PROCEDURAL CIRCULARITY: BEFORE THE MERITS

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Author's Note. This paper is a work in progress. The Introduction, conceptual framework, and Article 81 guardianship analysis reflect the portions of the project that are most developed and closest to my current formulation of procedural circularity. Comparative applications and normative implications remain under revision and are therefore omitted from this workshop draft.

I would particularly welcome feedback on:

1. *Whether procedural circularity identifies a phenomenon distinct from path dependence, bias, paternalism, and broader forms of procedure-merits entanglement;*
2. *Whether the proposed framework adequately captures the relationship between decisional-ability assessments and procedural authority in guardianship proceedings; and*
3. *The appropriate scope and limits of the framework, including whether it extends beyond guardianship and, if so, which proceedings provide the strongest comparative examples.*

At this stage, I am primarily interested in feedback on the conceptual framework and its boundaries.

INTRODUCTION

American procedural theory generally assumes that the authority to participate in litigation is conceptually distinct from the merits of the dispute. A defendant accused of breaching a contract may direct counsel before liability is determined. A tort defendant retains authority to make litigation decisions before the court resolves whether wrongdoing has occurred. Even in cases where substantive rights remain contested, the legal system ordinarily presumes that the individual's authority to participate in the adjudication is not itself the subject of the adjudication. Protective proceedings[1] present an unusual exception; they occupy a distinctive position in the legal landscape.

Consider the experience of D.P.[2] In a New York guardianship proceeding[3], D.P.'s sons petitioned for the appointment of a guardian to oversee D.P.'s personal and financial affairs. D.P. opposed the petition and informed the court that she neither needs nor wants a guardian. Pursuant to Article 81 of the New York Mental Hygiene Law[4], the court appointed counsel to represent her. After several court appearances, D.P. became dissatisfied with appointed counsel and retained an attorney of her own choosing. At the next appearance, D.P. and her newly retained attorney sought the substitution of counsel.

Before granting the request, the judge explained, the court must determine whether D.P.'s decision to retain private counsel was made "freely and independently,"[5] and therefore conducted an inquiry into D.P.'s decision. The court asked how D.P. found the attorney, who recommended the attorney, whether anyone pressured her to hire the attorney, and who paid the retainer. The inquiry then turned to D.P.'s understanding of the decision itself. Did D.P. read and understand the

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[1] The terms *protective proceeding*, *protective framework*, *protective regime*, and *protective arrangement* are used in the Article interchangeably to denote a descriptive category rather than a legal one. It groups together several different proceedings that share a similar structure, even though the law does not formally treat them as a single class. As used here, these terms refer to adjudicative structures, such as guardianship and medical-capacity determinations, in which the state's protective authority is predicated on assessments of impaired decisional ability or heightened vulnerability. While the law does not classify these proceedings under a single statutory or doctrinal heading, they share a common structural feature—decisional capacity functions both as the substantive basis for the state intervention and as the threshold governing access to the procedures through which the basis is adjudicated.

[2] This is an unpublished case that the Author litigated representing D.P. The case is used here as an illustrative example of the procedural dynamics examined throughout this Article. The facts are drawn from the court's discussion concerning D.P.'s request to substitute privately retained counsel for court-appointed counsel during the pendency of the guardianship proceeding.

[3] MHL 81

[4] MHL 81.10

[5] MHL 81.10 and add caselaw

retainer agreement? Did counsel explain the representation and the possible outcomes of the guardianship proceeding? Why did D.P. choose this particular attorney? What did D.P. want the attorney to do? Did D.P. understand that she had the right to select counsel, and did she wish this attorney to represent her?

At first glance, these questions concern the circumstances surrounding D.P.'s choice of counsel. Some of these questions address the legitimate concern of whether a third party has improperly influenced or coerced D.P.'s decision. The remaining questions, however, appear to require something more. They invite the court to evaluate D.P.'s understanding of the decision, her ability to explain her reasons, and her capacity to exercise judgment concerning the representation. The inquiry moves from investigating the independence of the choice to assessing the decisional abilities of the person who made it.

