
Problems with Mental Capacity

Individuals make decisions all the time, ranging from the mundane, such as which cereal we choose to have in the morning, to the profound, such as whom to marry or which religion to follow. The importance of choice in our lives makes the value of autonomy a core pillar of liberal society. Despite its alleged universal importance, the right to make decisions about one's life has been extended to individuals with mental impairments only very recently. With this shift comes a challenge to understand what it means to exercise autonomy in the context of impairment and disability.

Medico-judicial practice and bioethicists commonly posit that individuals with cognitive and psychosocial impairments can exercise their autonomy when they demonstrate mental capacity. At its core, the concept of mental capacity captures the simple intuition that we need to display a level of decision-making competence in order for our choices to be respected; it is a technical concept that assesses the following: can individuals understand and reason about the various options available to them? Can they understand the consequences of their decisions? Are their reasons internally consistent? Can they draw upon true as opposed to deluded beliefs? In short, capacity is an all-or-nothing concept that determines whether others around them defer to individuals' subjective choices, protecting individuals' autonomy from outside intrusion. In many legal jurisdictions, a finding of incapacity means best interests decisions can be made on behalf of another according to what others believe to be beneficial to their well-being, overriding their subjective choices.

Yet this prevalent concept of mental capacity has become increasingly fraught terrain in bioethical and medico-judicial contexts. Consider the following scenarios:

- A woman with Down syndrome can understand why one would use contraception and the implications and risks of not using it; she does not wish to become pregnant. Yet she still refuses to use contraception

due to the coercive influence of her husband, who wants a baby and threatens to leave her if she starts using birth control.

- An elderly woman with mild dementia grants power of attorney to her son, who manipulates, abuses, and isolates her.
- A woman with cognitive impairments is coerced into marrying in a foreign country due to family influence, even as this does not express her own preferences.
- A young man with learning impairments refuses to move away from his enmeshed relationship with his mother, cultivating within him learned helplessness and unhealthy dependence.

These common scenarios raise fundamental questions about how relationships influence mental capacity and the decision-making process. The role of relationships in mental capacity has not been properly considered in theory or practice. The realm of legal practice currently pulls in opposite directions, recognising, on one hand, the *interpersonal* source of capacity: that the assessment of mental capacity can often turn on the relationships surrounding individuals with impairment. Increasing emphasis on supportive decision-making implies that some relationships foster and sustain capacity whilst others undermine it. Conversely, other prominent legal judgments under the Mental Capacity Act 2005 in England and Wales (MCA) assert the *intrapersonal* source of capacity – namely the causative nexus between mental disorder and the inability to decide. Understanding mental capacity in this way captures common law intuitions about individuals as rights-bearers; moreover, it may have procedural justification from a strict legal perspective in that it helps demarcate the boundary between the MCA and inherent jurisdiction in England and Wales.¹

Even as practice is moving increasingly towards an intrapersonal direction, such an interpretation of mental capacity is unconvincing at a deeper, theoretical level, particularly when we consider the supportive framework that is simultaneously acknowledged as necessary for individuals with impairments to exercise their autonomy and practical reasoning. Thus far, theoretical conceptualisations have yet to situate mental capacity within relationship. Different approaches have stressed how capacity should be situated within discussions of cognitive procedural processes,²

¹ See Appendix 1 for a brief overview of the MCA and inherent jurisdiction in England and Wales.

² Allen E. Buchanan and Dan W. Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge: Cambridge University Press, 1990).

authenticity,³ diachronic values,⁴ or emotional aptitude.⁵ But absent in these discussions is a sustained examination of how *relationships and intersubjective dialogue* bear on capacity – a problem medico-juridical practice increasingly faces but has yet to generate corresponding theoretical reflection in the bioethical and philosophical literature.⁶ In sum, the concept of mental capacity needs to move away from its formalistic, individualistic inflection in bioethical literature and medico-juridical practice.

