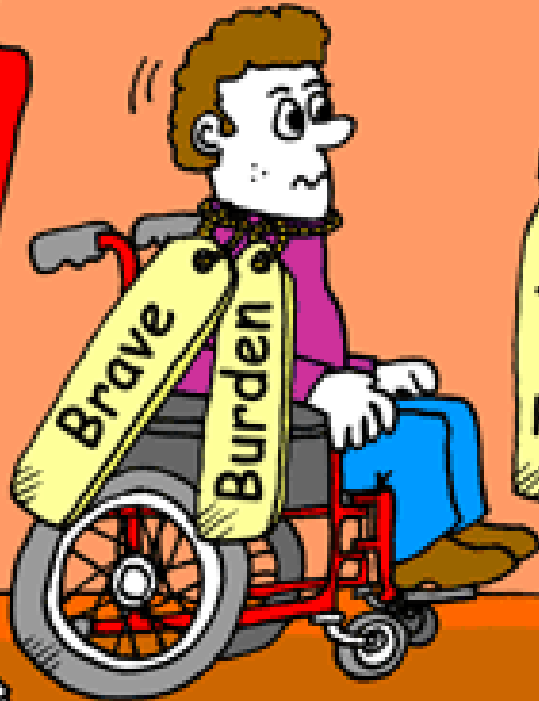


Come along now,  
one more label and  
you're ready to  
face the world!

Department of  
Dependency  
and Care



**Crippen**



# Legal capacity

Oliver Lewis

# MDAC

1. Objectives to:
  - a. Create progressing jurisprudence
  - b. Initiate law reform
  - c. Empower people with disabilities
2. Fight physical and legal segregation
3. Central and eastern Europe, now also 3 African countries and India



1. What is legal capacity?
2. What's wrong with guardianship
3. What does the CRPD demand?
4. A proposal for law reform















# Legal capacity approaches

1. Status approach
2. Outcome approach
3. Functional approach

# Status-based approach

**Diagnosis = guardianship**

“Oliver has schizophrenia therefore he needs to be put under guardianship”

Signed: A N Psychiatrist

# Outcome approach

The result of your decision determines whether you have capacity.

“I’m the doctor and I think you need to take this medication for your illness. Do you agree with me?”

“Yes!”: Result is I have capacity (and I take the medication *voluntarily*)

“No!”: Result is I lack capacity (and the medication is forcibly injected)

# Functional approach

The quality of your decision-making determines whether you have capacity

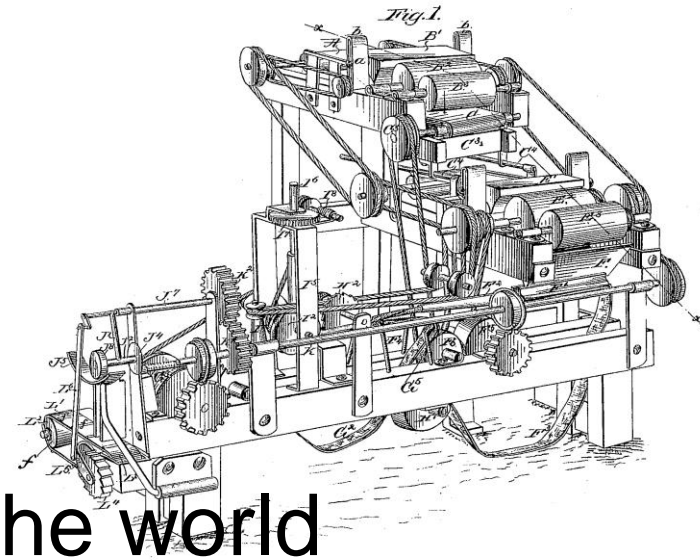
- Understanding relevant information
- Appreciating consequences of a decision
- Acting voluntarily, autonomously
- Communicating decisions

(Classic medical law test)

# Functional approach

Can you prove that you are capable of:

- rationally apprehending the world
- rationally processing information
- knowing all consequences for self and others
- rationally forming own preferences
- clearly able to express preferences
- hold an identity that is stable through time



