.S. at 1–2.

104 (1829) 4 Eng. Rep. at 1242; Bligh N.S. at 2–3.

105 (1829) 4 Eng. Rep. at 1242, 1248; Bligh N.S. at 1, 3, 21 (emphasis added).

106 (1829) 4 Eng. Rep. at 1242, 1249; Bligh N.S. at 3, 22.

While courts of common law saw mental capacity as a threshold concept of mental ability, courts of equity were more concerned with the fairness of the impugned transaction.[107] In addition to "idiocy," "lunacy" and cognitive deficiency, equity courts avoided transactions on the basis of a "weakness of mind"—a vague standard covering "temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions, which result from sudden fear, or constitutional despondency, or overwhelming calamities."[108] Moreover, equity courts avoided transactions on the basis of "excess drunkenness".[109] A finding that a transacting party was mentally weak (or excessively drunk) would give rise to an inference of fraud, imposition or undue influence; the other party would then bear the burden to rebut such inference.[110] These equity cases would gradually develop into the "mental weakness" strand of the modern doctrine of undue influence.[111]

In the nineteenth century, Anglo-American courts clearly felt the impact of new developments in psychiatry and medical jurisprudence.[112] As Professor Susanna Blumenthal wrote, judges were "generally receptive to the teachings of the new medical psychology but found it difficult to apply them in the courtroom."[113] Judges also often found it desirable to protect the interests of the *capable* transacting party and the security of transactions.[114] As a result, judges began to apply equitable principles to uphold transactions that were considered fair, even if a transacting party was mentally-incapable.[115] Diminishing the role of medical evidence, this "pragmatic" approach

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107 In this Part, "common law courts" refer to the Court of Queen's Bench or King's Bench, the Court of Common Pleas and the common law side of the Exchequer; and "equity courts" refer to the Court of Chancery and the equity side of the Exchequer. *See generally* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY chs. 3, 6 (5th ed. 2019) (providing an overview of the English superior courts).

108 1 STORY, *supra* note 93, § 234.

109 *Id.* § 231.

110 *Id.* § 235. Even when "idiocy" or "lunacy" was found, courts of equity took into account whether the transaction was made in good faith, whether the capable transacting party had knowledge of the incapacity, whether she had overreached, and whether she could be restored to the status quo ante. *See id.* § 231.

111 *See supra* subpart II.B; BLUMENTHAL, *supra* note 32, at 180–81.

112 *See* BLUMENTHAL, *supra* note 32, at 78–79.

113 *Id.* at 178.

114 *Id.* at 183–84, 193–95.

115 *Id.* at 178–79, 184. *See also* 2 JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE §§ 928, 948 (3d ed. 1905).

rendered "disparities in mental ability . . . less salient as a matter of law."[116]

The "pragmatic" approach taken by nineteenth-century courts produced a majority rule that heavily relied on equitable considerations to limit or deny the power to avoid transactions on the basis of mental incapacity.[117] Under the majority rule at the time, a finding that a transacting party lacked mental capacity would only ground a qualified power to avoid the transaction. This power would generally be lost if the capable transacting party "proceeded in good faith and in nonnegligent ignorance of the incapacity, unless the parties could be placed in *status quo*."[118] These restrictions on the power of avoidance were primarily concerned with the conduct giving rise to the transaction and the remedial consequences of avoidance. The initial finding of mental incapacity was merely a pretext for a judicial inquiry into the equities of the transaction.

In exercising their substantial discretion to resolve transactional capacity disputes, nineteenth-century judges were generally more willing to uphold transactions in the business sphere than in the family sphere. As Professor Blumenthal observed, while judicial opinions on mental capacity and neighboring principles were not uniform,[119] judges tended to protect strangers who had no reason to suspect incapacity.[120] At the same time, judges were generally reluctant to uphold contracts and lifetime gifts of property in a broad range of family relationships that were considered confidential or fiduciary in nature.[121] Business and family were "separate doctrinal realms that many nineteenth-century judges envisioned and tried to maintained, concerned as they were with insulating intimate relations from those of the market."[122] In particular, judges were strongly suspicious of formal caregiving agreements in families, in which "services and support were supposed to be offered freely, without expectation of return."[123]

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116 BLUMENTHAL, *supra* note 32, at 17.

117 *Id.* at 184. The minority rule at the time held that mental incapacity rendered the transaction void, rather than merely voidable at the option of the incapable individual (or her representative). *Id.* at 184.

118 *Id.* at 184. *See also* 1 STORY, *supra* note 93, § 231.

119 BLUMENTHAL, *supra* note 32, at 184, 181, 230.

120 *Id.* at 181, 184.

121 *Id.* at 179–80,199–200.

122 *Id.* at 199.

123 *Id.* at 221 (citation omitted).

2. *The Realist Revolution*

In the light of the judicial tendency to search for inequitable conduct, Realist legal scholars in the early twentieth century reformulated the mental capacity doctrine. Most influential was Professor Milton Green's critique in the 1940s. The formalists at the time offered a lack of subjective "meeting of the minds" to justify avoidance of a transaction for want of mental capacity.[124] Professor Green disagreed, arguing that it is impossible to ascertain a person's subjective state of mind.[125] In reality, courts examined the behaviors of the person, and only paid lip service to the cognitive test of incapacity.[126] Also common was equally-qualified psychiatrists reaching opposite conclusions regarding mental ability, leading courts to disregard expert opinions all together.[127]

Professor Green offered two alternative theories to explain and justify avoidance of transactions for want of mental capacity. First, his *conflicting-policies theory* articulated the public policies at stake: protecting the mentally-incapable individual and her family, and protecting the security of transactions.[128] To Green, these policies were necessarily in conflict because the incapable individual's (or her representative's) choice to challenge the transaction indicated that it was disadvantageous to her.[129]

Second, Green offered the *abnormality theory*: judicial decisions depended on an implicit but dominant consideration pertaining to the objective abnormality of the impugned transaction. Abnormality manifested "in a transaction which is obviously out of line with the institutional pattern of similar transactions" in the light of "all of the circumstances" and "which a reasonably competent [person] might have made."[130]

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124 *See* Dexter v. Hall, 82 U.S. (1 Wall.) 9, 20 (1872) (discussed in Green, *Operative Effect*, *supra* note 14, at 558).

125 *See* Green, *Judicial Tests*, *supra* note 14, at 160–61.

126 *See id.* at 161, 163; Green, *Major Premise*, *supra* note 14, at 306. Searching for a subjective "meeting of the minds" was also inconsistent with the then-emerging, objective theory of contract law that "scrutiniz[es] the conduct of the promisor from an objective viewpoint to see if it was of such a character as to arouse reasonable expectations." Green, *Judicial Tests*, *supra* note 14, at 162. *See also* Green, *Operative Effect*, *supra* note 14, at 562 (explaining that mental incapacity typically does not void an agreement, "but merely [makes] it voidable").

127 *See* Green, *Major Premise*, *supra* note 14, at 285–86; Faber v. Sweet Style Mfg. Corp., 242 N.Y.S.2d 763, 768 (Sup. Ct. 1963).

128 Green, *Public Policies*, *supra* note 14, at 1214.

129 *See id.* at 1214. *Contra infra* section III.A.1 (arguing that this is the critical flaw of Green's theories).

130 Green, *Major Premise*, *supra* note 14, at 309.

Fraud and gross inadequacy of consideration were among the factors showing abnormality.[131] Courts were more likely to avoid a transaction if some abnormal factor was present.[132] To Green, abnormality was both "evidence of a disordered mind" and of potential overreach.[133] To promote a scientific study of the law and greater predictability in future cases, he advocated for explicit consideration of abnormality.[134]

In addition to adopting Green's theories, the Restatement (Second) of Contracts responded to new developments in psychiatry.[135] To supplement the cognitive test of incapacity,[136] this Restatement introduced a *qualified* volitional test, which denies contractual capacity if due to a mental disorder or defect, the relevant transacting party is unable to act in a reasonable manner in relation to the transaction, *and* the other party has "reason to know"[137] In a treatise, the reporter explained that imposing a knowledge qualifier on the volitional test, but *not* on the traditional cognitive test, was a compromised position between not adding a volitional test at all and adding it without qualification.[138] However, the modern Restatements on property and trusts were unwilling to adopt the volitional test.[139]

Ortelere v. Teachers' Retirement Board of New York was one of the very first cases to adopt Green's theories.[140] In that case, the widower of a retired school teacher sought to avoid an irrevocable election of retirement benefits that the school

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131 *See id.* at 304–05, 307.

132 *See id.* at 305–06.

133 *Id.* at 305. *Contra* Alexander & Szasz, *supra* note 35, at 541 (arguing that judicial consideration of abnormality deprives the incapable individual of the right to make eccentric transactions, the practical result of which is "punishment for deviancy, not protection against helplessness").

134 *See* Green, *Major Premise*, *supra* note 14, at 309–11.

135 RESTATEMENT (SECOND) OF CONTRACTS § 15 cmts. a, b (AM. LAW INST. 1981).

136 *Id.* § 15(1)(a).

137 *Id.* § 15(1)(b), reporter's note (citing, *inter alia*, Note, *Mental Illness and the Law of Contracts*, 57 MICH. L. REV. 1020, 1033–36 (1959) (arguing in favor of expanding the mental capacity doctrine to cover non-cognitive mental disorders)); *see also* Leonhard J. Kowalski, Note, *Contracts-Competency to Contract of Mentally Ill Person Who Fully Understands Transaction but Is Unable to Control Conduct*, 16 WAYNE L. REV. 1188, 1195 (1970) (arguing psychiatric experts should be allowed to opine on incapacity without regard to legal categories)). *But see* Alexander & Szasz, *supra* note 35, at 542–55 (opposing the adoption of the volitional test).

138 E. ALLAN FARNSWORTH, CONTRACTS § 4.6(4th ed. 2004).

139 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(c), reporter's note 3 (AM. LAW INST. 2003) (on mental capacity to make irrevocable gifts); RESTATEMENT (THIRD) OF TRUSTS § 11(3) (AM. LAW INST. 2003) (on mental capacity to make irrevocable lifetime trusts).

140 250 N.E.2d 460 (N.Y. 1969).

teacher made while she was under treatment for "involutional melancholiac in depression" (a form of clinical depression).[141] The election increased her allowance during her lifetime but upon her death, nothing would be payable to her designated beneficiary—her widower.[142] She died shortly after making the election, so in hindsight, it turned out to be a poor financial choice for her family.[143] The evidence revealed that she had "complete cognitive judgment or awareness" at the time of making the election,[144] but the administrators of the retirement system were aware that she was seeing a psychiatrist.[145] The New York Court of Appeals reversed the lower court's dismissal of her widower's claim for avoidance. The Court found the cognitive test out-of-step with psychiatric learning; it failed to account for people who could not control their conduct due to a mental disorder even though there was no impairment of their cognitive ability.[146] The Court went on to adopt the qualified volitional test and Green's theories.[147]

Recent developments continue the steady march to make the mental capacity doctrine broad and indeterminate. Further rendering "disparities in mental ability . . . less salient as a matter of law[,]"[148] the practical differences between the cognitive and volitional tests of incapacity are gradually disappearing. The recently-published Restatement (Third) of Restitution and Unjust Enrichment applies the same equitable considerations—including any knowledge of the incapacity—to qualify the power of avoidance arising from any form of incapacity, cognitive or volitional.[149] This departs from the earlier view

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141 *Id.* at 462, 466.

142 *Id.* at 462.

143 *Id.* at 462–63.

144 *Id.* at 462.

145 *Id.* at 465–66.

146 *Id.*

147 *Id.* at 464–65. An earlier New York case adopted the volitional test without the knowledge qualifier. *See* Faber v. Sweet Style Mfg. Corp., 242 N.Y.S.2d 763, 765, 768–69 (Sup. Ct. 1963).

148 BLUMENTHAL, *supra* note 32, at 17. *See, e.g.*, Meiklejohn, *supra* note 32, at 342, 387 (analyzing transactional capacity cases from the 1960s to the 1980s to make the claim that courts tend to give more weight to lay testimony than to expert testimony, which tendency indicates courts' reluctance to unduly defer to psychiatry).

149 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmts. e, g, reporter's note e (AM. LAW INST. 2011). A jurisdiction's failure to adopt the volitional test also does not prevent volitional mental disorders from satisfying the cognitive test of incapacity. For example, manic depressive disorder—the mental disorder that led to New York's early adoption of a version of the volitional test in *Faber*, 242 N.Y.S.2d at 766—has successfully satisfied the cognitive test in other jurisdictions. *See, e.g.*, Shoals Ford, Inc. v. Clardy, 588 So. 2d 879, 882–85 (Ala.

that insofar as contracts are concerned, the knowledge qualifier should only apply to the volitional test of incapacity, but not to the cognitive test.[150] Moreover, the new Restatement takes the view that "the contours of legal responsibility [in transactional capacity cases] are determined, not by measuring 'capacity to contract' against some *a priori* standard, but by weighing at each point the value of the protection secured against the cost of securing it."[151] This view not only reaffirms Green's theories, it also eschews general and predictable rules in favor of a substantial judicial discretion to conduct a cost-benefit analysis on a case-by-case basis.

III
VARIETIES OF TRANSACTIONS IN THE ERA OF AGING POPULATION

Centuries of gradual expansion has made the mental capacity doctrine in prevailing American law broad in scope and indeterminate in application. Perhaps for this reason, the doctrine is considered "one of the great controversies in American legal history[,]"[152] and "more tenuous or spectral" than other branches of jurisprudence.[153] The doctrine now grants a substantial judicial discretion to balance the conflicting policies of protecting incapable individuals and protecting the security of transactions. A finding of mental incapacity is merely a pretext for a case-by-case assessment of the cost and benefit of protection. Theoretical and normative considerations now guide the exercise of judicial discretion to avoid transactions and to determine the remedial consequences of successful avoidance.[154]

While nineteenth-century courts tended to treat business and family as separate doctrinal spheres,[155] both the Restate-

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1991) (applying Alabama's cognitive test to a plaintiff suffering from manic depressive disorder). The modern name for manic depressive disorder is bipolar disorder. NORTH & YUTZY, *supra* note 88, at 12.

150 *See* RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(b) (AM. LAW INST. 1981).

151 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 33 cmt. c (AM. LAW INST. 2011). *See also* Meiklejohn, *supra* note 32, at 352–53, 355 (analyzing transactional capacity cases from the 1960s to the 1980s to make the claim that substantive imbalance as an abnormality factor is relevant to, but not determinative of, the issue of capacity).

152 Hirsch, *supra* note 33, at 290.

153 Waggoner v. Atkins, 162 S.W.2d 55, 58 (Ark. 1942) (dismissing an incapacity challenge to a sale of interest in land by a seller who drank excessively, used narcotics, and brought the challenge three years after restoration of his mental faculties).

154 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 33(3) (AM. LAW INST. 2011).

155 *See supra* notes 119–123 and accompanying text.

ment (Second) of Contracts and the Restatement (Third) of Restitution and Unjust Enrichment direct modern courts to apply the same, *transcontextual* standards to govern transactions with businesses and transactions between relatives and friends.[156] Such transcontextual standards leave courts to determine the exact legal criteria to be applied in individual cases, with the benefit of hindsight.[157] Hence, in modern times, whether business transactions and family-and-friend transactions should be treated differently is a matter of judicial discretion.

In this light, I will argue that courts should loosen regulation of transactions between close relatives and friends, but rigorously protect potentially incapable individuals from exploitative business practices. In modern times, most transactions covered by the mental capacity doctrine involve relatives and friends;[158] Subpart III.A below will examine these transactions. Subpart III.B will consider transactions between potentially incapable individuals and businesses. The overarching claim to be advanced is that the prevailing doctrinal theories are unduly suspicious of transactions that take place in close familial and personal relationships.[159] However, these doctrinal theories remain suitable for regulating transactions with businesses.

A. Transactions between Relatives and Friends

A survey of modern transactional capacity cases shows the prevalence of claims by relatives who expect to inherit from

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156 *See* RESTATEMENT (SECOND) OF CONTRACTS § 15 illus. 2–7 (AM. LAW INST. 1981); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 illus. 2, 4, 7–8 (AM. LAW INST. 2011). *See also* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PENN. L. REV. 595, 597 (1995) (explaining private legislatures' incentives to produce standards that delegate substantive discretion to courts); Schwartz & Scott, *supra* note 87, at 1526 (criticizing efforts to create transcontextual default standards).

157 *See, e.g.*, Kaplow, *supra* note 87, at 566 ("[A] complex standard might be preferred to a simple rule because . . . of the advantages of *ex post* formulation . . . .").

158 *See infra* notes 160–161 and accompanying text and figures.

159 This Article uses "close family" as a shorthand for a familial relationship that satisfies the "core qualities [of] . . . a demonstrated, long-term commitment and the assumption of mutual care and financial responsibility" Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 306 (2015) (footnote omitted) [hereinafter, Scott & Scott, *From Contract to Status*]. *See id.* at 305 (explaining the key attributes of a contemporary family that is based on adult relationships). Rather than based on formal marriage or biological relationship, a close family is a family of "affection and dependence." LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 11 (2009).

potentially incapable individuals.[160] As Figure 1 shows, in more than half of the cases surveyed, the person who sought avoidance was a relative of the potentially incapable individual's.[161] Figure 2 further shows that about half of the cases surveyed concerned a transaction between the potentially incapable individual and another relative or friend. Moreover, Figure 3 shows that the impugned transaction was frequently made in the potentially incapable individual's final years of life. These observations suggest that avoidance claims were usually sought by a relative to pursue a personal benefit: to increase her expected inheritance from the potentially incapable individual.