³ Jacinta Tan et al., ‘Competence to Make Treatment Decision in Anorexia Nervosa: Thinking Processes and Values’, *Philosophy, Psychiatry, and Psychology* 13:4 (2006): 267–82; Jacinta Tan et al., ‘Competence to Refuse Treatment in Anorexia Nervosa’, *International Journal of Law and Psychiatry* 26 (2003): 697–707; also see a distinction between ‘abilities-based’ as opposed to ‘pathology-based’ approach, made by Gerben Meynen and Guy Widdershoven, ‘Competence in Health Care: An Abilities-based versus a Pathology-based Approach’, *Clinical Ethics* 7 (2012): 39–44.

⁴ Jillian Craigie, ‘Competence, Practical Rationality and What a Patient Values’, *Bioethics* 25:6 (2011): 326–33.

⁵ Louis C. Charland, ‘Is Mr. Spock Mentally Competent? Competence to Consent and Emotion’, *Philosophy, Psychiatry, and Psychology* 5:1 (1998): 67–81.

⁶ There has been some reflection on the impact of relationships in parallel, slightly unrelated debates about voluntariness of informed consent. The standard bioethical account of valid informed consent to participate in research has tended to separate out what we might call ‘capacity-related’ issues from ‘voluntariness-related issues’ (see Robert M. Nelson, et al., ‘The Concept of Voluntary Consent’, pp. 6–16, and Paul Appelbaum, ‘Can a Theory of Voluntariness Be A Priori and Value-Free?’, pp. 17–18, both in *American Journal of Bioethics* 11:8 (2011)). Capacity-related issues would include the intrapersonal factors that are causally implicated in an individual’s ability to consent, whilst voluntariness-related issues include external factors that can affect one’s decision-making (i.e. relational coercion and manipulation). Ultimately, this separation is premised on the assumption that decision-making capacities (i.e. what it means to make autonomous decisions in the world) do not necessarily overlap with mental capacity. However, I find this demarcation both puzzling and unconvincing. From a legal perspective, informed consent cases are separate from mental capacity: the former revolve around issues of medical negligence of risks and the provision of proper information about risks, whereas it seems strange to speak of ‘informed consent’ to reside somewhere of one’s choosing, for example. Moreover, mental capacity combines what these debates separate – namely, how impairment and, in some cases, one’s relationships can impinge on an individual’s ability to make decisions. It might be that someone like Appelbaum would argue that this rests on a mistake that conflates capacity and voluntariness criteria. But from a theoretical perspective, it seems to me an arbitrary move to separate mental capacity criteria from voluntariness criteria, unless one is committed to a highly reductive explanatory framework, which, in my mind, neglects the close interconnection between the two. Mental capacity involves an interrelated network of other concepts, such as autonomy and rationality, especially when we consider the typical criteria for capacity involving pillars such as ‘use and weigh’ or ‘understand and appreciate’. The argument of this book makes clear that I am committed to a more holistic approach to mental capacity, which will indeed encompass the same concerns that are artificially relegated to voluntariness-related criteria.

Motivating this book are two concerns: first, assumptions in medico-judicial practice and bioethical theory cause capacity to be seen as an objective, either-or concept, primarily rooted in internal biological causes. Whether such an account leads to ethically justifiable outcomes in terms of state intervention is questionable: individuals who might be found to lack capacity on these criteria may in fact be able to make their own decisions given a supportive relational environment. Equally, those who choose to remain within abusive, disabling relational contexts are often found to have capacity, causing public institutions to neglect a duty to intervene in such contexts. The second, deeper motivation revolves around concerns about how a shared world with individuals with impairments can be established so that their decisions and actions can be better situated, interpreted, and understood. Those with impairments and disorders are often viewed by society as ‘other’, in that their behaviour, their choices, or their way of interacting with their environment seem incomprehensible, beyond the bounds of what is deemed ‘normal’, whatever that term means. And philosophers aren’t immune to the impulse to sideline those with impairments. Normative conceptions of rights, autonomy, and reasoning frequently utilise impairment as *contrast* cases, as illustrating *exceptions* to the rule, for how the normative ideal of such concepts looks like for individuals *without* impairments. I want to push back against this sidelining move in rethinking the concept of mental capacity, so as to provide a shared account of its underlying values. The normative conditions of such values will be more broadly construed so as to include individuals with impairments and their unique, embodied interactions with their environment.