# Right to work



**DENIED**



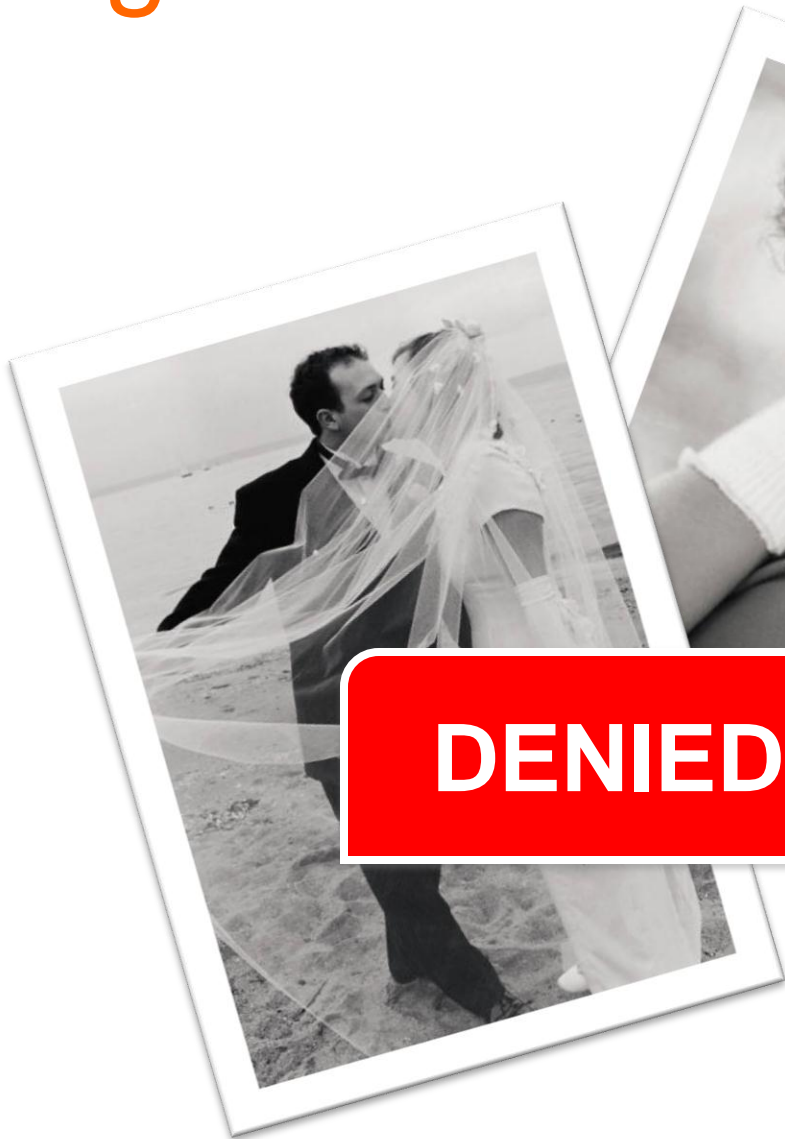
# Right to consent to or refuse physical/mental health treatment