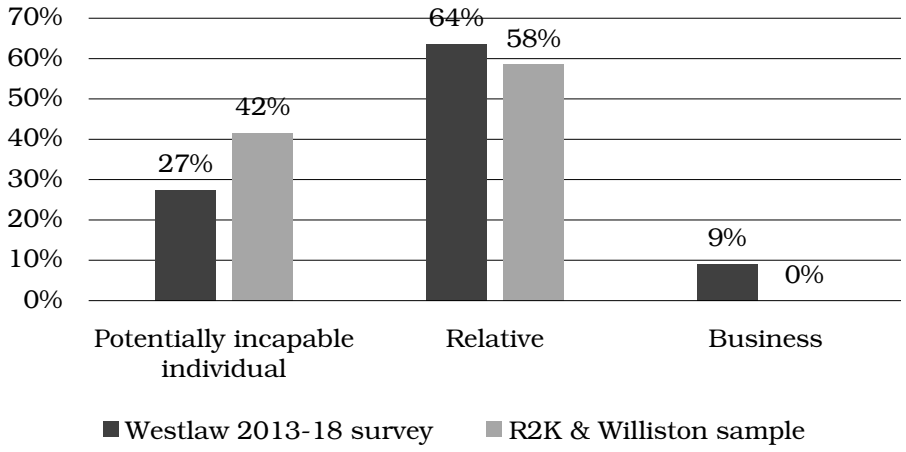

FIGURE 1: IDENTITY OF THE CLAIMANT

160 This survey covers cases decided in 2013-18 that are listed under Westlaw's West Key Number System, k-92. *See* the Online Appendix. The survey excludes cases that did not reach issues regarding mental capacity and cases concerning a breach of fiduciary duty. Fiduciary cases raise different issues. *See generally* Chen, *supra* note 31. There are thirty cases in the survey if arbitration agreements are included, and twenty-two if arbitration agreements are excluded. Arbitration agreements raise federal-law issues. *See infra* notes 232–238 and accompanying text.

161 As a robustness check, Diagram 1 also compares the results of the Westlaw survey with the results of a sample of fifty-five cases decided between 1963 and 2018 that appear in the case citations supplement to RESTATEMENT (SECOND) OF CONTRACTS § 15 (AM. LAW INST. 1981) and in the footnotes of 5 WILLISTON & LORD, *supra* note 28, § 10:8. 1963 was the year in which the New York judiciary first adopted a volitional test of mental capacity. *See* Faber v. Sweet Style Mfg. Corp., 242 N.Y.S.2d 763, 768 (Sup. Ct. 1963).

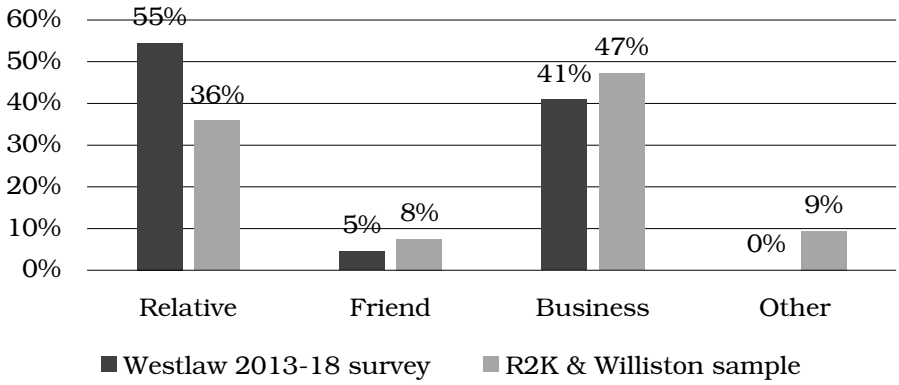

FIGURE 2: IDENTITY OF THE CAPABLE TRANSACTING PARTY

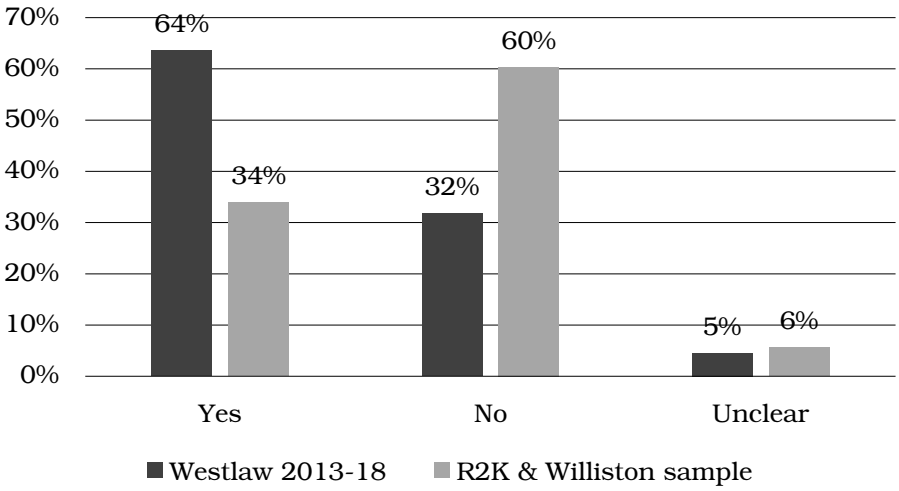

FIGURE 3: IMPUGNED TRANSACTION MADE IN OLD AGE

1. *Claims Driven by Inheritance Expectations*

The survey of modern cases reveals the hidden role of inheritance expectations in transactional capacity disputes. Figure 4 below depicts the typical procedural posture. The potentially incapable individual is typically inactive due to mental inability or death. The size and composition of her estate at death depend on the outcome of the avoidance claim against the capable transacting party. A successful claim tends to enlarge the estate of the incapable individual, and thereby benefits the claimant (who expects to inherit some or all of such estate). Thus the mental capacity doctrine can potentially impact upon potentially incapable individuals *and* potential claimants who have inheritance expectations.

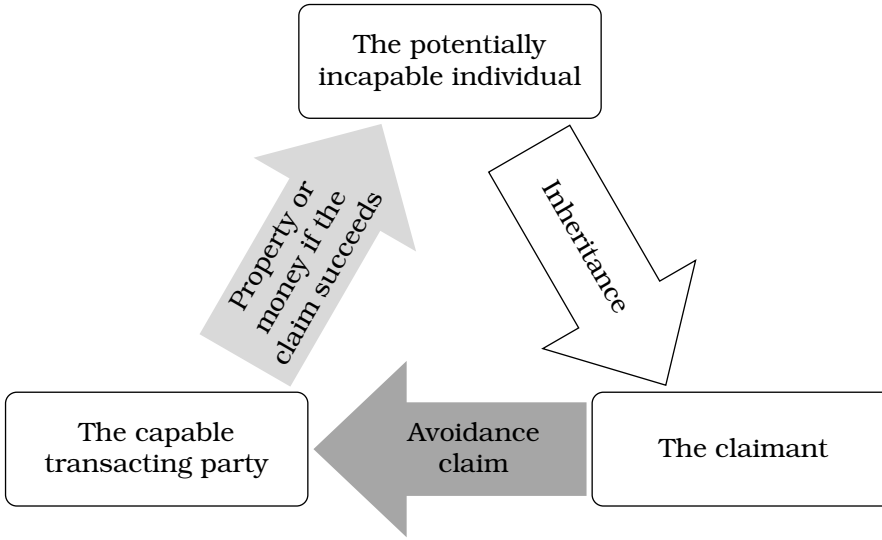

FIGURE 4: TYPICAL TRANSACTIONAL CAPACITY DISPUTE

The prevailing doctrinal theories fail to recognize the role of inheritance expectations. The conflicting-policies theory critically depends on the assumption that the potentially incapable individual finds the impugned transaction subjectively disadvantageous; it is for this reason that the policies of protecting the individual and protecting the security of transactions are necessarily in conflict.[162] However, in typical cases, the true claimant is not the potentially incapable individual herself; the claimant's interest may or may not be aligned with the individual's. In cases involving misalignment of interest, the individual may actually find the transaction beneficial instead of disadvantageous.[163] In these cases, the conflicting-policies theory is wrong.

Moreover, a hallmark of inheritance disputes is the "worst evidence" problem: the testimony of a deceased individual is unavailable.[164] The court can at best gauge from circumstantial evidence to ascertain the past mental state or intention of the deceased. If the impugned transaction took place in pri-

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162 *See supra* note 129 and accompanying text.

163 *See also* Kohn, *supra* note 54, at 2, 20–24 (criticizing statutes that criminalize elder financial abuse for allowing the state to act without the active participation of victims).

164 *See generally* SITKOFF & DUKEMINIER, *supra* note 79, at xxxiii, 141, 263–64 (stating that the witness who is best to authenticate, verify, and clarify the meanings of the terms of a will is dead by the time the court considers such issues). *See also* Goldberg & Sitkoff, *supra* note 57, at 336, 344–46, 365, 376–77 (criticizing the tort of interference with inheritance for failing to address the "worst evidence" problem).

vate, then the court also can only rely on circumstantial evidence to ascertain whether the capable transacting party had overreached. Such significant evidential deficiency, together with the legal uncertainty arising from the vague standards of mental capacity,[165] give the potential beneficiaries of the deceased's estate an opportunity to avoid transactions that actually *advance* the deceased's testamentary intent. This again challenges the conflicting-policies theory.

2. *Estate Planning*

Section III.A.1 has shown that the prevailing, conflicting-policies theory wrongly assumes that the potentially incapable individual necessarily finds the impugned transaction disadvantageous. This Section will argue that the widely-accepted abnormality theory is also often wrong; it ignores the fact that many near-death transactions are estate-planning instruments.

Many near-death transactions captured by the mental capacity doctrine are in substance *will substitutes*—meaning lifetime transactions that serve the function of a will without going through the formal probate system.[166] For example, by creating a joint tenancy in her property with a right of survivorship, a potentially incapable individual allows her co-tenant to inherit the property when she passes away.[167] Professor John Langbein showed that will substitutes are popular estate-plan-

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165 *See supra* subparts II.A, II.B, section II.C.2.

166 *See generally* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (arguing that "[m]ost property now takes the form of claims on financial intermediaries, who can easily transfer account balances on death, without court proceedings"); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 cmt. a (AM. LAW INST. 2003) (stating that a will substitute need not be executed in compliance with statutory formalities required for a will). To be sure, near-death contracts and gifts are often "imperfect" will substitutes; unlike wills, they cannot be revoked by their makers before death, and they also take effect before death. Langbein at 1114–15. Perhaps for this reason, prevailing American law applies the test for contractual capacity, rather than testamentary capacity, to irrevocable gifts. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(c) cmt. d, reporter's note 4 (AM. LAW INST. 2003). However, if the maker of an irrevocable will substitute lacks capacity, then the will substitute become prima facie revocable. The maker (or her representative) may exercise the power to avoid the will substitute for want of capacity before she dies. *See supra* note 66 and accompanying text. In other words, mental incapacity can render formally irrevocable will substitutes practically revocable.

167 *See* Langbein, *supra* note 166, at 1112. *See, e.g.*, Dubree v. Blackwell, 67 S.W.3d (Tex. Ct. App. 2001). For discussion of the case, *see infra* text accompanying notes 272–275.

ning instruments in the United States.[168] He and others also called for regulation of will substitutes as estate-planning instruments rather than as contracts or lifetime gifts.[169] Nonetheless, like their counterparts in the nineteenth century,[170] modern American courts continue to apply contractual doctrines to resolve capacity disputes over will substitutes.[171]

Engaging the abnormality theory, judicial application of contractual doctrines to will substitutes ignores the inherent differences between estate-planning instruments and true contracts. First, abnormality means deviation from the "norm," and what may be "normal" in contractual practices is different from what may be "normal" in estate planning. In particular, while "normal" contracts are beneficial to both sides, "normal" will substitutes are one-sided—in favor the party who is expected to inherit. Like wills, but unlike true contracts, will substitutes inherently exhibit substantive imbalance *regardless* of whether their makers have a strong or weak mental ability. Thus the abnormality theory wrongly asserts that substantive imbalance is a sign of mental incapacity.[172] The same problem affects other factors that amount to deviation from the contractual "norm" but are consistent with the estate-planning "norm."

Second, the abnormality theory assumes the existence of a "norm" the deviation from which is suspect, but ascertaining what is "normal" in estate planning is notoriously hard. Since the mid-twentieth century, families based on formal marriage and bloodline are in decline, while unmarried cohabiting partnerships, blended families, and other nontraditional family forms are becoming more prevalent.[173] The task of ascertaining the probable estate plan of a typical person is complicated by the great diversity of modern family forms. That task, as Professor Robert Sitkoff and the late Professor Jesse

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168 Langbein, *supra* note 166, at 1123.

169 *See id.* at 1140–41; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 7.1, 7.2 (AM. LAW INST. 2003).

170 *See* BLUMENTHAL, *supra* note 32, at 179–80, 199–200.

171 *See generally* the Online Appendix (surveying modern transactional capacity cases).

172 *See generally supra* notes 130–133 and accompanying text (describing the theory that that abnormality is "evidence of a disordered mind").

173 *See* Scott & Scott, *From Contract to Status*, *supra* note 159, at 302–03; SITKOFF & DUKEMINIER, *supra* note 79, at 74–75, 90, 108–10; RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 1–4 (2004); Thomas P. Gallanis, *The Flexible Family in Three Dimension*, 28 L. & INEQ. 291, 291 (2010); Kathrine M. Arango, *Trial and Heirs: Antemortem Probate for the Changing American Family*, 81 BROOK. L. REV. 779, 782–87 (2016) (discussing a recent survey of Census statistics and empirical studies on American families).

Dukeminier wrote in the context of intestate rules, "often involves substantial guesswork, as people's preferences differ, and it is hard to know what most people . . . would want."[174]

Moreover, the abnormality theory is overly cynical in asserting that substantive imbalance is a sign of overreach by the capable transacting party.[175] Will substitutes are typically made to transfer wealth to their makers' close relatives or friends. In a close familial or personal relationship, biological and affective bonds can partially deter misconduct, so can social and moral norms.[176] Whether these extralegal mechanisms are strong enough to replace formal law depends on the nature of the relationship. For instance, Professors Elizabeth Scott and Robert Scott argued that intrinsic bonds and informal norms are typically sufficient to deter misconduct in close parent-minor child relationships.[177] More recently, Professor Elizabeth Scott and I argued that extralegal mechanisms can also partially deter misconduct when a spouse/partner or an adult child serves as guardian to an incapable senior.[178] However, affective bonds tend to be less effective in such a family guardianship than in a close parent-minor child relationship. The point is that substantive imbalance may or may not be a reliable signal of misconduct by the capable transacting party; such signal must be interpreted in the light of the presence of intrinsic bonds and informal norms as well as the strength of such extralegal mechanisms. It is often wrong for the abnormality theory to treat substantive imbalance as evidence of potential overreach.

It must be clarified that the strength of intrinsic bonds and informal norms in the relationship between a potentially incapable individual and the capable transacting party depends little on the individual's relationship with the claimant. This

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174 SITKOFF & DUKEMINIER, *supra* note 79, at 63. Intestate rules are majoritarian default rules governing distribution of the probate property of persons who die without a will. *Id. See also* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 801, 811–12 (2012) (arguing that fixed intestacy rules fail to adapt to diverse family structures and proposing guided judicial discretion as an alternative); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 205–09, 251 (2001) (arguing against the family paradigm in American inheritance law and proposing potential reforms outside that paradigm).

175 *See supra* notes 130–133 and accompanying text.

176 *See generally* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2430–33 (1995) [hereinafter, Scott & Scott, *Parents*].

177 *Id.*

178 Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, *in* OXFORD HANDBOOK OF FIDUCIARY LAW ch. 12 at 16 (Evan J. Criddle, Paul B. Miller, Robert H. Sitkoff eds., 2019).

clarification matters because in many disputed cases, the active litigants are all related to the potentially incapable individual, for example, her relations from different marriages.[179] The relationship between the claimant and the capable transacting party is typically acrimonious. However, what matter for deterring misconduct are the extralegal mechanisms that regulate the capable transacting party's relationship with the potentially incapable individual, not with the claimant. Thus the fact that the disputed cases usually involve litigants who are related to each other does not weaken the argument that intrinsic bonds and informal norms can partially deter misconduct in the relationship between the potentially incapable individual and her close relative or friend.

Empirical findings regarding elder abuse in families therefore must be cautiously interpreted. Surveys from American jurisdictions consistently report that alleged perpetrators of elder abuse are usually related to the victim.[180] While the exact figures vary, adult children and spouses/partners are typically reported as the largest groups of alleged perpetrators.[181] Yet these findings should not be interpreted to suggest that spouses/partners, adult children, or other family members are prone to commit elder abuse. Saying elder abusers are likely to be family members is not the same as saying family members are likely to be elder abusers.[182] That family members are well-represented in elder abuser statistics may well be driven by the prevalence of transactions between seniors and their family

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179 *See, e.g.*, Kinsel v. Lindsey, 526 S.W.3d 411, 415 (Tex. 2017) (claims brought by the potentially incapable individual's step-children and step-grandchildren against her niece, nephew and others).