This book argues that mental capacity must be conceived of as a relational concept that can be enhanced through intersubjective dialogue. I assume in the first instance that biological causes to impairment can affect decisional capacity – indeed, as the law does according to recent interpretations. However, capacity assessments must also recognise the *relational* constituents of decisional capacity – how these can interact with and worsen biological factors affecting capacity. Most accept that physical accommodations are often necessary to promote the inclusion and autonomy of individuals with impairments, yet relational aspects – that is, the presence or absence of enabling, inclusive narratives – can equally affect one’s decision-making abilities and practical agency. Relationships are central to the ability to cope with one’s embodied reality; they can enable one’s ability to make decisions about one’s life. Yet through environmental conditions of abuse, manipulation, or coercion they can

also suppress and neglect the necessary skills one needs for daily coping or making authentic choices – much more so if one’s impairments necessitate reliance on others. For this reason, I set aside discussion of the biological causes of mental impairments and simply assume its contributing – but not determinative – influence throughout this book. My purpose is to refocus the concept of mental capacity so that, from one end, it considers the reality of certain unique vulnerabilities that emerge out of embodiment and impairment, whilst, from the other end, it galvanises critical reflection on the obligations, duties, and competencies required *on behalf of others* to enable and promote the autonomy of individuals with impairments.

The argument of the book is as follows:

1. An individual’s environment, particularly one’s surrounding relationships, affects one’s ability to make decisions. This is clear when we examine more carefully the theoretical concepts grounding mental capacity, such as rights, autonomy, and rationality. Philosophical accounts are increasingly challenging the individualistic, subjective temper of these concepts. Once we acknowledge that environmental, relational factors do bear on one’s decisional capacity, we need further clarification as to what normative criteria should discriminate between those contexts that support and sustain mental capacity from those that undermine it. Without these criteria, capacity assessments that take into consideration individuals’ relational context appear arbitrary; judgments as to whether individuals can make decisions about their care, treatment, living arrangements, or the choice to live or die would simply be a matter of whether capacity assessors subjectively approve or disapprove of an individual’s relationships. The book argues that supportive environmental, relational features will cultivate ‘autonomy competencies’ within individuals with impairments, namely, a range of socially acquired perceptual, psychological, emotional, and cognitive skills necessary to engage with the world and make choices in accordance with one’s values. Conversely, the absence of supportive relationships and environments, or the presence of abuse, manipulation, and coercion, can fundamentally disable individuals’ decisional abilities.
2. The importance of relationships in supportive decision-making entails a range of interpersonal, enforceable duties and practices. This in turn blurs the current legal boundaries separating mental capacity from best interests, as becomes clear when we consider the justifiability of third-party interventions in disabling but freely

chosen relationships. I argue that in situations where the autonomy competencies of individuals are neglected, third-party interventions in disabling relationships can be warranted. Third-party duties to assist and intervene in abusive relationships involving individuals with impairments will be founded on how their decisional capacity and potential for developing autonomy competencies have become compromised within this context, so that individuals can be placed within an environment where their competencies can be encouraged. However, these interventions must be justified and carried out within certain ethical constraints – that is, the same enabling practices that apply to an individual’s immediate relationships.

3. I argue that capacity assessments themselves are intersubjectively situated and that the very manner in which these assessments are carried out can have a profound effect on the individual whose capacity is under scrutiny. Capacity adjudications are informed by their particular medico-judicial environment, by their own traditions, preconceptions and therefore are not value-neutral despite their air of objectivity. These assessments themselves are forms of interventions that become part of an individual’s context; consequently, they have the potential to enable or disable individuals’ decisional autonomy, just as their immediate surrounding relationships. Capacity adjudicators must therefore deploy certain interpretive skills to facilitate understanding rather than misunderstanding of the individual being assessed. These interpretive skills hinge on the exercise of critical reflexivity within the medico-judicial context, where background values and presuppositions in judgments are explicit and open to scrutiny, *even if* the outcome of the capacity adjudication overlaps with what we think is morally defensible.

