

**Supported Decision-
Making:
Protecting Rights by
Ensuring Choices**

FIRST PRINCIPLE

How Many Guilty People should
be Exonerated before one
Innocent Person is Convicted?

- Blackstone, 1893

WHY?

WHAT DO YOU DO

- When a defendant or client:
 - Speaks Spanish?
 - Is Deaf and uses sign language
 - Is a wheelchair user?

WHY?

RIGHTS ARE PRECIOUS: THE FOURTEENTH AMENDMENT

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

- U.S. Const. amend. XIV

RIGHTS ARE PRECIOUS: THE AMERICANS WITH DISABILITIES ACT

People with disabilities have the “right to fully participate in all aspects of society” - 42 U.S.C. 12101

No “qualified individual with a disability shall . . . be excluded from or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by such entity” – 42 USC 12132

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability – 28 CFR 35.130

THINK ABOUT YOUR LIFE

What's Your Favorite
Right?

RIGHTS=CHOICE

"I am my choices. I cannot not choose. If I do not choose, that is still a choice. If faced with inevitable circumstances, we still choose *how we are* in those circumstances."

- Jean Paul Sartre

CHOICE IN THE JUSTICE SYSTEM

- Whether to invoke Miranda right to remain silent
- Whether to testify
- Whether to accept a plea
- Whether to accept conditions of parole
- Whether to take part in programs or services

CHOICE REQUIRES UNDERSTANDING

A waiver of an important constitutional or statutory right must be knowing and voluntary to be valid. - *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)

How can you ensure:

A “Knowing” Waiver

A “Voluntary” Plea?

An “Informed” Choice?

CHOICE IN THE CIVIL AND PROBATIONARY SYSTEM

Guardianship or other substituted decision-making processes as a condition of release or to ensure compliance with plans

“Plenary” or “Full” Guardianship

- Gives the Guardian power to make ALL decisions for the person.
- Used in the **vast** majority of cases
- Teaster, Wood, Lawrence, & Schmidt, 2007.
- “As long as the law permits plenary guardianship, **courts will prefer to use it.**”
- Frolik, 1998

AS A RESULT

Guardians have “substantial and often complete authority over the lives of vulnerable [people].”

4 NAELA J. 1, 7 (2008).

This includes power to make the most basic health, personal, and financial decisions.

AARP, Guardianship Monitoring: A National Survey of Court Practices 1-2 (2006).

CRIMINAL OR CIVIL: THE SAME RIGHTS ARE AT STAKE

“The typical ward has fewer rights than the typical convicted felon By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen.”

- House Select Committee on Aging, H.R. Rpt. 100-641 (opening statement of Chairman Claude Pepper)

RIGHTS=CHOICE

CHOICE=SELF-DETERMINATION

- Life control
- People's ability and opportunity to be “causal agents . . . actors in their lives instead of being acted upon”
 - Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000

BENEFITS OF SELF-DETERMINATION

People with greater self determination are:

- Healthier
 - More independent
 - More well-adjusted
 - Better able to recognize and resist abuse
- Khemka, Hickson, & Reynolds, 2005;
O'Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

AND

People with Intellectual and Developmental Disabilities who do **NOT** have a guardian are more likely to:

- Have a paid job
- Live independently
- Have friends other than staff or family
- Go on dates and socialize in the community
- Practice the Religion of their choice

2013-2014

2017-2018



AND

Women with intellectual disabilities exercising more self-determination are **less likely to be abused**

- Khemka, Hickson, and Reynolds, 2005

WHERE DO WE GO FROM HERE?

What we Need:

- A way to ensure that people with disabilities are able to understand and exercise their rights and choices in the criminal justice and civil systems
- A way to ensure that people with disabilities have enhanced self-determination and life outcomes, reduce recidivism, and minimize victimization

A WAY FORWARD: SUPPORTED DECISION-MAKING

“[P]eople with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions.”

- Blanck & Martinis, 2015

THINK ABOUT IT

How do you make decisions?

What do you do if you're not familiar with the issue?

- Taxes?
- Medical Care?
- Auto Repairs?

What Do You Do?

**SO, SUPPORTED DECISION-MAKING IS A
LOT OF WORDS FOR**

Getting help when its needed

Just like you and me

WHERE DO WE GO FROM HERE? THINK ABOUT “CAPACITY”

- People may have “capacity” to make some decisions but not others.
- Or be able to “manage” affairs some times but not others.
- Or be unable to “govern” themselves unless they get help understanding the situations they face.
- E.g. Salzman, 2010

Capacity to take medicine is NOT the same as capacity to prescribe it

SUPPORTED DECISION-MAKING CAN ADDRESS LIMITATIONS IN DECISION-MAKING

Supported Decision-Making can help people:

- Understand information, issues, and choices;
 - Focus attention in decision-making;
 - Weigh options;
 - Ensure that decisions are based on their own preferences
 - Interpret and/or communicate decisions to other parties.
- Salzman, 2011

IT'S A PARADIGM, NOT A PROCESS

There is no “one size fits all” method of Supported Decision-Making.

Can include, as appropriate

- Informal support
- Written agreements, like Powers of Attorney, identifying the support needed and who will give it
- Formal Micro-Boards and Circles of Support
- Martinis, Blanck, and Gonzalez, 2015

SUPPORTED DECISION-MAKING AND SELF DETERMINATION

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015

RESEARCH

In a study, young adults who used Supported Decision-Making showed:

- Increased independence, confidence, and decision-making abilities
 - Made better decisions
 - Had enhanced quality of life
- Martinis & Beadnell, 2021

<http://supporteddecisionmaking.org/node/488>

LAWYERS: YOU'RE ALREADY DOING IT, OR SHOULD BE

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

VA State Bar Ethical Rule 1.14

COMMENT TO RULE 1.14

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. . . . [A] client with diminished capacities often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.

SUPPORTED DECISION-MAKING IN PRACTICE

- Providing access to a “supporter” – friend, family member, or professional – to help the person understand and make choices
- Offering “plain language” material and asking questions to make sure its understood
- Offering extra time for a person to review documents or material or offering to give them a chance to review with a supporter to ensure that agreements are “knowing” or “voluntary”

IT CAN HAPPEN



Jenny Hatch and her attorney celebrate after the court victory. (TWP)

‘I’m so happy to go home today’

Theresa Vargas

Jenny Hatch, a 29-year-old-woman with Down syndrome, can live the life she wants after a judge rules she can reside with friends.

IT DOES HAPPEN



IT KEEPS HAPPENING



IT WILL KEEP HAPPENING



CHANGE THE CULTURE, CHANGE THE WORLD!

With Supported Decision-Making, older adults and people with disabilities “will have the same opportunities for success and security as their nondisabled peers. If we change the culture, we will change the world!”

Gustin & Martinis, 2016

JOIN THE CONVERSATION

**National Resource Center for
Supported Decision-Making:**
SupportedDecisionMaking.Org

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