**DENIED**

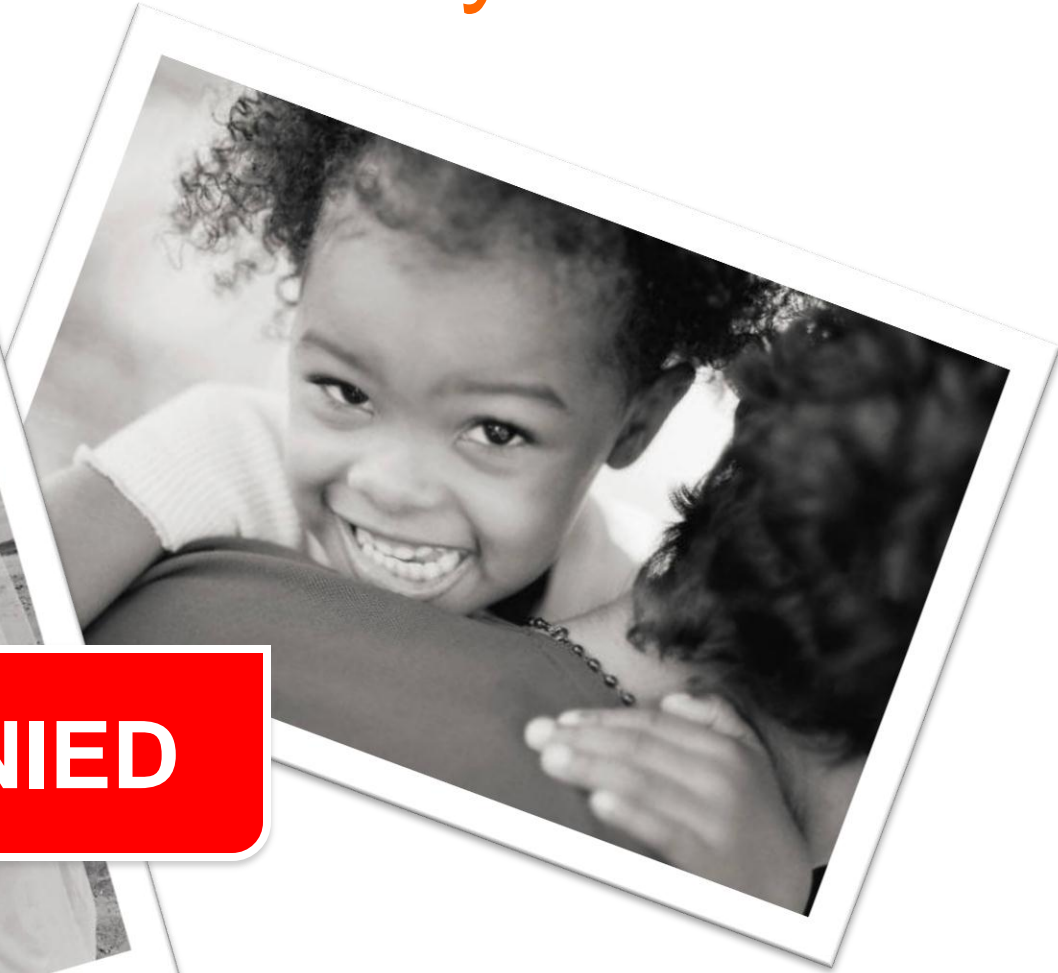




# Right to have a family



**DENIED**



# Right to use *your* money and property



**DENIED**

# Right to live in the community

**DENIED**



# Right to vote, associate, assemble



**DENIED**

# Proportionality?





# Lobsterpot of the law



# Many guardianship regimes

- Worst of medicine and law
- No probing of evidence
- No attention to or participation of the person
- All decision-making removed
- Fundamental rights restricted



# CRPD



- What are the relevant provisions?

# Two normative premises



1

We have the **right to make our own decisions** (autonomous decision-making)

– Article 12(2) CRPD

# 2

There is an **obligation to provide supports** to where needed to exercise legal capacity.

- Article 12(3) CRPD

And of course...

Safeguards - Article 12(4)

Protection against **exploitation,  
violence and abuse** - Article 16  
CRPD

# CRPD Committee

“replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences.” (CRPD Committee, re Spain, 2011)

# CRPD Committee

“It further recommends that training be provided on this issue for all relevant public officials and other stakeholders.” (CRPD Committee, re Spain, 2011)

My hopes and  
dreams

Who am I?

Places that  
matter to me

What's  
important to me?

Important  
people

My story



# ECHR cases

- *Stanev v. Bulgaria* (2012)
- *DD v. Lithuania* (2012)
- *Kedzior v. Poland* (2012)
- *Sykora v. Czech Republic* (2012)
- *Lashkin v. Russia* (2013)



# How can you

- Maximize autonomy?
- Prevent and remedy exploitation, violence and abuse?
- Deal with cases where domestic law does not meet CRPD standards?
- Order the local government to put in place supports?
- Create jurisprudence to abolish blanket forms of control?
- Cite the CRPD in your judgments?



***“I’m not an object,  
I’m a person.  
I need my  
freedom.”***

Rusi Stanev, before  
the European Court  
of Human Rights,  
February 2011

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# Thank you!