Substantially similar decisional abilities[6] are central to the guardianship proceeding itself. The petition alleges that D.P. lacks sufficient decisional abilities to manage her affairs without judicial intervention. The proceeding therefore exists because D.P.'s capacity for decision-making is in dispute. Yet before that question is adjudicated, the court assessed substantially similar decisional abilities in determining whether D.P.'s choice of counsel should be honored. More importantly, the preliminary assessment is not merely evidentiary. If the court declines to recognize D.P.'s choice of counsel, that determination may affect the conditions under which D.P. would participate in the litigation that ultimately determines her legal status by adjudicating substantially similar decisional abilities. This preliminary assessment may shape her procedural position before determining the ultimate question of whether she requires a guardian. It may affect D.P.'s procedural authority[7], participation, or litigation control.

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[6] Decisional abilities are substantially similar when both inquiries require evaluation of overlapping cognitive or functional capacities such as understanding relevant information, appreciating consequences, reasoning about alternatives, or communicating a choice, even if the legal standards governing the inquiries differ. The concept does not require that the threshold and merits inquiries involve identical legal tests. Rather, procedural circularity arises when both inquiries require adjudicators to evaluate substantially overlapping decision-making functions. *Add citations.*

[7] Procedural authority refers to the capacity to make legally recognized decisions concerning the conduct of the litigation, including the selection of counsel, direction of litigation strategy, assertion or waiver of rights, settlement decisions, evidentiary choices, and the expression of litigation objectives. This concept is distinct from substantive legal capacity and from mere participation in proceedings.

This Article identifies and theorizes a structural phenomenon that existing literatures observe in fragments but have not recognized as a distinct procedural problem. This Article terms this phenomenon *procedural circularity*. In proceedings such as guardianship and other capacity-based adjudications, the legal system must determine whether an individual possesses sufficient decisional abilities to exercise legally recognized authority over personal decisions. Yet assessments of substantially similar abilities may simultaneously influence the procedural authority accorded to the individual during the litigation itself, affecting the degree of control the individual exercises over counsel, strategy, evidentiary presentation, and the expression of preferences. The result is a recursive structure in which preliminary assessments of the question to be adjudicated help determine the procedural conditions under which that question is adjudicated. The concern is structural rather than outcome-based. The significance of procedural circularity is not that it necessarily produces inaccurate outcomes, but that it is a structural feature that raises distinct concerns about procedural legitimacy, fairness, and the integrity of the adjudicative design by allowing the merits question to shape the process through which the merits question is decided. Procedural circularity may exist even when every participant in the proceeding acts in good faith, every safeguard is observed, and the final determination is entirely correct. Procedural circularity arises when a proceeding allocates procedural authority based on a preliminary assessment of decisional abilities that substantially overlaps with the unresolved merits question, thereby allowing the subject of the adjudication to shape the conditions under which adjudication occurs. In this way, the proceeding provisionally treats a contested proposition as a premise of the procedure before that proposition has been conclusively established.

The significance of this dynamic does not depend upon whether D.P. ultimately required the appointment of a guardian or that the court reached the correct outcome. In fact, it does not depend on whether the court's preliminary assessment ultimately affected the outcome of the guardianship proceeding at all. The significance lies elsewhere. It reveals a structural feature of certain adjudicative systems. Before the state has established that D.P. lacks decisional authority, the proceeding may begin allocating procedural authority as though that proposition were already partially true. In a limited class of proceedings, unresolved assessments of decisional authority may become relevant to determining the authority accorded to decisions made during the proceeding itself. This Article examines that phenomenon.

Existing scholarship has examined related concerns from several directions. Guardianship scholars have explored the relationship between autonomy, substituted decision-making, supported decision-making, and the risk of incorrect findings of incapacity.[8] Disability scholars have examined legal capacity, personhood, and the implications of recognizing decision-making rights irrespective of disability status.[9] Procedural-justice scholars have emphasized the importance of participation, voice, and legitimacy independent of substantive outcomes.[10] Mental health law scholars have analyzed the connection between decisional capacity and refusal rights.[11] These literatures illuminate important aspects of protective adjudication and have made important contributions, however, they generally address such questions within their particular doctrinal domains. Yet they have not fully addressed the implications of relying upon a preliminary assessment of decisional abilities to structure participation while substantially similar decisional abilities remain the contested object of the adjudication.