In sum, the task of the book is twofold: first, to argue for a relational concept of mental capacity; second, to elucidate the ethical characteristics, obligations, and duties incumbent on the surrounding relationships *as well as* capacity assessors in order to contribute to the enablement of individuals with impairments. These claims could help the law develop toward a more relational interpretation of the mental capacity so that medico-judicial assessors and judges can apply current legal concepts in a manner that will enable individuals with impairments to exercise their autonomy.⁷ Moreover, the theoretical analysis of the book provides a

⁷ It also could have a potentially broader scope, applying to relationships involving not only those with borderline capacity under the law but also victims of abuse who pass the legal

different approach to the mainstream philosophical understanding of key normative concepts, such as autonomy and rationality, so that individuals with impairment are not utilised to illustrate *exceptions* or *outliers*, but rather their unique potential capacities and abilities are better accommodated.

Theories and Methodology

This book adopts an interdisciplinary approach, bringing philosophical reflection to bear on existing legal practice, thus forming the interpretive lens through which I examine the law of capacity. This aspect of my methodology may be controversial. Obviously the law has its own disciplinary conventions and constraints. From one perspective, the book's analysis of case law tries to be sensitive to these conventions but will likely prove unsatisfactory to the legal scholar. From another perspective, however, drawing upon external normative sources is intrinsic to the process of legal interpretation. I want to examine this latter view in further depth here because it shows how the analysis of case law offered in this book might sidestep objections from a purely legal standpoint. More importantly, we might also see how certain conflicting legal judgments about mental capacity, including those lower down, or at the margins of, the legal hierarchy, may be indicative of conceptual disagreement at a deeper, more normative level.⁸

According to Ronald Dworkin, legal practice and analysis requires an 'interpretive attitude' in which personal and institutional morality interacts.⁹ Legal interpretation is constructive in so far as it advances the purposes of the law, yet is also subject to both *internal* and *external* normative constraints. Internal standards of law include the importance of history, precedent, and available interpretations, whilst external

threshold of mental capacity, in the context of promoting their potentialities and abilities in mundane day-to-day settings. I do not discuss this implication in the book, as this would detract from my primary focus here.

⁸ I mean 'normative' in the sense that there are certain guidelines that recommend what ought to be the case. In this sense, the normative constraints of the law are not necessarily coextensive with normative *ethical* constraints. Normativity should not be conflated with morality – the latter concept of course will contain normativity, but the opposite is not true, or would require some philosophical manoeuvring to establish.

⁹ I set aside Dworkin's arguments about 'law as integrity', which presupposes that judges make interpretive decisions based on the assumption that these laws are agreed upon within the community, in accordance with fairness and justice. I do not believe one has to be committed to this more robust conception of the law to nonetheless draw upon the overall structure of Dworkin's account of the judicial interpretive endeavour.

constraints refer to socio-cultural norms and moral and political ideas. Hard cases or conflicting judgments at the level of law are often indicative of disagreement at a conceptual level, where further examination of the underlying concepts informing them is warranted. This analysis is not just descriptive but involves normative assessments based on (i) *fit* with previous cases, the legal record, and particular legal practices, as well as (ii) *justification* from the standpoint of political morality.¹⁰

Given that earlier decisions have ‘gravitational force’,¹¹ the first criterion of fit may well recommend legal interpretations that are ‘not too novel’.¹² As Dworkin states, ‘[a]t the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations’.¹³ However, the second criterion could ‘set these reasons against . . . *more substantive political convictions* about the relative value of two interpretations’.¹⁴ One interpretation could emerge as superior from this standpoint if it ‘makes the legal record better overall . . . *even at the cost of the more procedural values*’.¹⁵ In short, the process of normative justification leads to questions of how moral and political theory supports the body of laws.