Web [www.mdac.info](http://www.mdac.info)

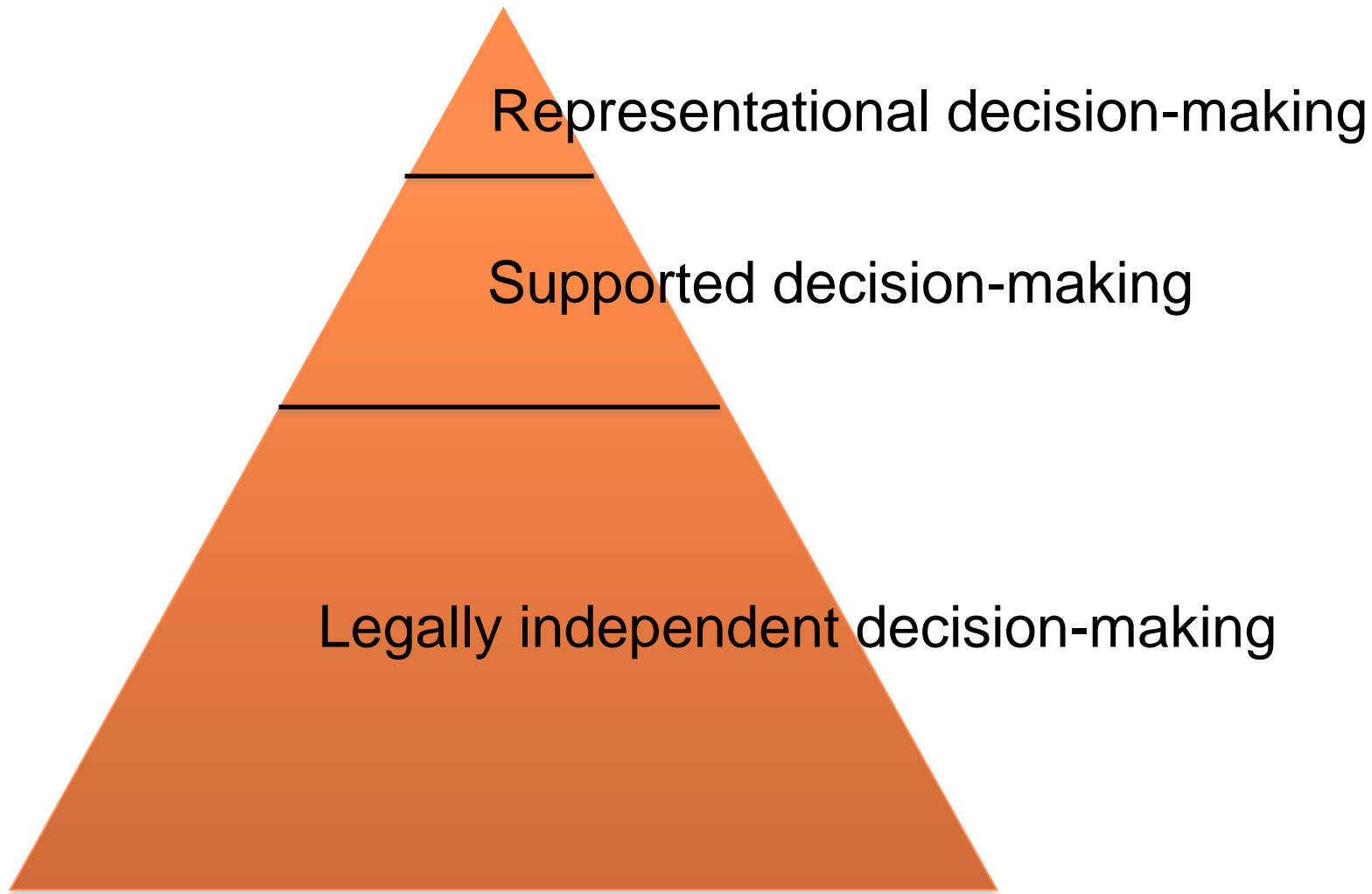
Email: [olewis@mdac.info](mailto:olewis@mdac.info)

Twitter: [@olewis75](https://twitter.com/olewis75)