This Article provides a framework for understanding this phenomenon. It identifies three features that together generate procedural circularity. First, the proceeding defines the merits inquiry in terms of an individual's decisional abilities. Second, access to procedural authority, participation rights, litigation control, or other incidents of procedural status depends upon a threshold assessment of substantially similar decisional abilities. Procedural circularity does not require that the same legal standard govern both inquiries. Rather, it arises when a threshold determination requires an assessment of decisional abilities that substantially overlaps with the decisional abilities that remain contested in the merits proceeding. Third, the threshold determination may alter the individual's procedural position within the proceeding.

Procedural circularity therefore involves more than the presence of a capacity-related threshold question. It arises when an initial assessment of decisional ability determines the procedural conditions under which a later adjudication examines substantially similar decisional abilities. The existence of procedural circularity does not depend on showing that the subsequent merits determination is wrong. A proceeding may exhibit procedural circularity even when the

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[8] *Cite Lawrence A. Frolik, Nina A. Kohn, Jeremy A. Blumenthal, Amy T. Campbell, and Catheryn Koss*
[9] *Cite Michael L. Perlin, Gerard Quinn, and Tina Minkowitz*
[10] *Cite Tom R. Tyler*
[11] *Cite Paul S. Appelbaum, Thomas Grisso, Paul S. Appelbaum, and Bruce J. Winick*

ultimate merits determination was correct. It exists whenever a preliminary assessment of decisional ability affects the procedural framework within which substantially similar decisional abilities are later adjudicated. The threshold determination influences whether the individual directs the litigation strategy; the scope of the individual's participation; who participates in the adjudication, how the record is developed, and other incidents of procedural authority within the proceeding. The assessment of decisional abilities becomes intertwined with the conditions under which the merits inquiry, decisional abilities, is adjudicated. The concern is that the proceeding begins assigning procedural weight to the person's decisions based on assumptions about the very question the proceeding exists to answer.

This framework helps distinguish procedural circularity from several distinct but related concepts, such as path dependence, evaluator bias, and the broader entanglement of procedure and merits. Procedural circularity is not reducible to path dependence because it does not require a showing that preliminary determinations influence later adjudicative decisions.[12] It is not a form of bias as the phenomenon may exist even when decisionmakers remain entirely open-minded.[13] Nor is it merely another example of procedure-merits overlap[14]. The central issue is not that procedural and substantive questions intersect, but rather, that unresolved determinations concerning decisional abilities have the potential to affect the authority accorded to participation before decisional authority has been ultimately determined. These phenomena may coexist with procedural circularity and, in some cases, intensify its effects. However, they do not fully explain the recursive structure examined here. Procedural circularity identifies a distinct feature of protective adjudicative design – the possibility that a preliminary assessment of contested decisional abilities influences the procedural conditions under which substantially similar abilities are ultimately adjudicated.

Although the problem here arises in the context of guardianship, it extends beyond Article 81 proceedings. The implications of procedural circularity extend beyond any single doctrinal field. Protective proceedings force legal institutions to navigate the difficult boundary between respecting individual autonomy and responding to concerns about impaired decision-making. Procedural circularity illuminates how that tension can become embedded in the structure of the

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[13] define
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adjudication itself. Recognizing the phenomenon is therefore an important first step toward designing procedural frameworks that protect vulnerable individuals without allowing preliminary judgments to unduly constrain the process through which those very judgments are ultimately evaluated.

The Article proceeds in five Parts. Part I develops the conceptual framework, explaining its defining features, and distinguishing it from related doctrines. Part II examines Article 81 guardianships as the Article's principal case study and demonstrates how procedural circularity operates when assessment of decisional ability shape procedural authority. Part III shows that the phenomenon extends beyond guardianship by examining medical decision-making capacity adjudications and related capacity-based adjudications. Part IV explores the implications for participation, procedural authority, and adjudicative legitimacy. Part V evaluates potential reforms designed to mitigate the recursive effects and better align autonomy, protection, and procedural design.