180 *See supra* notes 46–47.

181 *See, e.g.*, LIFESPAN OF GREATER ROCHESTER, WEILL CORNELL MED. CTR. OF CORNELL UNIV. & N.Y.C. DEP'T FOR THE AGING, *supra* note 47, at 34–35 (reporting that financial abuse is the most common form of elder abuse, and that spouses/partners and adult children are the most common abusers).

182 More formally, let Ω denote the set of transactions involving seniors. Let A denote the subset of Ω that constitute abuse, and F the subset of Ω that involve a family member. In general, $P(F|A) \neq P(A|F)$, where $P(F|A)$ is the conditional probability that a given abusive transaction involves a family member, and $P(A|F)$ the conditional probability that a given transaction with a family member constitutes abuse. Existing empirical studies consistently show a high $P(F|A)$, *see supra* notes 46–47 and accompanying text, but stop short of revealing $P(A|F)$.

To be sure, Bayes' theorem implies $P(A|F)=P(F|A)\times P(A)\div P(F)$, where P(A) is the (unconditional) probability that a transaction constitutes abuse, and P(F) the (unconditional) probability that a transaction involves a family member. In principle, one can derive $P(A|F)$ from $P(F|A)$, P(A), and P(F). Yet the hidden nature of elder abuse seems to prevent empirical researchers from ascertaining P(A). *See, e.g.*, LIFESPAN OF GREATER ROCHESTER, WEILL CORNELL MED. CTR. OF CORNELL UNIV. & N.Y.C. DEP'T FOR THE AGING, *supra* note 47, at 7 (attempting to quantify the extent of elder abuse).

members (especially in the estate-planning context), rather than by any strong tendency of family members to commit elder abuse.[183] I am not aware of any empirical finding showing such a tendency.

Showing undue suspicion of substantive imbalance in transactions between close relatives and friends, the abnormality theory can harm the welfare of incapable individuals. Experimental research in psychology and behavioral economics shows that individual preferences are typically other-regarding, rather than purely self-regarding. A common form of other-regarding preferences is *reciprocity fairness*—returning kindness for another's kindness but unkindness for another's unkindness.[184] In particular, wills can be the final manifestation of strong other-regarding preferences in close and long-term relationships.[185] Similarly, one-sided contracts, irrevocable gifts, and many forms of will substitutes can be the manifestation of strong other-regarding preferences. Yet the mental capacity doctrine tends to regard these transactions with great suspicion; it harms the welfare of many incapable individuals by rendering them less able to pursue valuable other-regarding goals and preferences.

To be sure, there is preliminary evidence that courts often exercise their substantial discretion to uphold transactions made in close families and personal relationships. Based on a doctrinal analysis of transactional capacity cases decided in

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183 More formally, Bayes' theorem implies $P(F|A)=P(A|F)\times P(F)\div P(A)$, where these probabilities are described in *supra* note 182. A high $P(F|A)$ can be explained by a high P(F), (or a low P(A)), rather than by a high $P(A|F)$.

184 *See generally* SANJIT DHAMI, THE FOUNDATIONS OF BEHAVIORAL ECONOMIC ANALYSIS chs. 5.2, 5.3, 6.7 (2016) (surveying experimental research on other-regarding preferences). *See, e.g.*, Ernest Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q. J. ECON. 817, 819 (1999) (modeling fairness as self-centered inequity aversion); Gary E. Bolton & Axel Ockenfels, *ERC: A Theory of Equity, Reciprocity, and Competition*, 90 AM. ECON. REV. 166, 166–167 (2000) (modeling people as being motivated by both pecuniary payoff and relative payoff); Gary Charness & Matthew Rabin, *Understanding Social Preferences with Simple Tests*, 117 Q. J. ECON. 817, 817–21 (2002) (using experimental models to show that subjects were motivated by concerns for social welfare and reciprocity). *See also* DHAMI, ch. 5.5 (discussing external validity of experimental research); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1646, 1685–90 (2003) (arguing that preferences for reciprocal fairness provide a source of self-enforcement in deliberately incomplete contracts).

185 *See generally* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 564–78 (1999) (arguing that people invest in long-term, reciprocally-based relationships for mutual support and aid, and inheritance can be viewed as the final act of gift giving that flows from a reciprocal, trust-based relationship between family members) [hereinafter Leslie, *Enforcing Family Promises*].

the 1960s to the 1980s, Professor Alexander Meiklejohn found that courts were generally willing to consider relational factors and tended to uphold transactions made in the course of long-term and close relationships that benefited the potentially incapable individual.[186] For this and other reasons, he concluded that the prevailing doctrinal theories are "fundamentally sound."[187] However, neither Professor Meiklejohn's sample of cases nor mine is large enough to generate statistically significant claims regarding correlation or causation in judicial decision-making,[188] especially in the light of the numerous abnormality factors and other relevant variables.[189] To the extent that courts indeed tended to uphold transactions between close relatives and friends, they reached the right results for the wrong reasons. Part IV below will offer reform suggestions to maximize the likelihood that the right results are reached, for the right reasons.

3. *Reward for Informal Caregiving*

In the present era of aging population, the "[e]conomic and social costs both to society and to potential caregivers [are] increasing, while the tax base and the pool of family caregivers, especially women, [are] shrinking."[190] In the United States, the burden of providing care to the elderly is primarily borne by families rather than by the state.[191] A recent empirical study

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186 Meiklejohn, *supra* note 32, at 364–67, 379, 387.

187 *Id.* at 310. The other reasons for Professor Meiklejohn's conclusion were that courts tended to give more weight to lay testimony than to expert testimony, showing their avoidance of undue deference to psychiatry, *id.* at 342, 387; that substantive imbalance was relevant to, but not determinative of, the issue of capacity, *id.* at 352–53, 355; and that the undesirable consequences of guardianship might be mitigated by the widespread legislative adoption of durable powers of attorney and limited guardianship, each of which preserved transactional capacity, *id.* at 379–86.

188 *See id.* at 311 n. 17, 366 n. 285; *supra* notes 160–161 (discussing my survey).

189 *See generally supra* notes 130–133 and accompanying text.

190 Ann M. Soden, *Family Matters: Some Emerging Legal Issues in Intergenerational and Generational Relations*, *in* BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING 99, 119 (Israel Doron & Ann M. Soden eds., 2012). *See also* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 134–35 (2008) [hereinafter Tate, *Caregiving*] (arguing that some elderly care recipients use testamentary freedom to reward their caregivers); Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 STETSON L. REV. 941, 947, 951–52 (2002) (arguing that fewer family members than in the past are available to provide informal care and assistance to elders, which leads to a greater need for guardians).

191 See generally Jennifer L. Wolff, Brenda C. Spillman, Vicki A. Freedman, & Judith D. Kasper, *A National Profile of Family and Unpaid Caregivers Who Assist Older Adults with Health Care Activities*, 176 JAMA INTERNAL MED. 372, 372–73,

estimates that about 41.8 million Americans provide unpaid care to an adult over the age of fifty, with nearly half of the care-recipients being seventy-five years or older.[192] Caregivers typically provide four years of unpaid care to an aged parent or spouse/partner.[193] Caregiving is burdensome and time-consuming; it generally takes 23.7 hours per week on average, and increases to 37.4 hours per week on average when the care-recipient lives with the caregiver.[194] To provide care, family caregivers often have to reduce their work hours, sacrifice their careers or tap into their retirement savings.[195]

In this light, the prevailing doctrinal theories can harm the welfare of many seniors by unduly limiting their ability to reward caregiving. Unless formally appointed to some fiduciary office,[196] family caregivers typically do not get paid a salary for providing valuable care. Instead, family caregivers may enjoy the emotional reward of caring for loved ones.[197] Another common form of reward for caregiving is inheritance from the care-recipient's estate.[198] Yet the prevailing doctrinal theories pose a heightened risk of avoiding will substitutes that truly reflect the testamentary intent of their makers.[199] As a result, potentially incapable seniors are less able to reward caregiving with inheritance.

Moreover, a limited ability to reward caregiving with inheritance may prevent many seniors from securing the services of their preferred family-and-friend caregivers. Close relatives

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378 (examining the involvement of family and unpaid caregivers in older adults' heath care activities and arguing for better engagement and support for these caregivers).

192 NAT'L ALL. FOR CAREGIVING & AARP, CAREGIVING IN THE U.S. 4, 14 (2020).

193 *Id.* at 18.

194 *Id.* at 30.

195 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-382, RETIREMENT SECURITY: SOME PARENTAL AND SPOUSAL CAREGIVERS FACE FINANCIAL RISKS 23–25 (2019).

196 *See, e.g.*, UNIF. PROBATE CODE §§ 5-316(a), 5-417 (amended 2010); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 120(b) (Unif. Law Comm'n 2017); RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(4) (AM. LAW INST. 2007).

197 *Cf.* Scott & Scott, *Parents*, *supra* note 176, at 2433 (arguing that parents "experience the rewards of social approval and self-fulfillment for good parenting").

198 *See* Tate, *Caregiving*, *supra* note 190 at 134–35 (Testamentary freedom allows the elderly to reward caregivers.). *See, e.g.*, Vig v. Swenson, 904 N.W.2d 489, 492 (N.D. 2017) (home as compensation for past services to parents). *See also* Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J. L. REFORM 761, 780 (2012) (proposing to give an elective share in the decedent's estate to family caregivers who have provided substantial uncompensated care to the decedent in a family residence).

199 *See supra* section III.A.2.

and friends are not fungible.[200] While professional caregivers and nursing homes have incentives to develop transferable skills and expertise,[201] close relatives and friends have an intimate relationship with the care-recipient and tend to be empathetic of her subjective needs and wishes.[202] The marginal benefit of receiving care from closes relatives and friends rather than from professional caregivers or nursing homes can be significant. A limited ability to reward caregiving with inheritance therefore may deprive potentially incapable seniors of the services of their preferred family-and-friend caregivers.

To be sure, care-recipients may use wills instead of will substitutes to leave inheritance to their caregivers.[203] Before a care-recipient loses mental capacity to make a lifetime transaction, she may make a will to reward her caregiver. Prevailing American law formally sets a lower threshold for testamentary capacity than for capacity to make contracts, irrevocable gifts and other lifetime transactions. The test of testamentary capacity enquires into cognitive ability,[204] but is easier to satisfy than the traditional cognitive test of capacity to make lifetime transactions. In theory at least, an individual can lack capacity to make lifetime transactions and yet has capacity to make a will.[205] Thus some care-recipients who lack capacity to make lifetime transactions can still make valid wills to reward their caregivers. However, the administration of wills invokes the formal probate system, which can be "slow, cumbersome, and expensive."[206] Moreover, the subtle differences between testamentary capacity and capacity to make lifetime transactions have practical significance only in borderline cases,[207] which

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200 *See* Scott & Scott, *Parents*, *supra* note 176, at 2415, 2445.

201 *See* Barnes, *supra* note 190, at 954–55. *See generally infra* section III.B.2.

202 *See* APPELBAUM & GUTHEIL, *supra* note 36, at 205–06; Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 3 UTAH L. REV. 1491, 1508 (2012) [hereinafter, Whitton & Frolik, *Theory and Reality*].

203 *See generally* Tate, *Caregiving*, *supra* note 190.

204 The prevailing test of testamentary capacity is:

> [T]he testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (AM. LAW INST. 2003).

205 SITKOFF & DUKEMINIER, *supra* note 79, at 268–69.

206 *Id.* at 444.

207 The formal differences between testamentary capacity and transactional capacity also seem not to affect the cognitive factors that psychiatric experts

are rare. In typical cases, individuals who lack capacity to make lifetime transactions would likely fail the test of testamentary capacity as well.

B. Transactions with Businesses

Subpart III.A above has argued that the prevailing theories underlying the mental capacity doctrine are ill-suited for resolving disputes over transactions between close relatives and friends. Turning now to transactions between potentially incapable individuals and businesses,[208] this Section will argue for continuing application of the prevailing theories.

1. *Need for Heightened Protection Remains*

Unlike transactions between close relatives and friends, transactions between potentially incapable individuals and businesses do not typically take place in the estate-planning context. My survey of modern cases suggests that consumer contracts are the most common type of transactions with businesses.[209] Unlike in the estate-planning context, the abnormality theory correctly regards substantive imbalance in transactions with businesses as a signal of mental inability and of overreach.[210] However, the conflicting-policies theory still ignores inheritance expectations and mistakenly assumes that claimants necessarily seek avoidance to advance the interests of the potentially incapable individual. There are nonetheless good reasons for continuing application of the prevailing theories *notwithstanding* that mistaken assumption.[211]

In transacting with businesses, potentially incapable individuals tend to be in a position of significant disadvantage. Aside from having a low bargaining power, individuals—mentally-capable or not—tend to be boundedly-rational in the sense of having cognitive biases, limited willpower, and many other forms of systematic mental limitations.[212] Research in

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examine to form an opinion regarding mental ability. *See* APPELBAUM & GUTHEIL, *supra* note 36, at 181–82.

208 For simplicity, this Article uses the term "business" to describe a company or a natural person who transacts with potential incapable individuals with a view to profit.

209 *See generally* the Online Appendix.

210 *See generally supra* subpart II.A, section II.C.2.

211 *Contra* Alexander & Szasz, *supra* note 35, at 547 (arguing for abolition of the mental capacity doctrine).

212 *See, e.g.*, Herbert A. Simon, *A Behavioural Model of Rational Choice*, 69 Q. J. ECON. 99, 104–106 (1955) (modelling satisficing rather than optimizing behaviour); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279–80, 282–83 (1979) (introducing the

behavioral economics and psychology has shown that businesses can exploit these mental limitations to extract extraordinary profits.[213] The concerns raised by such research are pronounced in cases concerning elderly incapable individuals. As Professors Sumit Agarwal, John Driscoll, Xavier Gabaix, and David Laibson wrote in an influential paper, the combination of severe cognitive limitations and substantial wealth can render many seniors particularly vulnerable to financial exploitation.[214] These authors further highlighted that market forces and competition are inadequate for protecting vulnerable seniors from exploitative business practices.[215] Moreover, unlike in close families and personal relationships, intrinsic bonds and informal norms do not constrain profit-driven businesses. Thus, the need to protect vulnerable seniors from exploitative business practices can justify application of a rigorous mental capacity doctrine.[216]

2. *Example: Contracts with Nursing Homes*

To illustrate how the mental capacity doctrine may operate in the consumer context, this Section considers contracts with nursing homes. About one-third of the cases in my survey concerned contracts for admitting a senior to a nursing

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prospect theory in part to capture risk aversion toward gains from a reference point and risk-loving attitudes toward losses from the reference point); Richard Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 ECON. LETTERS 201, 205 (1981) (survey evidence showing dynamic inconsistency in the sense of individual discount rates varying inversely with the size of the reward and the length of time to be waited). *See generally* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–81 (1998) (discussing bounded rationality, bounded willpower, and bounded self-interest); Jonathan Baron & Tess Wilkinson-Ryan, *Conceptual Foundations: A Bird's Eye View*, *in* RESEARCH HANDBOOK ON BEHAVIORAL LAW AND ECONOMICS 19, 25–38 (Joshua C. Teitelbaum & Kathryn Zeiler eds., 2018) (discussing cognitive biases and other behavioural traits that depart from classical economic theory).

213 *See generally* RAN SPIEGLER, BOUNDED RATIONALITY AND INDUSTRIAL ORGANIZATION 20, 24, 28, 34, 41, 55–56, 73, 105–06, (2011); Botond Köszegi, *Behavioural Contract Theory*, 52 J. ECON. LITERATURE 1075, 1104–10 (2014) (discussing contracts that exploit consumer mistakes and present biases); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 2, 42, 248 (2012) (discussing how businesses exploit consumers by collecting information from imperfectly rational consumers).

214 Sumit Agarwal, John C. Driscoll, Xavier Gabaix & David Laibson, *The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation*, 2009 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 51, 51–52, 80.

215 *Id.* at 80–81. *See also* BAR-GILL, *supra* note 213, at 2, 26–32; EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS 282–83, 285 (2018).

216 *See generally supra* subpart I.B (discussing how the mental capacity doctrine deters and sanctions financial misconduct).

home.[217] Contracts with nursing homes disproportionately affect seniors who may lack mental capacity, given their likely need for care in their final years of life. Unlike most family caregivers, nursing homes tend to be sophisticated institutions that are paid to provide their services. An analysis of contracts with nursing homes can therefore offer insights on how the mental capacity doctrine can protect elderly incapable individuals from potentially exploitative business practices.

Elder abuse and low-quality care in nursing homes are alarming problems. Nursing-home residents and their families tend to lack the ability to assess and monitor the provision of services and quality of care.[218] Advocates of regulation, and even nursing homes themselves, accept that market forces are insufficient to assure quality of care and deter abuse.[219] During years 1999 and 2000, "[o]ver thirty percent of the nursing homes in the United States—5,283 nursing homes—were cited for an abuse violation" that potentially causes harm to nursing-home residents.[220] Surveys done in the United States (and other countries) reported that over half of nursing-home staff admitted to committing abuse, and almost ninety percent of residents or their proxies reported neglect.[221] While federal law regulates nursing homes through standard setting and other mechanisms,[222] oversight and enforcement efforts have failed to achieve long-lasting improvements.[223]

A rigorous mental capacity doctrine can partially deter and sanction elder abuse and poor quality of services in nursing

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217 *See* the Online Appendix.

