

Incapacity Push-Back

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Sean M. Scott, *Contractual Incapacity and the Americans with Disabilities Act*, 123 **Dickinson L. Rev.** __ (forthcoming 2019), available at [SSRN](#).

What happens when a set of longstanding common law assumptions meets an assertive and vigorous civil rights act? Professor [Sean Scott](#) examines this question in terms of contractual incapacity and the Americans with Disabilities Act (ADA) in her aptly titled *Contractual Incapacity and the Americans with Disabilities Act*. She confronts the standard application of the doctrine of contractual incapacity in view of the ADA's wide-ranging aim of upsetting traditional notions of disability and impairment.

To combine these two antagonistic ideas—contractual incapacity and the ADA—Professor Scott first outlines the texts and ambitions of each. Next, she introduces these two unwilling dance partners to one another and demonstrates that particular aspects of the idea of contractual incapacity do in fact undermine both the ADA and the goals of the disability rights movement. She concludes with nudging. She gives the law a small push, suggesting that our legal imaginations might reconsider contractual incapacity against the demands of disability rights activists. It's a powerful nudge, one which has implications for various populations, from developmentally disabled persons to elderly individuals with dementia.

The contractual incapacity doctrine boasts deep roots, traceable to Roman law and the [Visigothic code](#). The basic idea is that a person lacking the cognitive wherewithal to understand a contract cannot be said to have entered into a contract at all. Incapacity is a defense. When the court finds that one party to a contract lacked capacity, the contract can be void or voidable. Given its ripe age, we might not be surprised to perceive in the doctrine some residue of outmoded and stereotypical tropes.

For example, Professor Scott explains, in contractual incapacity cases, "disability drift" commonly occurs, where "the presence of a physical disability is taken as evidence of a mental one...." (P. 25.) Historically, individuals who were deaf were presumptively "idiots" and therefore unable to contract. Even newer decisions can take disheveled hair or disordered mascara as evidence of mental incapacity. Other cases present individuals with mental disabilities as objects of pity with modifiers such as "tragic," "lonely," or "pathetic." (P. 24.) Another cluster of decisions demonstrates the way judges can view disability as pathology; as something wrong. A pathological/medical vision of disability ignores the roles which societal restrictions and responses to the individual's disability play. This kind of response can be exacerbated when an individual deviates from societal norms.

Despite the ADA's attempt to deconstruct the notion of disability by lifting social barriers, the contemporary contractual incapacity doctrine continues to disregard the notion of disability as social construct. The notion that it is the impairment itself coupled with society's response to it that results in a disability undergirds the ADA. Take away the social construction of the impairment and the affected individual's barriers recede or even disappear. But focus on the impairment and pathology and there is no space for consideration of the societal aspect of a disability. This then represents a direct collision between the ADA and contractual incapacity as it is currently applied.

Professor Scott also discerns another point of conflict between the ADA and contractual incapacity in the “regarded as” definition of a disability. The ADA actually contains three alternative definitions of “disability.” The first is an actual disability (a substantially limiting mental or physical impairment). The second is a record of having an actual disability. The third is simply being “regarded as” having a disability. The ADA’s “regarded as” definition participates in the disability-as-social-construct notion. Both the statutory definition and this notion are concerned with the disabling effects of stereotypical and outmoded social constructs of disability; disability as pathology, an object of pity, or drift.

The ADA also implicitly rejects uninformed lay diagnoses. Great harm follows assumptions such as the assumption that someone with a stutter cannot possibly understand a complex contract. “Better to leave cognitive diagnoses to medical experts,” the “regarded as” prong seems to say to the American people.

Contractual incapacity cases, meanwhile, are only too quick to rely on lay testimony. Lay testimony routinely invokes questionable evidence such as a party’s idiosyncratic behavior, uncleanliness, or speech irregularities. Moreover, the question of whether one party to the contract “should have known” of the other party’s mental disabilities once again invites a parade of judgmental and archaic observations frequently having little to do with an individual’s actual cognitive limitations.

Here, then, Professor Scott identifies a secondary collision between contractual incapacity and the ADA, within the “regarded as” definition of disability. Professor Scott then proposes a rather radical solution. She rejects the protectionist attitudes of courts’ applications of contractual incapacity. Instead, parties in a breach of contract action would only be permitted to raise incapacity as a defense to enforcement when they had been adjudicated as mentally incompetent (e.g., in a plenary guardianship proceeding). This would drastically limit the incapacity defense to only a handful of cases. The doctrines of undue influence and unconscionability might fill the gaps.

Of course, one consequence of enacting Professor Scott’s proposal would be that a number of individuals with disabilities would be bound to contracts they lacked any capacity to understand. This is no small cost. Professor Scott concedes that she does not intend “to offer a definite solution to a definite problem.” (P. 76.) Rather, her proposal is intended to nudge our thinking and our imaginations in the direction of autonomy and equality for individuals with mental impairments.

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