I. THE ARCHITECTURE OF PROCEDURAL CIRCULARITY

A. The Conceptual Foundation

Procedural circularity rests on a structural relationship between procedural access and decisional ability. Understanding that relationship requires beginning with the design features that make the dynamic recur. Procedural circularity describes an adjudicatory design in which procedural authority, participation rights, or access to procedural opportunities depend upon a preliminary assessment of decisional abilities. The structure is recursive. The threshold judgment may shape the procedural environment within which the adjudication occurs; the procedural environment may influence how the evidentiary record develops; and the resulting record forms the basis for the eventual merits determination.[15] Each stage thus generates the conditions under which the next is evaluated, producing a self-reinforcing procedural architecture. In this sense, procedural circularity is not a sequencing problem or a doctrinal anomaly. It is a design feature of protective regimes that define both procedural eligibility and substantive outcomes in terms of decisional ability.

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[15] *The Problem of Default*

The core insight is that the proceeding requires a preliminary, merits-laden procedural judgment, effectively a truncated preview of the merits, to determine the extent and character of the individual's participation in the adjudication of those same merits. Ordinary litigation exhibits linear path dependence; procedural sequencing influences the evidentiary record, which in turn influences the merits.[16] But the procedural stage does not require the decisionmaker to resolve the merits question itself.[17] Procedural circularity arises when a preliminary assessment of decisional abilities that substantially overlap with those contested on the merits is used to allocate procedural authority within the proceeding, thereby allowing an unresolved aspect of the merits inquiry to influence the procedural conditions under which that inquiry is adjudicated.

B. Distinguishing Procedural Circularity

Several concepts resemble procedural circularity but differ in mechanism, doctrinal domain, and structural effect. Clarifying these boundaries makes the structural logic of procedural circularity more precise and prevents misclassification.

1. Evidentiary Presumptions

Evidentiary presumptions shift the burden of producing or persuading on the merits[18], but they do not determine whether the individual may access the procedural tools through which the merits are adjudicated.[19] A presumption may influence how decisional ability is evaluated, but it does not require the decisionmaker to resolve a preliminary version of the merits question to decide whether the individual may participate in the proceeding. Presumptions structure inference; procedural circularity structures participation.

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[17] Greiner, *The Problem of Default*

[18] See Fed. R. Evid. 301; *Presumptions in Civil Litigation*

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2. Incapacity Standards

Incapacity standards define the substantive criteria for determining decisional ability[20], but they do not themselves generate procedural circularity. A capacity standard may be broad, indeterminate, or inconsistently applied, yet the standard alone does not require the decisionmaker to make a merits-laden judgment at the procedural stage. Procedural circularity arises only when the standard governing the merits is also used to gatekeep procedural access, forcing the decisionmaker to preview the merits to determine who may participate in adjudicating them. Incapacity standards define outcomes; procedural circularity defines access.

3. Evaluator Bias

Evaluator bias concerns how decisionmakers interpret behavior, evidence, or risk—the accuracy or neutrality of the individual decisionmaker[21], but bias does not create the structural loop at the heart of procedural circularity. A biased evaluator may misjudge decisional ability, but bias alone does not require the evaluator to resolve the merits question to determine procedural eligibility. Procedural circularity persists even under ideal, unbiased decision-making because the architecture of the proceeding requires a merits-laden threshold judgment. Bias can explain error; procedural circularity explains structure.

4. Institutional Pressures

Institutional pressures, such as docket constraints, resource scarcity, administrative incentives, and professional norms, shape how protective proceedings operate, but they do not produce the recursive relationship between procedural access and the merits.[22] Institutional pressures may influence the speed or depth of the evaluation, but they do not require the decisionmaker to resolve the substantive question of decisional ability in order to determine who may participate in resolving that same question. Procedural circularity arises from the design of the proceeding, not from institutional context; it is not a byproduct of external constraints. Institutional pressures explain variation and context; procedural circularity explains architecture.

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[20] *Matter of Dameris L.*
[21] *A Third View of the Black Box*
[22] *Why the "Haves" Come Out Ahead*

5. Procedural Path Dependence

Procedural path dependence describes how early procedural rulings shape the evidentiary record and influence later stages of adjudication, but it does not require the decisionmaker to resolve the merits question at the procedural stage.[23] Procedural circularity arises only when the same substantive inquiry governs both procedural access and the merits, such that the decisionmaker must make a preliminary, merits-laden judgment to determine whether the individual may participate in adjudicating that very question. Path dependence concerns sequencing[24]; procedural circularity concerns recursion.