218 David G. Stevenson, *The Future of Nursing Home Regulation: Time for a Conversation?*, HEALTH AFF. (Aug. 23, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180820.660365/full/ [https://perma.cc/3H8E-FQC5].

219 *Id.*

220 U.S. H.R., COMM. ON GOV'T REFORM, SPECIAL INVESTIGATIONS DIV., MINORITY STAFF, ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES 4–5 (2001), http://canhr.org/reports/2001/abusemajorproblem.pdf [https://perma.cc/64NY-FQC6].

221 Yongjie Yon, Maria Ramiro-Gonzalez, Christopher R. Mikton, Manfred Huber & Dinesh Sethi, *The Prevalence of Elder Abuse in Institutional Settings: A Systematic Review and Meta-analysis*, 29 EUR. J. PUB. HEALTH 58, 61 (2018) (citations omitted).

222 *See* Richard Weinmeyer, *Health Law: Statutes to Combat Elder Abuse in Nursing Homes*, 16 AM. MED. ASS'N J. ETHICS 359, 360–61 (2014).

223 *See* Robert Gebelhoff, Opinion, *The Hidden Victims of Trump's Deregulatory Agenda: Nursing Home Residents*, WASH. POST (Mar. 25, 2019, 12:39 PM) https://www.washingtonpost.com/opinions/2019/03/25/hidden-victims-trumps-deregulatory-agenda-nursing-home-residents/ [https://perma.cc/G8DY-FZWR]; Jordan Rau, *Poor Patient Care at Many Nursing Homes Despite Stricter Oversight*, N.Y. TIMES (July 5, 2017), https://www.nytimes.com/2017/07/05/health/failing-nursing-homes-oversight.html [https://perma.cc/37V3-ER49].

homes. First, the doctrine enables private suits by potentially incapable individuals or their representatives.[224] Private suits are especially valuable for holding nursing homes accountable when the state takes a lax attitude toward regulation.[225] My survey of modern cases shows that potentially incapable individuals who contracted with nursing home typically had passed away by the time of litigation.[226] Like in cases concerning relatives and friends, claimants who brought posthumous avoidance claims against nursing homes were usually relatives with inheritance expectations. However, unlike in the estate-planning context,[227] avoidance claims against nursing homes tend not to contradict the testamentary intent of the elderly individual; people typically do not intend to leave inheritance to their nursing homes. Thus, in cases concerning contracts with nursing homes, inheritance expectations can motivate private suits that are unlikely to be inconsistent with the interests of the potentially incapable individual.

Second, the abnormality theory, which sanctions deviation from the norm, tends to lead to contract avoidance when the nursing home in dispute charged more than what typical nursing homes would charge. Upon contract avoidance, the nursing home would be obliged to refund the contract price to the resident or her estate and would become entitled to recover a reasonable price commensurate with the services actually provided. Such reasonable price could match the market price or the cost of the services actually provided.[228] Thus, poor services would attract a low price. Any conscious wrongdoing by the nursing home would also reduce the price that it would receive.[229] Moreover, successful avoidance of a contract for want of capacity would vitiate any exclusion-of-liability clause

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224 *See supra* note 66 and accompanying text.

225 *See* Gebelhoff, *supra* note 223.

226 *See generally* the Online Appendix (describing litigations involving mental-incapacity claims against nursing homes, which typically occurred after potentially-incapable individuals had passed away).

227 *See supra* section III.A.2.

228 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmt. a, cmt. e, §§ 49, 54 (AM. LAW INST. 2011). To be sure, the mental capacity doctrine alone is insufficient to induce socially optimal levels of nursing-home services. For instance, setting the reasonable price for nursing-home services to equal the market price would not induce efficient outcomes, because the market price is not an efficient price. The usual obstacles to efficient bargaining—information asymmetry, cognitive biases, limited willpower and the like—are present in the nursing-home market. *See supra* section III.B.1; Hermalin, Katz & Craswell, *supra* note 39, at 30–46 (discussing the obstacles to efficient contracting).

229 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54(3)(b) (AM. LAW INST. 2011).

therein;[230] the capable contracting party would therefore be prevented from invoking any exclusion-of-liability clause to resist subsequent tort actions.[231]

To be sure, like many other consumer contracts in the United States,[232] nursing-home contracts tend to contain mandatory arbitration clauses that oblige parties to refer their disputes to an arbitral tribunal instead of a court.[233] About one-third of the cases I surveyed concerned an arbitration clause that formed part of a nursing-home contract.[234] Lacking salience, mandatory arbitration clauses can affect consumers regardless of their state of capacity.[235] Subject to some narrow exceptions, courts are obliged to refer to arbitration disputes within the scope of a facially valid mandatory arbitration clause. Disputes concerning mental capacity may or may not be an exception; the Supreme Court has left open the issue of whether mental capacity is a matter for a court or an arbitral

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230 *See, e.g.*, Del Santo v. Bristol Cty. Stadium, Inc., 273 F.2d 605, 607 (1st Cir. 1960) (holding that a minor is able to disaffirm contract despite release of liability).

231 *See, e.g.*, *id.*

232 *See, e.g.*, Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH J. L. REFORM 871, 883 (2008) ("Over 90% of the EDGAR employment agreements [filed with the U.S. Securities and Exchange Commission] included arbitration clauses.").

233 *See also* Gebelhoff, *supra* note 223 (discussing recent efforts to lift a previous ban on mandatory arbitration clauses in nursing-home contracts).

234 *See, e.g.*, John Knox Vill. of Tampa Bay, Inc. v. Perry, 94 So. 3d 715, 718–719 (Fla. Dist. Ct. App. 2012) (remanding for evidential hearing to ascertain mental capacity to enter into arbitration agreement); Liberty Health & Rehab of Indianola, LLC v. Howarth, 11 F. Supp. 3d 684, 688 (N.D. Miss. 2014) (denying motion to compel arbitration); Pikeville Med. Ctr., Inc. v. Bevins, No. 2013-CA-000917-MR, 2014 WL 5420002, at *4 (Ky. Ct. App. Oct. 24, 2014) (holding that the arbitration agreement is invalid); Maynard v. Golden Living, 56 N.E.3d 1232, 1240 (Ind. Ct. App. 2016) (referring to arbitration); Kindred Nursing Ctrs. Ltd. v. Chrzanowski, 791 S.E.2d 601, 606 (Ga. Ct. App. 2016) (remanding for evidential hearing to ascertain mental capacity to enter into arbitration agreement); Dalon v. Ruleville Nursing & Rehab. Ctr., LLC, 161 F. Supp. 3d 406, 417–18 (N.D. Miss. 2016) (denying motion to compel arbitration to allow hearing on enforceability of the agreement); Cardinal v. Kindred Healthcare, Inc., 155 A.3d 46, 54 (Pa. Super. Ct. 2017) (referring to arbitration); Richmond Health Facilities-Madison, L.P. v. Shearer, No. 5:17-255-KKC, 2017 WL 3273381, at *7 (E.D. Ky. Aug. 1, 2017) (referring to arbitration all but claims personal to claimant); Stephan v. Millennium Nursing & Rehab Ctr., Inc., 279 So. 3d 532, 546 (Ala.2018) (denying motion to compel arbitration).

235 *See generally* Oren Bar-Gill, *Consumer Transactions*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 465, 472–73 (Eyal Zamir & Doron Teichman eds., 2014) (arguing that arbitration clauses form part of those nonsalient aspects of consumer contracts that consumers typically do not read); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (arguing that mandatory arbitration clauses undermine substantive law).

tribunal to decide in the first instance.[236] Lower courts are divided on this issue.[237] The prevailing academic view is that mental incapacity is similar to unconscionability and other usual defenses to contract enforcement, which are typically referred to arbitration.[238]

The prevalence of mandatory arbitration clauses in nursing-home contracts does not completely undermine the mental capacity doctrine. Unless and until the Supreme Court rules otherwise, many lower courts can continue to resolve disputes over mental capacity instead of referring such disputes to arbitration. Claimants can also invoke the mental capacity doctrine before an arbitral tribunal. To be sure, *class-action* arbitration waivers can stultify consumer rights by making it too expensive to litigate individually,[239] but this problem is mitigated in high-stakes cases where a successful claim would recover a sufficiently large sum of money.

3. *Example: Annuities*

Annuities are another example of transactions with businesses that disproportionately affect seniors who may lack mental capacity. Primarily a retirement-planning product, an annuity is an insurance contract under which the insured pays premiums in exchange for a stream of income from the in-

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236 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006).

237 *See John Knox Vill. of Tampa Bay, Inc.*, 94 So. 3d at 718–19; *Liberty Health & Rehab of Indianola, LLC*, 11 F. Supp. 3d at 688; *Pikeville Med. Ctr., Inc.*, 2014 WL 5420002, at *4; *Maynard*, 56 N.E.3d at 1240; *Kindred Nursing Ctrs. Ltd. P'ship*, 791 S.E.2d at 606; *Dalon*, 161 F. Supp. at 417–18; *Cardinal*, 155 A.3d at 54; *Richmond Health Facilities-Madison, L.P.*, 2017 WL 3273381, at *7; *Stephan*, 279 So.3d 532 at 546. For brief descriptions of the outcomes in these cases, *see supra* note 234.

238 George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 34–35 (2012) (arguing that an arbitral tribunal should decide a mental-incapacity challenge to an arbitration agreement). *Contra* Autumn Smith, *You Can't Judge Me: Mental Capacity Challenges to Arbitration Provisions*, 56 BAYLOR L. REV. 1051, 1054 (2004) (arguing that a court should decide a mental-incapacity challenge to an arbitration agreement).

239 *See* Glover, *supra* note 235, at 3066–68 ("[T]he parties' waiver of class arbitration procedures was enforceable under the FAA even though the plaintiffs' claims would be prohibitively expensive to bring on an individual basis." (citing Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013))). *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627, 1632 (2018) (noting that class actions can increase enforcement of rights by spreading the costs of litigation); Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1426–27 (2017) (rejecting a clear statement rule that requires powers of attorney to specifically permit attorneys to enter into arbitration agreements); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (holding that federal law preempts state law which invalidates class-action-arbitration waivers in consumer contracts).

surer.[240] For example, a life annuity provides guaranteed periodic payments for the remainder of the insured's lifetime. A common reason for buying an annuity is to obtain insurance against the *longevity risk* of the insured living longer than expected and being unable to financially support herself.[241] Another common reason is to qualify the insured for Medicaid, which can pay for her medical and nursing-home costs. By making a large lump-sum premium to the insurer and meeting other criteria, the insured impoverishes herself to meet Medicaid's asset limits.[242]

Individuals often make suboptimal decisions regarding annuities. Research in behavioral finance and psychology suggests that due to imperfect mental accounting, loss aversion, and framing effects, individuals can incorrectly perceive annuities as risky gambles rather than insurance products.[243] Yet common types of annuities, especially fixed annuities that provide guaranteed streams of income, are not regulated by the Securities and Exchange Commission.[244] Moreover, commission-driven salespersons may sell annuities that are not in the buyer's best interests without violation of strict fiduciary duty.[245] In fact, several insurers recently reported booming

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240 *See Fast Answers: Annuities*, SEC, https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities [https://perma.cc/WFB5-LC4X] (last visited July 22, 2020).

241 *See* Bailey McCann, *What to Consider When Buying an Annuity*, WALL ST. J. (Feb. 3, 2019, 10:08 PM), https://www.wsj.com/articles/what-to-consider-when-buying-an-annuity-11549249680 [https://perma.cc/P4YP-Y3TN].

242 *See generally* Am. Council on Aging, *How Purchasing a Medicaid Compliant Annuity Impacts One's Eligibility for Medicaid Long-Term Care*, MEDICAID PLAN. ASSISTANCE, https://www.medicaidplanningassistance.org/eligibility-by-annuity [https://perma.cc/HDR9-P9XH] (last updated Jan. 5, 2021) (discussing annuity rules that one must meet to qualify for Medicaid).

243 Jeffrey R. Brown, Jeffrey R. Kling, Sendhil Mullainathan & Marian V. Wrobel, *Why Don't People Insure Late-Life Consumption? A Framing Explanation of the Under-Annuitization Puzzle*, 98 AM. ECON. REV.: PAPERS & PROC. 304, 305 (2008); Wei-Yin Hu & Jason S. Scott, *Behavioral Obstacles in the Annuity Market*, 63 FIN. ANALYSTS J. 71, 71 (2007).

244 *See* SEC, *supra* note 240.

245 Agarwal, Driscoll, Gabaix & Laibson, *supra* note 214, at 84–85. *See* Chamber of Commerce v. U.S. Dep't of Labor, 885 F.3d 360, 366, 388 (5th Cir. 2018) (invalidating the Fiduciary Rule which the Department of Labor proposed to impose ERISA fiduciary duties on a broad range of financial services brokers and advisers); Gregory F. Jacob, *Is the Fiduciary Rule Dead?*, REG. REV. (Apr. 10, 2019), https://www.theregreview.org/2019/04/10/jacob-is-fiduciary-rule-dead/ [https://perma.cc/T8AB-X5BM] (discussing the state of the Fiduciary Rule). *But see* Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor, 885 F.3d 676, 685–86 (10th Cir. 2018) (upholding the Fiduciary Rule).

annuities sales and partially attributed such boom to recent weakening of fiduciary regulation.[246]

If carefully applied, the mental capacity doctrine can partially fill in a gap in regulatory protection in the annuities market. Like in cases concerning nursing-home contracts,[247] the doctrine facilitates private suits, including those driven by inheritance expectations. Sanctioning deviation from the norm, the abnormality theory tends to avoid overpriced annuities. Upon avoidance, the insurer would be obliged to refund the incapable individual (or her estate) the prepaid premium and would become entitled to recover a reasonable price commensurate with the value of the insurance coverage.[248] The court, however, must be mindful that the value of the insurance coverage is *not* the same as the sum of income payments already received by the incapable individual.[249] Such sum does not account for the fact that the individual had benefited from passing on her longevity risk to the insurer. What the insurer is entitled to recover should reflect its assumption of the longevity risk.[250]

4. *Availability of Ex Ante Judicial Approval*

A further reason for treating transactions between relatives and friends differently from transactions with businesses is the availability of a process to obtain *ex ante* judicial approval. The discussions so far concern judicial scrutiny after the fact, that is, judicial scrutiny of a previously made transaction. To minimize the risk of avoidance after the fact, prospective transacting parties can petition a state court for approval of the transaction before the fact.[251] This Section describes the pro-

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246 *See* Suzanne Barlyn, *U.S. Annuities Sales Boom After Fiduciary Rule Kicks the Bucket*, REUTERS (Nov. 14, 2018, 6:10 AM), https://www.reuters.com/article/us-usa-insurance-annuities/u-s-annuities-sales-boom-after-fiduciary-rule-kicks-the-bucket-idUSKCN1NJ1GY [https://perma.cc/AAD9-4T2S].

247 *See supra* section III.B.2.

248 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 illus. 14, § 54 illus. 24 (AM. LAW INST. 2011).

249 *But see* Ortelere v. Teachers' Ret. Bd. of N.Y., 250 N.E.2d 460, 462–66 (N.Y. 1969) (reversing the lower court's refusal to avoid the decedent's election for maximum lifetime benefit where the decedent suffered volitional impediments). For discussion of the case, see *supra* text accompanying notes 140–147.

250 *See also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54(6) cmt. k (AM. LAW INST. 2011) (limiting remedies in cases of prejudicial or speculative delay in asserting a right of rescission).

251 *See, e.g.*, UNIF. PROBATE CODE § 5-411 (amended 2010) ("After notice to interested persons and upon express authorization of the court, a conservator may: (1) make gifts . . . ."); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 414 (UNIF. LAW COMM'N 2017) ("[A] conservator

cess for obtaining ex ante judicial approval and argues that the availability of this process partially justifies heightened regulation of transactions with businesses.

The process for engaging ex ante judicial scrutiny is part and parcel of a state's guardianship system. To create a guardianship over a potentially incapable individual, prevailing American law requires the relevant state court (typically the probate court) to be satisfied that the individual lacks mental capacity to manage some aspect of her life or property.[252] Once the individual is found incapable, the court has a discretion to appoint a substitute decision maker—typically called a guardian or conservator—to make decisions on behalf of the individual. The court can also make a decision on its own. This process has enabled capable transacting parties to obtain ex ante judicial approval of transactions that would otherwise be vitiated by mental incapacity.[253]

Both the procedural and substantive aspects of the guardianship process provide safeguards against financial misconduct. The petitioner is typically required to give notice to the potentially incapable individual and any interested parties, and disclose any conflict of interest.[254] This procedure gives the court and any interested parties an opportunity to evaluate the pros and cons of the proposed transaction.[255] In some cases, independent legal representation can also be afforded to the potentially incapable individual.[256] The equitable doctrine of

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must . . . receive specific authorization by the court before the conservator may exercise with respect to the conservatorship the power to: (1) make a gift . . . .").