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# A paradigm of support



# As well as this

- Advance directives
- Enduring powers-of-attorney
- Adult protection systems

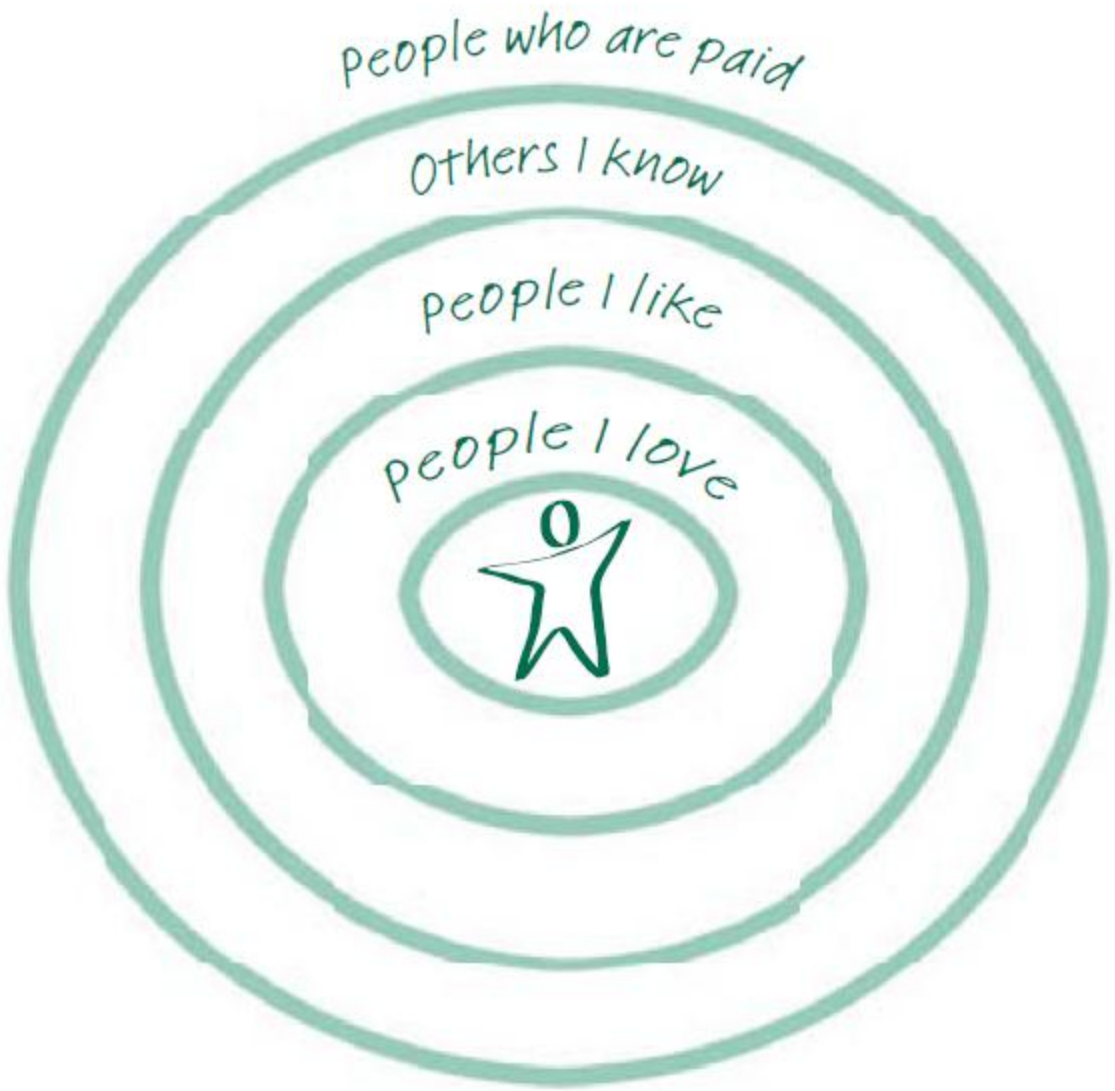
# What is supported decision-making?

- “[s]upported decision-making can take many forms. Those assisting a person may **communicate** the individual’s intentions to others or help him/her understand the choices at hand. They may **help others to realize** that a person with significant disabilities is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity.”
- UN Handbook

# Principles

- Respect for **autonomy**, irrespective of disability
- **Presumption of capacity** and identity
- Entitlement to decision-making **supports** necessary to exercise capacity and reveal identity:
  - Promote full participation, and
  - Lessen the need for legal intervention
- Identity is revealed, and decisions are made **interdependently** with family, friends, and trusted others chosen by the individual
- These will be **recognised** and legally validated.





# Relationships of trust