6. Jurisdictional Fact

Jurisdictional fact requires a court to make a threshold**,** merits-related determination to decide whether it has authority to hear a case, but that determination is front-loaded and discrete.[25] It does not shape the evidentiary environment or structure the conditions under which the merits are later developed. Procedural circularity, by contrast, arises only when the same substantive inquiry governs both procedural access and the merits, creating a recursive loop in which the threshold judgment shapes participation, participation shapes the record, and the record shapes the merits. Jurisdictional fact concerns a threshold preview; procedural circularity a structural loop.

7. Merits–procedure Entanglement

Merits–procedure entanglement describes situations in which procedural rulings are influenced by implicit assumptions about the merits, or in which the merits determinations are shaped by procedural structures, but without requiring the decisionmaker to resolve the merits question at the procedural stage.[26] Entanglement reflects a blurring between procedure and substance, not a recursive loop. A judge may tailor discovery based on perceived claim strength, or a pleading standard may influence how the merits are framed, yet these interactions do not force the

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[23] Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 Wash. U. L. Rev. 1315, 1323 (2008) (defining procedural path dependence as the way early procedural features shape the development of substantive outcomes).

[24] Briefly explain and note that it is further discussed in Part C.

[25] Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973 (2006) (explaining that jurisdictional fact involves preliminary substantive assessments that are front-loaded and discrete rather than iterative); Richard H. Fallon, Jr., *Jurisdictional Rules and Jurisdictional Facts*, 103 Harv. L. Rev. 618 (1990) (distinguishing between threshold determinations of power and subsequent merits adjudication).

[26] Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873 (2009); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

decisionmaker to answer a preliminary version of the substantive inquiry in order to determine procedural access. Entanglement concerns influence; procedural circularity concerns recursion.

8. Paternalism

Paternalism refers to a normative stance in which a decisionmaker substitutes their judgment for the individual's, believing that overriding the person's expressed preferences will protect them from harm.[27] It is a justification for intervention, not a structural feature of adjudication. A judge may reject a respondent's choice of counsel "for their own good," or an evaluator may interpret resistance as incapacity because the refusal appears dangerous, but these are normative overrides, not architectural predicates. In protective-regime scholarship, paternalism is often invoked to explain judicial or clinical overrides of individual choice, but it is a justification for intervention rather than a structural feature of adjudication. Paternalism can coexist with procedural circularity, but it does not generate the recursive dynamic at the heart of the circularity because it does not require the decisionmaker to resolve the substantive inquiry—decisional ability—in order to determine procedural access. Paternalism concerns normative substitution; procedural circularity concerns structural recursion.

Taken together, these distinctions show that procedural circularity is a structural feature of protective adjudication that arises whenever procedural access and substantive judgment turn on the same underlying inquiry.

II. CASE STUDY I: GUARDIANSHIP

Guardianships exhibit procedural circularity in its most visible form because all three structural conditions appear at the outset of the proceeding. Article 81 of the New York Mental Hygiene Law[28] ("Article 81") provides an ideal case study for procedural circularity. This statute is widely regarded as a modern, functional alternative to the plenary guardianship, emphasizing

[27] Nina A. Kohn, *Outliving the Law: Legal Capacity in the Age of Longevity*, 50 Ga. L. Rev. 607 (2017); Bruce J. Winick, *The Side Effects of Incompetency Labeling*, 1 Psychol. Pub. Pol'y & L. 6 (1995); Charles P. Sabatino, *Competency, Decision-Making, and Guardianship*, 3 Elder L.J. 1 (1996).
[28] MHL § 81

tailored interventions, individualized assessments, and the least restrictive alternative.[29] Yet its adjudicative architecture contains the precise structural conditions identified in Part II: (1) merits defined in terms of decisional ability; (2) procedural actions that structure the merits environment; and (3) threshold gatekeeping by actors with institutional authority over the merits.[30] The result is a proceeding that aspires to functional tailoring but nonetheless exhibits recursive interactions between threshold judgments and merits determinations.