252 *See* UNIF. PROBATE CODE § 5-401 (amended 2010); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § -401(b) (UNIF. LAW COMM'N 2017).

253 *See, e.g.*, *In re* Keri, 853 A.2d 909, 911–12 (N.J. 2004) (providing ex ante judicial approval of large gifts to the sons of the incapable individual). *See also* Lisa S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 38–39 (2007) (discussing bank and financial institutions asking for invocation of guardianship proceedings to confirm authority to transact large properties of incapable individuals).

254 *See* UNIF. PROBATE CODE § 5-411(a) (amended 2010); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 414(a) (UNIF. LAW COMM'N 2017).

255 *E.g.*, *In re* Castner, 661 A.2d 344, 348 (N.J. Super. Ct. Law Div. 1995) (holding that the process for ex ante judicial approval gives "the court and interested parties an opportunity to analyze the transaction . . . to ensure if it [is] fair to the ward and in her best interests, and to determine the degree of risk presented to the ward, since an incompetent's estate should be cautiously managed.").

256 *See, e.g.*, *In re Keri*, 853 A.2d at 919 ("When a court orders a hearing on an application for guardianship, *Rule* 4:86–4(b) requires the appointment of counsel for the alleged incompetent."). *See generally* AM. BAR ASS'N COMM'N ON LAW & AGING, *Representation and Investigation in Guardianship Proceedings* (2018), http://www.americanbar.org/content/dam/aba/administrative/law_aging/

substituted judgment (or its statutory adoption) provides the substantive standard for determining whether to grant ex ante judicial approval. This standard typically requires the court to give effect to what the incapable individual would have wanted if she were capable.[257] If her wishes are not known, or if giving effect to her wishes would unreasonably harm or endanger her, then the court rules according to what is in her best interest.[258]

Hence, at least in high-stakes cases, businesses that wish to transact with potentially incapable individuals without bearing the risk of subsequent avoidance can take advantage of the process for obtaining ex ante judicial approval. On the other hand, unless advised by lawyers who are familiar with guardianship law, lay relatives and friends are unlikely to be sufficiently sophisticated and well-informed to invite ex ante judicial scrutiny. The availability of ex ante judicial scrutiny thus provides a reason for regulating transactions with businesses more strictly than transactions with relatives and friends.

C. Summary of Shortcomings

This Part has argued that the mental capacity doctrine in prevailing American law is ill-suited for the era of aging population. Transactional capacity disputes typically concern inheritance. Yet the conflicting-policies theory fails to recognize that claims to avoid transactions between relatives and friends are usually made to increase the claimant's expected inheritance, rather than to advance the interests of the potentially incapable individual. Moreover, the abnormality theory fails to recognize that substantive imbalance is an inherent characteristic of estate-planning instruments; it is not indicative of mental incapacity or of overreach. Thus, the prevailing doctrinal theories

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chartrepresentationandinvestigation.authcheckdam.pdf [https://perma.cc/YL9T-3A33] (surveying right to counsel in American guardianship statutes).

257 *See generally infra* subpart IV.A (applying the substituted-judgment doctrine to assess what decision an individual would have made if she had mental capacity). *See, e.g.*, UNIF. POWER OF ATTORNEY ACT § 217(c) cmt. (UNIF. LAW COMM'N 2006) (discussing gifting by agent); UNIF. PROBATE CODE §§ 5-411(a), 5-411(c), 5-427(b) (amended 2010) (discussing gifting by guardian); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 414(c) (UNIF. LAW COMM'N 2017) (stating that courts must consider individual's preferences); RESTATEMENT (THIRD) OF TRUSTS § 11(5) cmt. f, note to cmt. f (AM. LAW INST. 2003) (discussing the doctrine of substituted judgement).

258 UNIF. PROBATE CODE §§ 5-314(a), 5-418(b) (amended 2010); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 418(c) (UNIF. LAW COMM'N 2017).

are unduly suspicious of transactions made in the estate-planning context.

On the other hand, these shortcomings of the prevailing doctrinal theories do not affect typical transactions between potentially incapable individuals and profit-driven businesses. In the business context, claims driven by inheritance expectations are unlikely to contradict the testamentary intent of the potentially incapable individual. Substantive imbalance in transactions with businesses is also a signal of overcharge, if not of overreach. Given the prevalence of elder financial abuse by businesses, courts should rigorously apply the mental capacity doctrine to avoid seemingly exploitative transactions and disgorge the ill-gotten gains of exploitation.[259]

IV
LIMITING AVOIDANCE OF TRANSACTIONS WITHIN CLOSE FAMILIES AND PERSONAL RELATIONSHIPS

Guided by Part III, this Part will make reform proposals to loosen regulation of transactions between potentially incapable individuals and their close relatives or friends. Subpart IV.A below will elaborate upon a reform proposal to limit the power to avoid transactions for want of capacity. Subpart IV.B will make further reform suggestions regarding the remedial consequences of successful avoidance.

A. Adoption of a Substituted-judgment Defense

The main reform proposal is to make available to close relatives and friends a *substituted-judgment defense*: the power to avoid a transaction for want of capacity is lost if the capable transacting party can prove (by the usual civil standard of preponderance of evidence) that the incapable individual would have made the transaction in a state of capacity. The proposed defense is an additional hurdle to successful avoidance; after the claimant successfully proves a lack of mental capacity, the capable transacting party can resist avoidance by establishing the proposed defense.

The proposed substituted-judgment defense originates from guardianship law and the law of trusts.[260] In guardian-

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259 *See generally supra* subpart I.B. *Contra* Alexander & Szasz, *supra* note 35, at 558–59 (arguing for abolition of the mental capacity doctrine notwithstanding the survival of "unfortunate contracts").

260 *See* UNIF. PROBATE CODE §§ 5-314(a), 5-418(b) (amended 2010); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 414 cmt. (UNIF. LAW COMM'N 2017); RESTATEMENT (THIRD) OF TRUSTS § 11(5) cmt. f, note to

ship and trust cases, when a court is petitioned to make a decision on behalf of an incapable individual, the equitable doctrine of substituted judgment (or its statutory adoption) typically supplies the decision-making standard. As section III.B.4 has explained, this doctrine typically directs the court to make a decision that the individual would have made herself if she had mental capacity. The proposed defense essentially imports the doctrine of substituted judgment into cases concerning contracts, irrevocable gifts, and other lifetime transactions.

1. *Economic Intuition*

A stylized example can illustrate the economic intuition behind my proposal to adopt the substituted-judgment defense.[261] Suppose that pursuant to a hypothetical transaction, an incapable individual transferred some money or property—which she valued at P—to the capable transacting party. The value of P is the maximum that the individual was willing to transfer in a state of incapacity.[262] If the individual had capacity, then she would have been willing to transfer B at most. For instance, the value of B may reflect the individual's benefit arising from leaving inheritance to a close relative or friend, or from rewarding her caregiver.[263] After the individual had

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cmt. f (AM. LAW INST. 2003). *See generally* Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J. L. REFORM 739, 742–43 (2012) [hereinafter Frolik & Whitton, *A Proposal for Reform*] (surveying financial decision-making standards in American guardianship statutes).

261 This example belongs to the class of multiselves models, which have been widely applied to study a variety of legal issues. *See, e.g.*, RICHARD A. POSNER, AGING AND OLD AGE 84–95 (1995) (multiselves and aging); Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 59–62 (1990) (multiselves and precommitment mechanisms in marriages); Agnieszka Jaworska, *Advance Directives and Substitute Decision-Making*, STAN. ENCYCLOPEDIA OF PHIL. § 3 (Mar. 24, 2009), https://plato.stanford.edu/entries/advance-directives/. [https://perma.cc/5NX2-AF34] (multiselves and surrogate decision making); Jennifer Radden, *Multiple Selves*, *in* THE OXFORD HANDBOOK OF THE SELF 547, 547 (Shaun Gallagher ed., 2011) (multiselves and dissociative identity disorder).

262 This specification captures the scenario of a sophisticated capable transacting party acting to maximize her own payoff with the knowledge that she is transacting with an incapable individual and with superior bargaining power relative to the incapable individual. While this scenario may seem unrealistic and cynical, it captures the problem of elder financial abuse. This problem is most pronounced when the potential abuser—the capable transacting party—is sophisticated, self-interested, well-informed, and superior in bargaining. In this scenario, the normative case for maintaining a broad mental capacity doctrine is the strongest. Because I propose to narrow the doctrine, I choose to analyze this scenario to "stack the deck" against me.

263 *See generally supra* sections III.A.2–3 (arguing that limited ability to reward caregiving with inheritance may deprive potentially incapable seniors of caregiving services by their family and friends).

passed away, the claimant decides whether to seek avoidance of the transaction.[264] In the event of successful avoidance, the claimant recovers P from the capable transacting party and pays a reasonable price R for what the individual had received pursuant to the avoided transaction. For simplicity, suppose that P and R are sufficiently large so that it would be worthwhile for the parties to incur litigation costs to resolve any capacity dispute (or transaction costs, to reach a settlement).

In this stylized example, if the claimant's power to avoid transactions for want of capacity is unrestricted, then she has an incentive to seek avoidance whenever $P > R$. Her marginal benefit of seeking avoidance is $P - R$, which is positive whenever $P > R$. Notice that her incentive to seek avoidance does *not* depend on B—the "true" benefit of the transaction to the incapable individual. In particular, in cases of $B \geq P > R$, the claimant is incentivized to seek avoidance notwithstanding the fact that the individual had benefited from the transaction. In these cases, allowing avoidance generates the error cost of avoiding a transaction that had advanced the welfare of the incapable individual. Other costs arising from the avoidance attempt include litigation costs or the transaction costs of reaching a settlement.

This stylized example captures the dynamics of capacity disputes between relatives and friends. Subpart III.A has shown that inheritance expectations can drive claimants to seek avoidance of transactions that had actually benefitted the incapable individual. The stylized example captures this possibility by specifying $B \geq P > R$: the claimant is incentivized to seek avoidance ($P > R$) even though the transaction was beneficial to the incapable individual ($B \geq P$). The prevailing doctrinal theories mistakenly assume $P > B$ in every case, which means that the transaction was necessarily disadvantageous to the incapable individual.[265] This mistaken assumption can lead to avoidance of transactions that meet the description of $B \geq P$.

The economic intuition behind the proposed substituted-judgment defense is to preclude avoidance in cases where $B \geq P$. In these cases, the incapable individual would have made the transaction even if she had capacity. Any claim for avoidance does not account for the "true" benefit of the transaction to the incapable individual. Recognizing this, the proposed substituted-judgment defense imposes a restriction on the

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264 *See generally supra* section III.A.1 (discussing the role of inheritance expectations in transactional capacity disputes).

265 *See supra* note 129.

claimant's power of avoidance. Such restriction prioritizes the interests of the incapable individual over the claimant's.

2. *Verification of Subjective Will and Preferences*

The analysis in section IV.A.1 depends on having sufficient information to ascertain whether the facts and circumstances of a particular case meets the description of $B \geq P$ or $B < P$. Denoting what the incapable individual had transferred to the capable party, P is usually readily observable and verifiable. However, B—the incapable individual's valuation if she had capacity—can be hard to verify. To be sure, there is no need to ascertain the *exact* value of B; courts only need to ascertain whether B is smaller than P or not. This Section discusses how, in practice, the proposed substituted-judgment defense may elicit information regarding B relative to P.

An individual's own choices made in a mentally capable state are evidence of her subjective will and preferences.[266] To elicit such evidence, the proposed substitute-judgment defense typically looks to the incapable individual's past conduct, transacting patterns, and relational norms.[267] To be sure, capacity disputes often concern one-off transactions that the individual may not have had an opportunity to make in the past.[268] However, typical cases concern seniors who have had a lifetime of opportunities to make use of estate-planning instruments, such as wills, will substitutes, and wish letters.[269] Seniors also tend to have left behind a "memory trail" of informed opinions and value preferences in the minds of their family and friends.[270] Moreover, transactions made in the final years of an individual's life may be the final manifestation of

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266 *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 222–29 (1993) (discussing how the substituted-judgment standard promotes individual autonomy); Jaworska, *supra* note 261, § 1 (arguing that past values or patters of decision making are well-suited for determining the preferences of a formerly capable individual); B. Douglas Bernheim, *Behavioral Welfare Economics*, 7 J. EUR. ECON. ASS'N 267, 290–93 (2009) (justifying a choice-based welfare criterion on instrumental grounds and on the basis of respecting individual autonomy).

267 *See, e.g.*, *In re* Brice's Guardianship, 8 N.W.2d 576, 578 (Iowa 1943) (affirming finding that the incapable individual would have made the transaction if capable).

268 *See, e.g.*, Dubree v. Blackwell, 67 S.W.3d 286, 288 (Tex. App. 2001) (discussing transferring title to house and bank accounts).

269 *See, e.g.*, *In re* Miller, 935 N.E.2d 729, 733–34 (Ind. Ct. App. 2010) (discussing capacity dispute involving an individual with estate plan).

270 Terry Carney, *Adult Guardianship and Other Financial Planning Mechanisms for People with Cognitive Impairment in Australia*, *in* SPECIAL NEEDS FINANCIAL PLANNING: A COMPARATIVE PERSPECTIVE 3, 5–6 (Lusina Ho & Rebecca Lee eds., 2019).

property-sharing and gift-giving norms within a close familial or personal relationship.[271] The substituted-judgment defense directs courts to consider the incapable individual's past relational norms and estate plan, in addition to her past conduct and transacting patterns.

Dubree v. Blackwell can illustrate how the proposed defense can operate to limit or deny the power of avoidance.[272] In that case, Lillie—an elderly woman—transferred her house to Edward—her lifelong friend and caregiver—a few months before she died. Lillie also changed her bank account to a joint account with Edward with a right of survivorship. After Lillie had passed away, her nephew—who was entitled to inherit her estate—sought to avoid these transactions on grounds of mental incapacity and undue influence.[273] Medical experts and lay witnesses gave conflicting testimonies regarding Lillie's mental ability at the time of making the transactions.[274] Refusing to allow avoidance, the Texas court gave significant weight to a long history of property sharing and of a close personal relationship between Lillie and Edward.[275] The court practically applied the substituted-judgment defense: Lillie's past dealings with Edward and their relational norms indicated that she would have made the transactions if she had capacity.

To be sure, there are cases involving conflicting evidence of what the incapable individual would have wanted if she had capacity.[276] In these cases, there should be a rebuttable presumption in favor of upholding her testamentary intent expressed in any properly executed will or will substitute. Prevailing American law requires that a valid will (or will substitute) be executed in a mentally capable state.[277] There are also formality requirements to be satisfied. For example, an attested will needs to be in writing, signed by the individual and attested by witnesses.[278] Similarly, a revocable trust over

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271 *See generally* Leslie, *Enforcing Family Promises*, *supra* note 185, at 564–78 (discussing the cultural norm of "mandatory reciprocity" in gift giving within families as a means of building trust).

272 *Dubree*, 67 S.W.3d at 288.

273 *Id.* at 288, 290–91. Within the scope of cases concerning "mentally weak" individuals, the doctrine of undue influence is functionally equivalent to the mental capacity doctrine. *See supra* subpart II.B.

274 *Dubree*, 67 S.W.3d at 290–91.

275 *Id.* at 288.

276 *See* Whitton & Frolik, *Theory and Reality*, *supra* note 202, at 1492–93.

277 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (AM. LAW INST. 2003).

278 *Id.* § 3.1. Courts may excuse some harmless errors in executing a will. *Id.* § 3.3.

real property—a form of will substitute—needs to be in writing and signed.[279] Estate-planning instruments that satisfy formality requirements are solid evidence of the individual's wishes. Formality requirements are also imposed to caution the individual against making ill-considered choices. Moreover, formality requirements may protect the individual from fraud and imposition. Finally, formality requirements function to facilitate standardization, so that testamentary intent expressed in wills (or will substitutes) can be distinguished from other expressions of intent.[280] Thus properly executed wills and will substitutes should be afforded special evidential weight in the application of the proposed substituted-judgment defense.

A variation of the facts in *Farnum v. Silvano* can illustrate the practical operation of the proposed presumption.[281] Recall that in that case, an elderly incapable woman—Viola—sold her house for about half of its fair market value to her young friend—Joseph—in whom she had trust and confidence.[282] Suppose that under her validly executed will, her nephew Harry was entitled to inherit her house. Harry brought the avoidance claim to recover his expected inheritance. The proposed substituted-judgment defense would enshrine what Viola would have wanted if she had capacity. In cases of conflicting evidence, the proposed presumption would operate to uphold Viola's testamentary intent expressed in her validly executed will: to gift her house to Harry. The result would be avoidance of the sale to Joseph.

The proposed presumption in favor of upholding testamentary intent expressed in valid wills and will substitutes should nonetheless be rebuttable. As Professor Adam Hirsch observed, estate-planning instruments made in the past can be obsolete.[283] These "stale" instruments are practically "frozen" upon their makers losing mental capacity.[284] For example, a will made long before the loss of capacity may fail to provide for

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279 RESTATEMENT (THIRD) OF TRUSTS §§ 23, 24 cmt. a (AM. LAW INST. 2003).

280 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 2003); RESTATEMENT (SECOND) OF CONTRACTS § 72 cmt. c. (AM. LAW INST. 1981); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–03 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492–97 (1975).

281 540 N.E.2d 202, 203 (Mass. App. Ct. 1989).

282 *Id.* at 203.

283 Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 612 (2009) [hereinafter Hirsch, *Text and Time*] (quoting Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L. REV. 179, 190 (1963)).

284 *Id.* at 611, 615.

a caregiver who primarily gives care to the incapable individual in her final years of life. Yet a desire to reward caregiving may well be consistent with the individual's past transactional preferences before she lost capacity.[285] In this example, the will is "stale"; circumstances have changed such that the incapable individual would likely update her estate plan if she had capacity.[286] Thus, clear and convincing evidence of "staleness" of the relevant will or will substitute should rebut the proposed presumption. Adoption of a heightened standard of proof reflects the consideration that due evidential weight should be afforded to testamentary instruments that comply with formality requirements.

Adoption of the substituted-judgment defense would not undermine the role of psychiatric evidence. The defense merely qualifies the power to avoid transactions for want of capacity; there continues to be a need to ask the threshold question of whether the individual lacked sufficient mental ability at the time of making the impugned transaction.[287] In other words, the substituted-judgment defense would become a second obstacle to successful avoidance; the threshold question of mental ability remains the first obstacle. Hence, adoption of the substituted-judgment defense does not prevent psychiatric experts from opining on mental ability.

However, adoption of the substituted-judgment defense would preclude judicial consideration of whether the impugned transaction is abnormal (in the sense of deviating from the transactions of reasonably competent people).[288] What a particular individual would have done if she had capacity depends little on what other people tend to do. In the notation of the stylized example, whether $B \geq P$ or $B < P$ is specific to the individual; B does not depend on other people's preferences and choices. What the individual would have done may well be deviant or eccentric.[289] Unlike evidence of the individual's own transacting patterns and relational norms, evidence of what other people tend to do has little bearing on whether $B \geq P$ or B

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285 *See, e.g.*, Dubree v. Blackwell, 67 S.W.3d 286, 288, 290–91 (Tex. App. 2001). For discussion of the case, see *supra* text accompanying notes 272–275.

286 *See* Hirsch, *Text and Time*, *supra* note 283, at 611, 615.

287 *See supra* notes 61–65 and accompanying text.

288 *See* Green, *Major Premise*, *supra* note 14, at 309.

289 *See generally* Alexander & Szasz, *supra* note 35, at 541, 559 (criticizing considerations of substantive abnormality because they potentially deprive personal autonomy and punish people with mental disorders for deviancy or eccentricity).

< P. Hence, contrary to prevailing doctrinal theories,[290] introducing the substituted-judgment defense would preclude consideration of abnormality factors.

3. *Comparison with the Best-Interest Standard*

As an alternative to the substituted-judgment standard, guardianship law and the law of trusts sometimes apply the *best-interest standard* to make a decision on behalf of an incapable individual.[291] This standard directs the court to do what is objectively best for a reasonable or rational person in like circumstances.[292] This standard is highly sensitive to context. While the individual's known wishes are a factor in determining what amounts to her best interest,[293] the court may also consider the individual's financial circumstances, tax liabilities, general economic conditions, and many other factors.[294]

The following explains why I prefer to qualify the power to avoid transactions for want of capacity with the substituted-judgment standard rather than the best-interest standard. First, the best-interest standard is more likely to lead to paternalistic decisions based on the decision maker's own values, stereotypes, and prejudices.[295] *In re Keri* can illustrate this point.[296] In that case, the sons of an elderly incapable woman—Keri—wanted to move her from her own house into a

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290 *See generally supra* subpart II.A, section II.C.2 (discussing present doctrinal theories of mental capacity).

291 *See* UNIF. PROBATE CODE §§ 5-314(a), 5-418(b) (amended 2010); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 418(d) (UNIF. LAW COMM'N 2017).

292 *See supra* note 258 and accompanying text; Jaworska, *supra* note 261, §1; Frolik & Whitton, *A Proposal for Reform*, *supra* note 260, at 751–57; Whitton & Frolik, *Theory and Reality*, *supra* note 202, at 1505–17 (discussing and comparing the best-interest standard, the substituted-judgment standard, as well as their expanded and hybrid versions).

293 *See* UNIF. POWER OF ATTORNEY ACT § 114 cmt. (UNIF. LAW COMM'N 2006); UNIF. PROBATE CODE §§ 5-314(a), 5-418(b) (amended 2010).

294 *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 418(d) (UNIF. LAW COMM'N 2017).

295 *See, e.g.*, BRASHIER, *supra* note 173, at 208 (stating that a discretionary system would maximizes the possibility that the judge's prejudices will taint the outcome); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 633, 641–44 (1982) (rejecting paternalistic decision making that purports to promote the best interests of incapable individuals and providing examples of how such decision making can be affected by the decision maker's biases); Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 480, 482 (1997) (discussing the presence of ageist paternalism among health care professionals, lawyers, and others).

296 853 A.2d 909, 911–912 (N.J. 2004).

nursing home.[297] Keri's will left her estate to her sons, but they would receive nothing if her assets were spent on her nursing-home costs.[298] The sons thus devised a plan to accelerate her eligibility for Medicaid reimbursement of her nursing-home costs.[299] They planned to sell Keri's house and transfer a significant proportion of the proceeds to themselves.[300] The practical effect of the sons' plan was to shift the financial burden of supporting Keri from themselves to the state. In this case, application of the proposed substituted-judgment standard would allow the plan to the extent that it reflects what Keri would have wanted if she had capacity.[301] Application of the best-interest standard, on the other hand, can allow courts to rule according to their own assumptions regarding what tends to benefit a reasonable (or rational) person in Keri's position. For instance, approving the sons' plan, the New Jersey court in *In re Keri* assumed that it was in the best interest of an incapable individual to increase her children's inheritance at the expense of the state.[302] Some other courts make the opposite assumption to disapprove similar plans.[303] In extreme cases, some courts even rule according to their own notion of public policy and own view regarding the interests of the taxpayers.[304]

Second, the substituted-judgment standard tends to be more determinate and less informationally demanding to apply than the best-interest standard. The substituted-judgment standard tends to focus judicial attention upon the incapable individual's past behaviors. By comparison, in addition to past behaviors, the best-interest standard expands the judicial inquiry into a broad range of contextual factors.[305] Moreover, as Professors Elizabeth Scott and Robert Emery argued, the largely private nature of family life keeps much relevant infor-

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297 96a *Id.* at 911.

298 *Id.* at 911–12, 917–18.

299 97a *Id.* at 911.

300 *Id.* at 911–12.

301 *Cf. In re* M.L., 879 N.Y.S.2d 919, 920–21, 923 (N.Y. Sup. Ct. 2009) (holding that gifting assets to the beneficiary of the incapable individual's will for the purpose of Medicaid planning can be conducted on the condition of a trust being established to meet the personal needs of the individual).

302 *In re Keri*, 853 A.2d at 915–16.

303 *See, e.g.*, *In re* Estate of Berger, 520 N.E.2d 690, 704 (Ill. App. Ct. 1987) (rejecting gifts to the incapable individual's children notwithstanding tax benefits).

304 *See, e.g.*, *In re* Guardianship of F.E.H., 453 N.W.2d 882, 887 (Wis. 1990) (quoting the trial court's statement that "to expect the public to support the parents while the children take the assets without encumbrance is, in my view, contrary to public policy . . . .").

305 *See* Frolik & Whitton, *A Proposal for Reform*, *supra* note 260, at 752.

mation hidden from outsiders, such as a court.[306] Another problem pertains to the need to weigh or rank inherently incommensurable best-interest factors.[307] Overall, the best-interest standard can only be less determinate and more informationally demanding to apply than the substituted-judgment standard.

Generating a high degree of indeterminacy, the best-interest standard is ill-suited for resolving inheritance disputes in American jurisdictions. American legislatures have consistently rejected proposals to expand judicial discretion in the law of inheritance.[308] While rules can be informationally demanding and costly to promulgate ex ante, standards can generate high compliance costs and litigation costs to litigants and high decisional costs to courts.[309] Introducing a substantial judicial discretion to resolve inheritance disputes also heightens the risk of judges acting in accordance with "prejudices—particularly those against traditionally disfavored groups such as unmarried cohabitants, homosexuals and nonmarital children."[310] Thus, being more determinate than the best-interest standard, the substituted-judgment standard is more suitable for resolving inheritance disputes in American jurisdictions.

4. *Inability to Respect "New" Expressions of Preferences?*

Showing great deference to the incapable individual's past conduct, transacting patterns, and relational norms, the substituted-judgment standard tends to neglect her transactional preferences expressed in a state of incapacity. If these "new" expressions of preferences contradict the individual's past wishes and behaviors, then the substituted-judgment standard may be subject to the criticism by some Critical Legal Theorists that it effectuates extreme paternalism[311] and deprivation of

306 *See* Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 L. & CONTEMP. PROBS. 69, 74 (2014) (criticizing best-interest standards).

307 *Id.* at 75.

308 *See* SITKOFF & DUKEMINIER, *supra* note 79, at 570.

309 *See, e.g.*, Kaplow, *supra* note 87, at 560, 562–63 (discussing how rules and standards generate different costs before and after individuals act).

310 BRASHIER, *supra* note 173, at 208.

311 *See* Kennedy, *supra* note 295, at 633, 641–44 (criticizing the mental capacity doctrine as an extreme case of paternalism). Professor Kennedy's criticism in part depends on the understanding that the mental capacity doctrine grants a power of avoidance to the *capable* transacting party and grants no power to avoid contracts for "necessaries." *Id.* at 633. The modern view among American courts is that the capable transacting party has no power of avoidance and that contracts for "necessaries" are voidable. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 7

personal autonomy and dignity.[312] The tendency to respect the past seems to prioritize the individual's capable "past self" over her incapable "present self."[313]

This section will defend the proposed substituted-judgment defense against that criticism. First, if adopted to qualify the mental capacity doctrine, the substituted-judgment defense would increase the likelihood of transactions surviving avoidance attempts. Critical Legal Theorists criticize courts for paternalistically avoiding, not upholding, transactions affected by incapacity.[314] Thus, the proposed defense avoids their criticism.

Second, adoption of the substituted-judgment defense does not alleviate the need to prove mental incapacity. If the individual were capable of choosing subjectively beneficial transactions at the time of transacting, then the court should hold that she had capacity at that time; there would then be no occasion for applying the substituted-judgment defense. Critical Legal Theorists are really directing their criticisms at the existing threshold tests of mental incapacity[315] rather than any qualification on the resulting power of avoidance. The substituted-judgment defense would become such a qualification.

Third, to remove any possibility of paternalism and deprivation of personal autonomy would require a complete eradication of the mental capacity doctrine. It would also require complete eradication of other functionally similar doctrines, especially undue influence (when applied to "mentally weak" individuals);[316] eradication of the mental capacity doctrine would have no practical impact if those who seek avoidance could just argue undue influence instead. Such complete eradication would neglect the alarming problem of elder financial exploitation.[317] Complete eradication would also encourage courts to stretch other doctrines (or invent new doctrines) to resolve cases that would have been covered by the mental capacity doctrine. This happened in the eighteenth and

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cmt. b, 15 cmt. e (AM. LAW INST. 1981); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmt. c (AM. LAW INST. 2011). *See generally infra* section IV.B.2 (arguing that the mental capacity doctrine should still allow recovery of costs of supplying necessaries).

312 *See* Alexander & Szasz, *supra* note 35, at 541.

313 *See generally* Jaworska, *supra* note 261, § 3.1 (discussing "past self" and "present self").

314 *See* Kennedy, *supra* note 295, at 633, 641–44; Alexander & Szasz, *supra* note 35, at 541.

315 *See supra* text accompanying notes 61–65.

316 *See generally supra* subpart II.B (discussing the undue influence doctrine).

317 *See supra* subpart I.B.

nineteenth centuries, when courts created the cognitive-incapacity test (and the "mental weakness" strand of the undue influence doctrine) in part due to dissatisfaction with the narrow definitions of mental incapacity in guardianship law.[318] At the very least, retaining and reforming the mental capacity doctrine force courts to be transparent about their attitude toward mental disorders and elder financial exploitation.

B. Consequences of Successful Avoidance

Subpart IV.A has argued for the adoption of the substituted-judgment standard to preclude avoidance in cases where the incapable individual would have made the impugned transaction if she had capacity. That proposal aims to uphold transactions that meet the description of $B \geq P$ in the stylized example developed in section IV.A.1: the incapable individual's "true" valuation (B) of what she receives pursuant to the transaction is no smaller than what she transacts away (P). This Section now turns to cases where $B < P$.

1. *Beneficial Goods and Services*

A finding that a transaction should be avoided for want of capacity leads to the question of what remedies should follow.[319] The mental capacity doctrine is a double-edged sword; the possibility of avoidance ex post may discourage capable parties from entering into mutually beneficial transactions with incapable individuals ex ante.[320] This Section will propose to optimize the remedial consequences of successful avoidance to preserve incentives to supply beneficial goods and services.

A modification of the stylized example introduced in section IV.A.1 can illustrate the economic intuition underlying the reform to be proposed. Suppose that, in the stylized example, the capable transacting party had incurred the costs of C to supply some good or service to the incapable individual. (If such costs were uncertain at the time of supplying the good or service, then let C denote the expected costs.) Suppose further that B—the "true" benefit of the good or service to the incapable individual—was nonetheless smaller than what she had trans-

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318 *See supra* section II.C.1.

319 *See generally supra* notes 85–86 and accompanying text (discussing the vagueness of remedies for successful avoidance).

320 *See generally supra* notes 12, 200–02 and accompanying text (arguing that avoidance of transactions for want of capacity may discourage transactions with potentially incapable individuals).

ferred away, P. Thus B < P; the proposed substituted-judgment defense would not preclude avoidance of the transaction. The successful claimant would recover P from the capable transacting party and would pay a reasonable price R to the capable transacting party. The issue is what R should be.

The capable transacting party should be entitled to recover her costs if she can prove (by preponderance of evidence) that such costs were no greater than the benefits of the transaction to the incapable individual; in notation, R = C whenever B ≥ C. In these cases, the transaction facilitated the provision of some good or service that advanced joint welfare. Although avoidance should be allowed because the incapable individual had paid too much (B < P), the capable transacting party should be allowed to recover her costs. Without such recovery, suppliers of beneficial goods and services would be discouraged from benefiting incapable individuals and advancing joint welfare.

The elder-care problem can illustrate the practical implications of these economic arguments. Section III.A.3 has shown that there is a shortage of family caregivers. Care recipients tend to benefit from receiving care; incentivizing caregiving would promote their individual welfare. Caregiving also promotes joint welfare if the benefits to the care recipients exceed the costs to the caregivers. Thus, to the extent that a caregiver and a care recipient have made a transaction with an explicit or implicit intention of facilitating valuable caregiving, welfare considerations would generally caution against avoidance. In some cases, however, the transaction may impose too high a price on the care recipient (in notation, B < P). In these cases, although avoidance should be allowed (and would not be precluded by the proposed substituted-judgment defense), caregiving could still be joint-welfare-enhancing (in notation, B > C). If B > C, then welfare considerations would justify allowing the caregiver to recover her costs (C).

To determine whether to allow recovery of C, the court should ask whether the incapable individual would have paid C for what she had received under the avoided transaction if she had capacity; in notation, whether B ≥ C or B < C. This question is different from the question of whether the individual would have *made the transaction* if she had capacity; in notation, whether B ≥ P or B < P.[321] The recovery-of-costs question (whether B ≥ C or B < C) pertains to whether to allow recovery of C notwithstanding avoidance of the transaction, while the

321 *See generally supra* subpart IV.A (discussing adoption of the substituted-judgment defense).

avoidance question (whether $B \geq P$ or $B < P$) determines whether the transaction should be avoided.

To illustrate the finer differences between the recovery-of-costs question and the avoidance question, consider again *Farnum v. Silvano*, in which an elderly woman sold her house for about half of its fair value to her young friend.[322] If asked in that case, the avoidance question would be whether the woman would have sold her house at such a low price if she had capacity. The recovery-of-costs question, on the other hand, would be whether the young friend should be allowed to recover the costs of any services provided to the elderly woman. Suppose the young friend could prove that he had indeed provided valuable services, and that the elderly woman would have been willing to pay the costs of providing these services if she had capacity. Then the young friend should be allowed to recover these costs even if the sale of the house was avoided.

An alternative to the present proposal is to set $R = B$. If courts could observe and verify the exact value of B, then allowing avoidance and setting $R = B$ would tend to maximize joint welfare. In this hypothetical scenario, the capable transacting party's own payoff in the event of avoidance would be $B - C$ (excluding litigation or transaction costs)—the same as joint welfare. Hence, she would have an incentive to make transactions that advance joint welfare. At the same time, the incapable individual's payoff in the event of successful avoidance would be at least 0 (again, excluding litigation or transaction costs). If the incapable individual were to pay R, then she received B and paid $R = B$. Hence, setting $R = B$ would not harm the welfare of the incapable individual.