A. Article 81's adjudicative architecture

Article 81 is built around a functional-assessment framework.[31] Rather than relying on categorical incapacity, the statute requires courts to determine whether the individual alleged to be incapacitated is likely to suffer harm because they are unable to provide for their personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of that inability.[32] The Court of Appeals has emphasized that this standard demands a task-specific, functional inquiry, not a global declaration of incompetence.[33]

Although Article 81 frames its merits inquiry in terms of "functional limitations," the statute's requirement that the respondent "understand and appreciate" the nature and consequences of those limitations necessarily incorporates the same decisional-ability constructs identified in Part I. The functional standard is designed to avoid doctrinal debates about "capacity," but in practice courts implement it through assessments of understanding, appreciation, reasoning, and communication[34]—the very decisional abilities that also govern procedural access. As a result,

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[30] Cross reference Part II

[31] Although Article 81 of the Mental Hygiene Law frames its capacity standard in terms of "functional limitations," the statute itself requires decisional-ability assessments, and New York courts and court evaluators implement the functional criteria through those cognitive constructs. Section 81.02 of the statute directs courts to determine whether the respondent can "understand and appreciate" the nature and consequences of any inability to meet personal and/or property-management needs — language that necessarily requires an evaluation of decisional abilities such as comprehension, appreciation, reasoning, and communication. Published decisions confirm this practice; courts routinely assess whether choices are "knowing and voluntary" under § 81.10, whether refusals of evaluation reflect impaired understanding, and whether respondents can appreciate the implications of contesting the petition. Court evaluator reports likewise analyze decisional abilities as the mechanisms through which functional tasks are performed.

[32] MHL § 81.02(b)

[33] See *Matter of Samuel S.*

[34] See *Matter of Maher*, 207 A.D.2d 133 (2d Dep't 1994) (explaining that Article 81 requires determining whether the individual can "understand and appreciate" the nature and consequences of functional limitations); *Matter of Samuel S. (Helene S.)*, 96 A.D.3d 954 (2d Dep't 2012).

Article 81's functional inquiry operates as a decisional-ability inquiry in practice despite its doctrinal avoidance of the language of capacity, making it a paradigmatic example of procedural circularity.[35]

The statute allocates authority across two primary institutional actors: judges and court evaluators. Judges retain the ultimate authority over both the procedural and substantive determinations, including whether to appoint counsel, to compel an evaluation, to order the production of records, and to impose a guardianship.[36] Court evaluators, in turn, serve as the court's investigative arm.[37] They interview the respondent, review records, consult collateral sources, and prepare a report assessing functional limitations, decisional abilities, and the necessity and scope of a guardianship.[38] Article 81 courts routinely treat court evaluator reports as central to the merits determination, even while acknowledging that the court evaluator is not an interested party and does not represent the respondent.[39]

This allocation of authority embeds court evaluators and judges within a unified decisional structure. The court evaluators generate the informational record; the judges interpret it. Both actors make threshold judgments about decisional ability that shape the procedural environment in which the merits are later assessed.

B. Threshold judgments as gatekeeping

Article 81 requires courts to make threshold judgments about decisional ability before the merits can be adjudicated. These judgments determine, among other things, whether the individual may refuse an evaluation, select or retain counsel, contest the petition, or participate meaningfully in the hearing.

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[35] See Nina A. Kohn & Jeremy Blumenthal, *A Critical Assessment of Supported Decision-Making for Persons with Disabilities*, 40 Cardozo L. Rev. 481, 497–98 (2018) (explaining that functional standards are implemented through assessments of understanding, appreciation, and reasoning); Leslie Salzman, *Rethinking Guardianship (Again)*, 26 Stan. L. & Pol'y Rev. 317, 331–33 (2015) (noting that Article 81 presupposes decisional abilities in determining procedural participation).

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[38] MHL § 81.09(c)-(d).

[39] See *Matter of A.G.*

For example, Article 81 courts have treated the respondent's choice of counsel as contingent on a threshold finding that the alleged incapacitated person's choice is "knowing and voluntary" under § 81.10.[40] In *Matter of Maher*, the Appellate Division upheld the court's refusal to honor the respondent's preferred counsel where the court concluded that the respondent lacked the decisional ability to make an informed choice, and instead appointed counsel to protect her interests.[41] Similarly, courts have authorized compelled access by court evaluators when they conclude that the respondent cannot meaningfully consent to or refuse evaluation, treating the refusal itself as evidence of impaired decisional ability.[42]

These threshold judgments are merits-laden. They require the court to form preliminary views about the respondent's decisional abilities—the very abilities the proceeding is designed to adjudicate. The court must decide whether the respondent can understand for example, the nature of counsel, the purpose of an evaluation, or the implications of contesting the petition. These determinations are not ancillary; they are structurally intertwined with the merits.