However, my proposal to set $R = C$ tends to be less informationally demanding than the alternative proposal to set $R = B$. The capable transacting party presumably knows her own costs of transacting, C, and can provide information regarding C to a court or another third party. On the other hand, there tends to be significant informational challenges to observe and verify B—the exact value the incapable individual would assign to the transaction if she had capacity. As section III.A.1 has shown, typical capacity disputes concerned potentially incapable individuals who had passed away by the time of litigation. While evidence of her past transacting patterns and preferences may shed light on B *relative* to C (in order to ascertain whether $B \geq C$ or $B < C$), such evidence would unlikely be

322 540 N.E.2d 202 (Mass. App. Ct. 1989).

sufficient to enable a precise inference of the exact value of B. Moreover, there is no obvious proxy of B. Market prices are usually poor proxies of B in cases concerning relatives and friends; transactions between relatives and friends do not take place in a marketplace.[323] The price P stipulated by the avoided transaction also tends to be a poor proxy of B because of the antecedent finding that the incapable individual would not have paid P if she had capacity.[324] Hence, I propose to set R = C instead of R = B.

2. *Necessaries*

In many cases, there may be insufficient evidence to ascertain whether B ≥ C or B < C. In particular, caregiving provided in a familial or personal relationship—which is largely private—can be hard to describe and document.[325] Insufficient records can prevent family-and-friend caregivers from proving the value of their services to courts or other third parties. Focusing on cases of evidential deficiency, this Section will argue that the mental capacity doctrine should still allow recovery of costs if the avoided transaction facilitated the provision of necessities of life to the incapable individual.

The traditional formulation of the mental capacity doctrine has a *necessaries exception*: transactional incapacity grants only a severely limited power to avoid contracts for the supply of necessities of life.[326] Dating back to medieval English law, the necessaries exception aims to preserve incentives to supply necessaries to incapable individuals.[327] Centuries of case law has classified some goods and services as objective necessaries; these include food, clothing, housing, and medical services.[328] Courts typically respect the existing classification unless there is evidence proving that the relevant good or ser-

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323 *See supra* notes 200–202 and accompanying text (comparing family-and-friend caregivers and professional caregivers); *see also supra* section III.B.1 (arguing that cognitive deficiency and other forms of mental limitations cause inefficiencies in marketplaces in which incapable individuals transact with businesses).

324 *See generally supra* subpart IV.A (explaining that the substituted-judgment doctrine would guide courts to make a decision that the individual would have made if she had mental capacity).

325 *See* Scott & Emery, *supra* note 306, at 74.

326 *See generally* 5 WILLISTON & LORD, *supra* note 28, §§ 9:18–21, 10:7 (discussing liability for necessity). *Contra* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 16 cmt. g, reporter's note e, 33 cmt. d (AM. LAW INST. 2011) (rejecting "necessaries" as a distinct doctrinal category).

327 *See* 2 COKE, *supra* note 93, § 172.a.

328 *See* 5 WILLISTON & LORD, *supra* note 28, §§ 9:19, 10:7.

vice is not subjectively beneficial to the incapable individual.[329] Hence, in the presence of evidential deficiency, the necessaries exception sets a majoritarian default position which holds that the potential error costs of avoidance outweigh its potential benefits for whole categories of contracts.

There remains the question of what suppliers of necessaries should recover from the incapable individual (or her estate). In the traditional view, the necessaries exception denies the power to avoid contracts for necessaries, so the incapable individual is liable to pay the contract price for the necessary even if she has not yet received it.[330] Modern American law generally allows avoidance but imposes on the incapable individual (or her estate) a liability in restitution to pay for any necessaries that she has already received;[331] such restitutionary liability is backward-looking and does not arise if neither contracting party has performed.[332] Under the Restatement (Third) of Restitution and Unjust Enrichment, the incapable individual's (or her estate's) restitutionary liability is a matter of judicial discretion, which depends on factors such as her subjective valuation (to the extent ascertainable), market prices, the costs of supplying the necessary, any inequitable conduct, and any knowledge of the incapacity.[333]

The capable transacting party's costs of supplying the necessary should be the preferred measure of recovery. As section IV.B.1 has argued, when an avoided transaction facilitated the supply of a good or service that generated more benefits to the incapable individual than costs to the supplier, the supplier should be allowed to recover such costs. A cost-based measure of recovery promotes the incapable individual's own welfare as

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329 *See id.* §§ 9:19, 10:7; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 33 cmt. d (AM. LAW INST. 2011).

330 2 COKE, *supra* note 93, § 172.a; 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 418 (2d ed. 1937); 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 632 (1924); 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 51–52 (1925).

331 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 33 cmts. c, d, reporter's notes c, d (AM. LAW INST. 2011); 5 WILLISTON & LORD, *supra* note 28, §§ 9:18–21, 10:7 (citations omitted).

332 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 16 cmt. a, 33 cmt. a (AM. LAW INST. 2011) (stating that no restitutionary liability arises from a wholly executory contract). In modern transactional capacity cases, the main difference between the historical and modern views pertains to how to measure the "price" of the necessary. This is because the capable transacting party typically has already performed her contractual obligation (if any) by the time of litigation. *See generally supra* subpart III.A; the Online Appendix (describing a survey of modern cases).

333 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmts. a, e, §§ 49, 54 (AM. LAW INST. 2011).

well as the joint welfare of all contracting parties. This argument also applies to transactions for the supply of necessaries; necessaries are just a class of goods and services that benefit the incapable individual from an objective perspective, subject always to any evidence of subjective valuation indicating the contrary. Unless there is evidence showing that the incapable individual would not have paid the costs of supplying the particular necessary if she had capacity,[334] such costs should be the preferred measure of recovery.

The proposed cost-based measure of recovery is more determinate than the flexible approach under the Restatement (Third) of Restitution and Unjust Enrichment.[335] First, if the capable transacting party can provide sufficient evidence to prove her costs of supplying the necessary, then she can just recover such costs under the proposed measure; the judicial inquiry is narrowed to one factor—the capable party's costs—and there is no residual discretion to substitute an alternative measure. By comparison, the flexible approach under the Restatement would expand the scope of judicial inquiry to cover a broad range of contextual factors and alternative measures.[336] Second, if the capable party cannot provide sufficient evidence to prove her costs, then the proposed cost-based measure would look for the best *approximation* of her costs. In these cases, the proposed cost-based measure would leave room for judicial discretion but no broader than under the Restatement.[337] Thus, in these cases, the proposed measure is no more indeterminate, no more complex, and no more informationally demanding to apply than the Restatement approach.

C. Summary of Proposed Reforms

Taking a law-and-economics approach, this Part proposes reforms to the mental capacity doctrine in relation to transactions between close relatives and friends. The main proposal is to introduce a substituted-judgment defense to qualify the power to avoid transactions for want of capacity. This defense precludes avoidance in cases where the incapable individual would have made the impugned transaction if she had capacity. The other reform proposals focus on cases where an avoided transaction facilitated the supply of a good or service

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334 *See supra* subpart IV.A.

335 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 16 cmts. a, e, §§ 49, 54 (AM. LAW INST. 2011).

336 *See id.* §§ 49, 54.

337 *See id.*

(especially a necessity of life) that generated more benefits to the incapable individual than costs to the capable transacting party. In these cases, the capable party should be allowed to recover her costs. All reform proposals aim to promote the welfare of the incapable individual and the joint welfare of all transacting parties.

In sum, under the proposed reforms, the mental capacity doctrine would take the following form when applied to a transaction between a potentially incapable individual and her close relative or friend:

(1) The transaction should not be avoided if the individual had mental capacity at the time of making the transaction.
(2) Even if the individual lacked mental capacity, the transaction should still not be avoided if the capable transacting party can establish the substituted-judgment defense: the incapable individual would have made the transaction if she had capacity.
(3) If the individual lacked mental capacity and the capable party fails to establish the substituted-judgment defense, then the transaction should be avoided. The capable party should return any benefit that she has received pursuant to the avoided transaction. Her recovery from the incapable individual (or the individual's estate) should be as follows:
    a. Suppose the incapable individual would have paid the costs of supplying her benefits under the avoided transaction if she had capacity. In this case, the capable party should recover such costs.
    b. Suppose the capable party supplied a necessary to the incapable individual pursuant to the avoided transaction. Then the capable party should recover the costs of supplying the necessary.
    c. The capable party should not recover in other cases.

CONCLUSION

The mental capacity doctrine is a double-edged sword. On the one hand, the doctrine grants a power to avoid exploitative transactions and disgorge the ill-gotten gains of exploitation. On the other hand, my survey of modern cases reveals that avoidance claims were typically brought by a relative who expected to inherit from the potentially incapable individual.[338]

338 *See generally supra* notes 160–161 and accompanying text and figures (discussing claims by relatives who expect to inherit from potentially incapable individuals).

Rather than the individual's interests, the claimant could be driven by a desire to increase her expected inheritance. Yet prevailing doctrinal theories mistakenly assume that the interests of the claimant and of the potentially incapable individual are necessarily aligned.[339] Theoretical and normative considerations are meant to guide the exercise of a substantial judicial discretion to assess the costs and benefits of avoidance on a case-by-case basis.[340] Distorted by flawed theoretical considerations, the mental capacity doctrine can harm the welfare of many seniors by unduly limiting their ability to benefit their close relatives and friends, reward informal caregiving, and recruit their preferred caregivers.

Taking a law-and-economics approach, this Article proposes to limit the operation of the mental capacity doctrine in close families and personal relationships. The prevailing doctrinal theories pay insufficient attention to important differences between transactions between close relatives and friends on the one hand, and transactions with businesses on the other hand. Transactions between close relatives and friends often take place in the estate-planning context. In this context, a broad power of avoidance tends to incentivize avoidance claims that may defeat the testamentary intent of the potentially incapable individual. In contrast, avoidance claims against transactions with businesses (such as nursing-home contracts and annuities) are unlikely to affect the estate plan of the potentially incapable individual. When applied to transactions between close relatives and friends, the mental capacity doctrine should not generate a power of avoidance if the incapable individual would have made the transaction in a state of capacity. However, the doctrine should continue to apply with full rigor to transactions between potentially incapable individuals and profit-driven businesses.

In sum, the problem of elder financial abuse ought to be resolved in a way that advances the welfare of the elderly, as defined by their own will and preferences. Too broad and indeterminate, the mental capacity doctrine in prevailing American law is ill-suited for resolving typical capacity disputes in the present era of aging population. The doctrine ought to be reformulated to deter and sanction elder financial abuse without undue intrusion into close families and personal relationships.

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339 *See generally supra* section III.A.1 (arguing that the prevailing doctrinal theories neglect the role of inheritance expectations).

340 *See generally supra* section II.C.2 (discussing recent developments that favor a cost-benefit analysis on a case-by-case basis).

ELDER FINANCIAL ABUSE: CAPACITY LAW AND ECONOMICS—SURVEY OF MODERN CASES

Ben Chen

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WESTLAW 2013-18 SURVEY

The following table contains thirty cases decided in 2013-18 that are listed under Westlaw's West KeyNumber System, k-92. This table excludes cases that did not reach issues regarding mental capacity; and cases concerning a beach of fiduciary duty.

Court	Year	Case name	Alleged mental conditions	Old age?	Transaction(s)	Active parties	Identity of capable party	Cognitive test applied	Capable under cognitive test	Volitional test applied	Capable under volitional test	Inequitable conduct raised	Inequitable conduct found	Transaction(s) avoided
E.D.N.Y.	2013	Rivera v. Sovereign Bank	Post-traumatic stress disorder, mild postpartum depression, adjustment disorder and pronounced anxiety	No	Release of liability	Self v. employer	Business	Yes	Yes	Yes	N.A.	N.A.	N.A.	No
D.C. Ct. App.	2013	Hernandez v. Banks	Old age, guardian and conservator appointed	Yes	Lease	Estate v. landlord	Business	Yes	No	Yes	N.A.	No	N.A.	Remanded

Court	Year	Case name	Alleged mental conditions	Old age?	Transaction(s)	Active parties	Identity of capable party	Cognitive test applied	Capable under cognitive test	Volitional test applied	Capable under volitional test	Inequitable conduct raised	Inequitable conduct found	Transaction(s) avoided
N.Y. App. Div.	2014	Thomas v. Gray	Alcoholism	No	Purchase option agreement in lease	Brother (landlord) v. tenant	Business	Yes	Yes	N.A.	N.A.	Fraud, duress, coercion, undue influence	No	No
Miss. Ct. App.	2014	Legacy Hall of Fame, Inc. v. Transport Trailer Service. Inc.,	Extreme stress	No	Settlement	Employer v. contractor	Business	Yes	Yes	N.A.	N.A.	No	N.A.	No
Tex. Ct. App.	2014	ReadyOne Industries, Inc. v. Flores	No evidence	No	Arbitration agreement in employment agreement	Self v. employer	Business	Yes	Yes	N.A.	N.A.	Fraudulent inducement, procedural unconscionability, false misrepresentation	No	No
Ky. Ct. App.	2014	Pikeville Medical Center, Inc. v. Bevins	Old age, poor health, end stage renal failure	Yes	Arbitration agreement in admission agreements	Estate v. hospital	Business	Yes	No	N.A.	N.A.	No	N.A.	Yes
N.D. Miss.	2014	Liberty Health & Rehab of Indianola, LLC v. Howarth	Old age, profound diminishment, significant disconnect from reality	Yes	Arbitration agreement in admission agreements	Estate v. nursing home	Business	Yes	No	N.A.	N.A.	No	N.A.	Yes
Mo.	2014	Ivie v. Smith	Old age, paranoia, dementia, cognitive impairment, Alzheimer's	Yes	Retitling bank accounts and vehicles, changes to beneficiary designations in trusts	Half siblings v. husband	Family	Yes	No	N.A.	N.A.	Undue influence	Yes	Yes

Court	Year	Case name	Alleged mental conditions	Old age?	Transaction(s)	Active parties	Identity of capable party	Cognitive test applied	Capable under cognitive test	Volitional test applied	Capable under volitional test	Inequitable conduct raised	Inequitable conduct found	Transaction(s) avoided
D.C.	2015	Renchard v. Prince William Marine Sales	Deaf	No	Purchase of yacht, charges for maintenance and upgrades	Self v. seller	Business	Yes	N.A.	N.A.	N.A.	Fraud, conspiracy, unjust enrichment	N.A.	Remanded
Alaska	2015	Erkins v. Alaska Trustee	N.A. (summary disposition on other grounds)	No	Loan	Self v. subsequent good faith purchaser bank	Business	Yes	N.A.	Yes	N.A.	Good faith	No	No
La. Ct. App.	2015	Noel v. Noel	Old age, stroke, confusion, lack of awareness and memory	Yes	Revocation of real estate transactions through power of attorney	Children v. spouse and child	Family	Yes	N.A.	No	N.A.	Fraud	N.A.	Remanded
Miss. Ct. App.	2015	In re Estate of Holmes	Old age, Alzheimer's	Yes	Health care necessaries	Estate (daughter) v. son's estate (grandson)	Family	Unclear	Incapacity assumed	Unclear	Incapacity assumed	No	N.A.	No (liability to pay for necessaries found but claim is time barred)
Ga. Ct. App.	2016	Kindred Nursing Centers Limited Partnership v. Chrzanowski	Old age, dementia, chronic obstructive pulmonary disease, coronary											
artery disease, hypertension	Yes	Arbitration agreement in admission agreements	Estate v. nursing home	Business	Yes	N.A.	N.A.	N.A.	No	N.A.	Remanded			

Court	Year	Case name	Alleged mental conditions	Old age?	Transaction(s)	Active parties	Identity of capable party	Cognitive test applied	Capable under cognitive test	Volitional test applied	Capable under volitional test	Inequitable conduct raised	Inequitable conduct found	Transaction(s) avoided
Ind. Ct. App.	2016	Maynard v. Golden Living,	Old age	Yes	Arbitration agreement in admission agreements	Estate v. nursing home	Business	Yes	Yes	N.A.	N.A.	No	N.A.	No
Ark. Ct. App.	2016	Black v. Duffie	Old age, mild mental retardation, infirmity, some amount of confusion	Yes	Transfers of land and share in hunting club	Guardian/ nephew v. family friends	Social	Yes	No	N.A.	N.A.	Undue influence, inadequate consideration	Yes	Yes
N.D. Miss.	2016	Dalon v. Ruleville Nursing and Rehabilitation Center	Old age, depression, agitation, psychosis, confused, forgetful, suffering from either severe or moderate cognitive impairments and Huntington's Disease	Yes	Arbitration agreement in admission agreements (power of attorney)	Surviving spouse, estate v. nursing home	Business	Yes	N.A.	N.A.	N.A.	Procedural unconscionability (insufficiency of understanding is a factor)	Genuine issue	Remanded
M.D. Pa.	2017	Mony Life Insurance Company v. Snyder	Memory had been progressively declining, potential dementia	Unclear	Inter vivos transfer of insurance policy	Insurer v. insured's ex-wife, widow	Business	Yes	Yes	N.A.	N.A.	No	N.A.	No
Pa. Super. Ct.	2017	Cardinal v. Kindred Healthcare	Old age, physical											
infirmity, some amount of confusion	Yes	Arbitration agreement in admission agreements (power of attorney)	Estate v. nursing home	Business	Yes	Yes	N.A.	N.A.	Unconscionability, duress	No	No			

Court	Year	Case name	Alleged mental conditions	Old age?	Transaction(s)	Active parties	Identity of capable party	Cognitive test applied	Capable under cognitive test	Volitional test applied	Capable under volitional test	Inequitable conduct raised	Inequitable conduct found	Transaction(s) avoided
Tex.	2017	Kinsel v. Lindsey	Old age, macular degeneration, blind, infirm, extremely frail, confusion and forgetfulness	Yes	Amendment to trusts, sale of family ranch	Step-children, step-grandchildren v. niece, nephew, attorney	Family	Yes	No	N.A.	N.A.	Undue influence, tortious interference with inheritances, fraud, conspiracy	Yes	Yes
N.D.	2017	Vig v. Swenson	Guardianship, declining medical condition, including chronic heart and kidney failure, macular degeneration, and diabetes	Yes	Quit claim deed to convey land, farm leases	Estate (children) v. son	Family	Yes	Yes	N.A.	N.A.	No	N.A.	No
Ohio Ct. App.	2017	In re Estate of Flowers	Alzheimer's dementia, memory issues	Yes	Change of beneficiary designation of annuity funds	Estate v. sibling & children	Family	Yes	No	N.A.	N.A.	Undue influence	Yes	Yes
Kan. Ct. App.	2018	Moore v. Moore	Depleted physical and mental condition	Yes	Contracts to transfer land	Self, trustee established with spouse v. child & grandchild	Family	Yes	Yes	N.A.	N.A.	Undue influence	Remanded	Remanded
Nev.	2018	LaBarbera v. Wynn Las Vegas, LLC	Intoxication & gambling addition	No	Contracts to gamble at casino	Self v. Casino	Business	Yes	Remanded	Yes	Remanded	No	N.A.	Remanded
Tex. Ct. App.	2018	Anderton v. Green	Dementia	Yes	Change to bank accounts	Son v. grandchild	Business	Yes	No	N.A.	N.A.	No	N.A.	Yes

Court	Year	Case name	Alleged mental conditions	Old age?	Transaction(s)	Active parties	Identity of capable party	Cognitive test applied	Capable under cognitive test	Volitional test applied	Capable under volitional test	Inequitable conduct raised	Inequitable conduct found	Transaction(s) avoided
Conn. App. Ct.	2018	Bassford v. Bassford	Conservatorship, severe anxiety, depression, post-traumatic stress disorder, mild to moderate dementia, impaired hearing, susceptible to frequent urinary tract infections, drug dependence	Yes	Revocation of trust	Children v. spouse	Family	Yes	Yes	N.A.	N.A.	Undue influence	No	No
Ky. Ct. App.	2018	Estate of Adams by and through Mitchell v. Trover	Low intellectual quotient limited abstract reasoning abilities, cancer, mental stress of dealing with cancer	Yes	Settlement of medical malpractice suit	Estate v. foundation & physician	Business	Yes	Yes	N.A.	N.A.	Duress	No	No
N.Y. App. Div.	2018	Matter of Estate of Bordell	Early dementia, cataract surgery	Yes	Election of spousal share in deceased's estate	Self v. estate of husband	Family	Yes	Yes	N.A.	N.A.	No	N.A.	No
Ohio Ct. App.	2018	Weinberg v. Weinberg	Alzheimer's dementia, guardianship	Yes	Assignments of partnership interests	Son v daughter	Family	Yes	Remanded	N.A.	N.A.	Undue influence	Pending	Remanded

RESTATEMENT AND WILLISTON SURVEY

The following table contains fifty-five cases decided between 1963 and 2018 that appear in the case citations supplement to RESTATEMENT (SECOND) OF CONTRACTS § 15 (AM. LAW INST. 1981) and/or in the footnotes of 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 10:8 (4th ed. 1993 & Supp. 1999). This table excludes cases that did not reach issues regarding mental capacity.

Court	Year	Case name	Alleged mental conditions	Old age?	Transaction(s)	Active parties	Identity of capable party	Cognitive test applied	Capable under cognitive test	Volitional test applied	Capable under volitional test	Inequitable conduct raised	Inequitable conduct found	Transaction(s) avoided
N.Y. Sup. Ct.	1963	Faber v. Sweet Style Mfg. Corp.	Manic-depressive psychosis	No	Purchase of land	Wife v. seller	Business	Yes	Yes	Yes	No	No	N.A.	Yes
Wash.	1964	Harris v. Rivard	Stroke resulting in partial paralysis	No	Earnest money agreement	Self v. purchaser	Business	Yes	No	No	N.A.	No	N.A.	Yes
Okla.	1964	Matthews v. Acacia Mut. Life Ins. Co.	hypertension, high blood pressure, brain tumor	No	Designation of children as beneficiaries of death and retirement benefits	Widow v. children	Family	Yes	Yes	No	N.A.	No	N.A.	No
Colo.	1964	Davis v. Colorado Kenworth Corp.	Found not guilty by insanity, institutionalized	No	Purchase of tractor and goods	Wife v. seller	Business	Yes	Yes	No	N.A.	No	N.A.	No
N.Y.	1969	Ortelere v. Teachers' Retirement Bd. of City of New York	Involutional melancholiac in depression	No	Election to change retirement benefit	Beneficiary/ widower v. government	Other	Yes	Yes	Yes	No	No	N.A.	Remanded

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D.S.C.	1969	Humble Oil & Refining Co. v. DeLoache	Mental retardation	No	Options for lease of service station site	Executor v. lessee	Business	Yes	Yes	No	N.A.	No	N.A.	No
Tex.	1969	Mandell and Wright v. Thomas	In shock	No	Contingent fee contract	Self v. lawyer	Other	Yes	Yes	No	N.A.	Fraud, misrepresentation	No	No
N.Y. Sup. Ct.	1971	Fingerhut v. Kralyn Enterprises, Inc.	Ailment manic depressive psychosis	No	Contract and binder to purchase golf club	Self v. seller	Business	Yes	Yes	Yes	Yes	No	N.A.	No
Iowa	1971	Costello v. Costello	Old age, eccentric recluse	Yes	Contract and deed conveying half-interest in land	Nephew/ beneficiary under will v. nephew/ beneficiary under will	Family	Yes	No	No	N.A.	No	N.A.	Yes
Idaho	1972	McPheters v. Hapke	Old age, senile, undefined mental disability, guardian appointed post-contract	Yes	Sale of land	Executor v. purchaser	Business	Yes	No	No	N.A.	Unusual and financially disadvantageous	Yes	Yes
Kansas	1973	DeBauge Bros., Inc. v. Whitsitt	Old age, infirmity	Yes	Sale of business	Self v. purchaser	Business	Yes	Yes	No	N.A.	No	N.A.	No
N.Y. Surr. Ct.	1974	In re Gebauer's Estate	Undefined mental illness	Yes	Deed for sale of land	Executor v. purchaser	Business	Yes	Yes	Yes	Yes	Fraud, overreaching, undue influence, inadequacy of consideration	No	No
Or.	1974	Gore v. Gadd	Psychotic agitated depression, psychotic depressive reaction, schizophrenia	No	Contract for sale of land	Self v. purchaser	Business	Yes	Yes	Yes (contra. Dillin v. Alexander, In re Marriage of Davis)	Yes	No	N.A.	No

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Tex. Ct. App.	1974	Nohra v. Evans	Manic-depressive	No	Deed and other instruments for sale of land	Self v. purchaser	Business	Yes	N.A.	Yes	No	No	N.A.	Yes
Mass.	1974	Krasner v. Berk	Presenile dementia	Yes	Agreement to share rent and taxes	Self v. business partner	Business	Yes	No	Yes	No	No	N.A.	Yes
Ill. Ct. App.	1975	Curry v. Curry	Auditory hallucinations, severe depression, suicidal thoughts	No	Divorce settlement	Self v. former husband	Family	Yes	Yes	No	N.A.	No	N.A.	No
Cal. Ct. App.	1977	Board of Regents v. Davis	Old age, arteriosclerosis	Yes	Donation to university	Estate v. university	Other	Yes	Yes	No	N.A.	No	N.A.	No
Or.	1978	Dillin v. Alexander	Depression, little paranoid	No	Deed granting interest in property in favor of former wife's sons by prior marriage	Self v. former wife's sons by prior marriage	Family	Yes	Yes	No (contra. Gore v. Gadd)	N.A.	No	N.A.	No
Tex. Ct. App.	1978	Schmaltz v. Walder	Nervous tension and anxiety	No	Settlement of personal injury suit	Self v. insurance co.	Business	Yes	Yes	No	N.A.	Fraud, misrepresentation	No	No
N.Y. Sup. Ct.	1978	Pentinen v. New York State Emp. Retirement System	Psychosis	No	Election to change retirement benefit	Widow v. government	Other	Yes	N.A.	Yes	No	No	N.A.	No
N.C. Ct. App.	1982	Ridings v. Ridings	Headaches, anxiety and mild to moderate depression	No	Separation agreement	Self v. former wife	Family	Yes	Yes	No	N.A.	No	N.A.	No

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Ind. Ct. App.	1983	Gallagher v. Central Indiana Bank, N.A.	Stroke	No	Mortgage to secure son's and daughter-in-law' debt	Self, wife & son v. mortgagee	Business	Yes	Yes	No	N.A.	Undue influence	No	No
Ariz. Ct. App.	1985	Golleher v. Horton	Chronic alcoholic, organic brain syndrome, delirium tremens	No	Termination of trust and transfer of land by attorney/sister	Executor/ daughter v. attorney/ sister	Family	Yes	Yes	No	N.A.	Undue influence, fraud	Remanded	Remanded
Pa.	1986	Estate of McGovern v. Com. State Employees' Retirement Board	Alcoholism and apparent distress	No	Election under retirement plan that reduces benefits to surviving beneficiary	Son/ executor v. government	Other	Yes	Yes	No	N.A.	No	N.A.	No
N.Y. Sup. Ct.	1987	Blatt v. Manhattan Medical Group, P.C.	Major depressive illness	No	Settlement of employment dispute	Self v. former employer	Business	Yes	Yes	Yes	Yes	No	N.A.	No
Tex. Ct. App.	1988	Smith v. Christley	Unclear (issue not reached)	Unclear	Lease	Estate/sister v. businesses	Business	Yes	N.A.	Yes	N.A.	Unfair terms	No	No
Iowa Ct. App.	1988	Daughton v. Parson	Disoriented, old age	Yes	Deeds conveying land to son and wife	Guardian v. wife and son	Family	Yes	No	No	N.A.	Undue influence	Yes	Yes
Va. Ct. App.	1989	Drewry v. Drewry	Severe depression	No	Divorce settlement	Self v. former husband	Family	Yes	Yes	No	N.A.	Fraud, unconscionability	No	No
Idaho Ct. App.	1989	Knowlton v. Mudd	Parkinson's disease	Unclear	Amendment of commercial real estate contract with son	Conservator/ daughter v. son	Family	Yes	No	No	N.A.	No	N.A.	Yes
N.Y. Sup. Ct.	1989	Matter of Estate of Obermeier	Dementia	Yes	Contract for sale of land	Estate v. purchasers	Business	Yes	Yes	Yes	Yes	No	N.A.	No

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Mass. Ct. App.	1989	Farnum v. Silvano	Dementia and seizure disorder	Yes	Contract for sale of land	Guardian/ nephew v. friend/ purchaser	Social	Yes	No	Yes	No	Fraud, undue influence, constructive trust	Issue not reached	Yes
Va.	1989	Brown v. Resort Developments	Old age, great weakness of mind	Yes	Deed conveying land	Guardian/ niece v. purchaser	Business	Yes	Yes	No	N.A.	No	N.A.	No
Ala.	1989	Lloyd v. Jordan	Mental instability and chronic dementia related to hypoxemia	Yes	Change of life insurance beneficiary	Widow v. children from former marriage	Family	Yes, statutory	Yes	No	N.A.	No	N.A.	Yes
D.C Ct. App.	1990	Butler v. Harrison	Senile dementia	Yes	Quitclaim deed conveying interest to self and husband	Estate v. widower	Family	Yes	Yes	No (contra. Hernandez v. Banks)	N.A.	Undue influence	No	No
Ala.	1991	Shoals Ford, Inc. v. Clardy	Manic-depressive	No	Purchase of truck	Conservator/ wife v. seller	Business	Yes, statutory	No	No	N.A.	Wantonness	Yes	Yes
N.Y. Surr. Ct.	1992	Matter of Will of Goldberg	Organic brain syndrome related to stroke	Unclear	Instrument voiding antenuptial agreement	Widow v. estate	Family	Yes	Yes	Yes	Yes	Undue influence	No	No
Alaska	1993	Pappert v. Sargent	Transient ischemic attack	No	Exchange of land for mobile home	Estate v. friend	Social	Yes	No	No	N.A.	Unfair terms (low market value of mobile home)	No	Remanded
Bankr. D. Mass.	1995	In re Hall	Depression	No	Note and mortgage	Guardian/ brother v. lender	Business	Yes	N.A.	Yes	N.A.	No	N.A.	No
Wis. Ct. App.	1995	Hauer v. Union State Bank of Wautoma	Brain injury, previous guardian appointment but terminated	No	Loan	Self v. lender	Business	Yes	No	No	N.A.	Bad faith	Yes	Yes

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Me.	1995	Bragdon v. Drew	Flapping hands up and down, honking nose, banging head against wall	No	Deed for sale of land to neighbour	Siblings/ guardian and conservator v. neighbour	Social	Yes	No, but unclear which test	Yes	No, but unclear which test	Overreaching, undue influence, fraud, inadequate consideration	No	Yes
Tenn. Ct. App.	2001	Rawlings v. John Hancock Mut. Life Ins. Co.	Senile dementia and depression	Yes	Power of attorney, change of insurance beneficiary	Estranged husband v. brother/ beneficiary, insurer, employer,	Family	Yes	Yes	Yes	Yes	No	N.A.	No
Tex. App.	2001	Dubree v. Blackwell	Old age	Yes	Transfer of real and financial assets to lifelong friend	Nephew/ estate/ beneficiary v. lifelong friend	Social	Yes	Yes	Yes	Yes	Undue influence	No	No
Me.	2003	In re Estate of Marquis	Old age, dementia	Yes	Change of annuity beneficiary	Estate v. grandnephew	Family	Yes	No, but unclear which test	Yes	No, but unclear which test	Bad faith, undue influence	No	Yes
Or. Ct. App.	2004	In re Marriage of Davis	Depression, post-traumatic stress disorder, battered woman's syndrome.	No	Stipulated marriage dissolution judgment	Self v. former husband	Family	Yes	Yes	No (contra. Gore v. Gadd)	N.A.	No	N.A.	No
Ala.	2008	Mason v. Acceptance Loan Co., Inc.	Mildly retarded	No	Arbitration agreement in insurance contract	Self v. insurance co.	Business	Yes, statutory	Yes	No	N.A.	Fraud, misrepresentation, negligence	Referred to arbitration	No

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W.D. Wis.	2008	American General Life Ins. Co. v. Schreiber	Taking psychotropic medication	No	Change of insurance beneficiaries	Widow v. daughter from previous marriage	Family	Yes (citing In re Kringel's Estate, 144 N.W. 204 (Wis. 1913))	Yes	N.A.	N.A.	No	N.A.	No
D. Md.	2008	Biggs v. Eaglewood Mortg., LLC	Old age	Yes	Conversion of mortgage rates	Self v. lender	Business	Yes	Yes	Yes	Yes	Misrepresentation, fraud	No	No
D.D.C.	2010	Schmidt v. Shah	Severe depression, severe anxiety, obsessive-compulsive disorder	No	Settlement of employment discrimination complaint	Self v. government	Business	Yes	N.A.	Yes	No	Fraud, duress	No	Not reached (summary dismissal granted on other grounds)
Or. Ct. App.	2011	Drury v. Assisted Living Concepts, Inc.	Old age, dementia, chronic confusion, memory impairment	Yes	Arbitration agreement in admission agreements	Estate v. nursing home	Business	Yes	No	N.A.	N.A.	Unconscionability	No	Yes
Mass.	2012	Sparrow v. Demonico	Extremely upset and mentally distressed	No	Settlement of land ownership dispute	Self v. sister & brother-in-law	Family	Yes	Yes	Yes	Yes	No	N.A.	No
D.C. Ct. App.	2013	Hernandez v. Banks	Old age, guardian and conservator appointed	Yes	Lease	Estate v. landlord	Business	Yes	No	Yes	N.A.	No	N.A.	Remanded
D.C.	2015	Renchard v. Prince William Marine Sales	Deaf	No	Purchase of yacht, charges for maintenance and upgrades	Self v. seller	Business	Yes	N.A.	N.A.	N.A.	Fraud, conspiracy, unjust enrichment	N.A.	Remanded

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Alaska	2015	Erkins v. Alaska Trustee	N.A. (summary disposition on other grounds)	No	Loan	Self v. subsequent good faith purchaser bank	Business	Yes	N.A.	Yes	N.A.	Good faith	No	No
N.D.	2017	Vig v. Swenson	Guardianship, declining medical condition, including chronic heart and kidney failure, macular degeneration, and diabetes	Yes	Quit claim deed to convey land, farm leases	Estate (children) v. son	Family	Yes	Yes	N.A.	N.A.	No	N.A.	No
Tex. Ct. App.	2018	Estate of Riefler	Tremor, influence of prescription medication	No	Settlement	Self v. relatives	Family	Yes	Yes	N.A.	N.A.	No	N.A.	No