C. How Procedure Shapes What the Court Sees

Threshold judgments under Article 81 shape the procedural configuration of the proceeding, which in turn shapes the informational record available at the merits stage. When a court finds that the respondent cannot meaningfully participate, it may limit the respondent's presence at the hearing, authorize substituted participation through counsel or a guardian ad litem, or compel an evaluation.[43] Each of these procedural actions alters the conditions under which information is produced.

In *Matter of A.G.*, the court relied heavily on a court evaluator's report and observations made in a hospital setting, where the respondent's participation was limited and mediated through institutional staff.[44] The court's earlier decisions about the evaluation and presence shaped the evidentiary record, which then became the basis for the guardianship order.[45] Likewise, in *Matter of Mildred M.J.*, the court noted that the respondent's limited participation and reliance on

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[40] MHL § 81.10(a).
[41] Matter of Maher
[42] See MHL § 81.09(d); *Matter of A.G.*
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[44] *Matter of A.G.*
[45] Id.

appointed counsel affected the narrative available to the court, emphasizing that the record reflected "principally the accounts of third parties and the court evaluator."[46]

When the respondent is absent or represented through intermediaries, the record reflects fewer first-person accounts, fewer opportunities for clarification or correction, and fewer observable moments in which the respondent's preferences or reasoning can be assessed.[47] These procedural configurations do not merely influence the evidentiary record; they constitute it. The information available to the court at the merits stage is the product of procedural decisions made earlier in the proceeding—decisions that were themselves shaped by threshold judgments about decisional ability.

D. Self-reinforcing assessments

Article 81 proceedings often exhibit self-reinforcing assessments of decisional ability. Court evaluator reports, participation decisions, and procedural rulings interact to create a recursive loop in which early judgments shape later evidence, and later evidence appears to confirm early judgments.

In *Matter of Isadora R.*, the court's initial conclusion that the respondent could not meaningfully manage her affairs justified the appointment of a temporary guardian and the ordering of an evaluation.[48] The court evaluator's report, based on interactions structured by that temporary guardianship and the respondent's limited participation, then became the central evidence supporting a permanent guardianship.[49] The court's merits determination thus appeared to validate its threshold judgment, even though the evidentiary record had been shaped by that judgment from the outset.

This dynamic echoes concerns raised in other decisional-capacity contexts, where courts and commentators have noted that early competence findings can structure subsequent evidence and adjudication.[50] In Article 81 proceedings, the recursive interaction between threshold

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[46] *Matter of Mildred M.J.*,
[47] See *Rethinking Guardianship (Again)*
[48] *Matter of Isadora R.*, 5 A.D.3d 494, 495-96 (2d Dep't 2004).
[49]
[50] See Bonnie, The Competence of Criminal Defendants.

judgments, procedural configurations, and court evaluator reports is not the product of bias or error. It is a structural feature of the adjudicative architecture.

E. Structural implications

Article 81 is often celebrated for its functional tailoring and individualized assessments.[51] Yet its adjudicative architecture exemplifies procedural circularity. The statute's functional standard places decisional ability at the center of the merits. Its procedural rules require courts to assess decisional ability at the threshold. Its allocation of authority embeds judges and court evaluators within a unified decisional structure. And its procedural configurations shape the informational record in ways that reinforce initial judgments.

The result is a proceeding in which procedural access and substantive adjudication are recursively intertwined. Article 81's commitment to functional tailoring, while laudable, does not eliminate this structural dynamic; it intensifies it. By making decisional ability both the threshold and the merits question, Article 81 creates the conditions under which procedural circularity arises.

CONCLUSION

This draft has argued that guardianship proceedings reveal a structural phenomenon that this paper terms procedural circularity. When a preliminary assessment of decisional abilities influences the procedural environment within which substantially similar abilities are later adjudicated, the proceeding contains a recursive feature that is distinct from ordinary bias, path dependence, or merits-procedure overlap. Article 81 provides the paper's primary case study, but important questions remain regarding the concept's scope, limits, and applicability beyond guardianship. Those questions form the focus of the project's next stage and are the issues on which feedback would be most valuable and appreciated.

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