Dworkin’s multileveled methodology is adopted in this book to explore the *normative* concept of mental capacity as it applies to medico-judicial practice. Legal analysis comprises the first level, taking into consideration the evolution of mental capacity case law through specific judicial decisions, keeping in mind the priority of some cases and interpretations over others. The next two levels involve *extra-legal* steps: disagreements in hard cases require judgement to probe additional layers relevant to the case. This doesn’t mean that judges are *creating* new law or that they are adding these layers consciously. However, the use of judgement involves engaging in different levels of conceptual abstraction. According to Dworkin, ‘the controversy latent in this abstraction is identified and taken up’ in subsequent levels, and ‘exposing this structure may help to sharpen argument and will in any case improve the community’s understanding of its intellectual environment’.¹⁶

The level of analysis will determine our view as to whether medico-judicial debates about mental capacity are resolved. From a strict

¹⁰ Ronald Dworkin, *Law’s Empire* (Oxford: Hart, 1998), Dworkin, ‘Natural Law Revisited’, *University of Florida Law Review* 34:2 (1981–2): 165–88.

¹¹ Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1996), p. 111.

¹² Dworkin, *Law’s Empire*, p. 248.

¹³ *Ibid.*, p. 71.

¹⁴ *Ibid.*, p. 248, emphasis added.

¹⁵ *Ibid.*, emphasis added.

¹⁶ *Ibid.*, p. 71.

legal perspective, certain issues of mental capacity may revolve around consensus *internal* to the *practice* of law. We might think that developing case law and the clarification of procedural boundaries between capacity law and inherent jurisdiction together point to consensus that mental capacity is an intrapersonal concept. However, Dworkin's legal interpretivism suggests that these internal resolutions *by themselves* do not decide the *conceptual and ethical issues* underlying hard cases about mental capacity. Analysis at the first level does not exhaust what has to be said about concepts operating within the law; it may even indicate contested or incoherent assumptions. For this, a second level of analysis is needed, drawing on phenomenology, for example, to examine how legal interpretations cohere with or depart from the lived experience of impairment and presenting to us a more nuanced understanding of how important concepts, such as autonomy, reasoning, impairment, and disablement, manifest themselves in lived practice. The final level is normative, to provide a phenomenologically sensitive yet justifiable account of the values and concepts at stake in the medico-judicial practice of mental capacity.

I have not devoted separate sections of the book to each of procedural issues, phenomenological analysis, or normative argument but incorporate these different levels of analysis in a more holistic fashion. In the first instance, my argument draws on an eclectic range of philosophical sources, and my reasons for favouring some theories over others will become clear in each chapter. This philosophical eclecticism is important, as I would fail to do justice to the different ethical perspectives that warrant consideration if I endeavoured to apply a grand unifying theory. First-personal, second-personal, and third-personal dimensions of mental capacity need to be taken into account. The first-personal dimension involves the subjective experience of capacity. Phenomenological analysis will therefore be crucial to account for the first-hand experience of embodiment and impairment to offset the priority accorded to cognitive reflection in our conception of autonomy, which often excludes individuals with impairments. The second-personal dimension denotes the relational, intersubjective constituents of capacity – the type of interpersonal engagement, duties, and obligations that are owed to us by others. In this respect, feminist theory helps illuminate the interpersonal constituents in the development of autonomy, as well as challenges misguided individualistic, liberal assumptions implicit in our notion of legal rights. Hermeneutics moreover allows us to articulate more fully the substantive intersubjective practices that underlie enabling relationships and capacity assessments.

Finally, the third-personal dimension refers to the perspective of others who stand outside our immediate relationships. For this, a more deontological, Kantian approach captures the unique normative, third-party standpoint of capacity adjudications, whilst more substantive theories of rationality highlight the socially embedded nature of these judgements themselves.

As a whole, this multileveled, multi-perspectival methodology draws attention to instances where a more relational concept of mental capacity is or ought to be assumed in practice; it likewise pinpoints where our theoretical understanding and analysis of contested background values and concepts could improve. Some degree of ‘reading between the lines’ inevitably occurs in my analysis of the law and case reports, but this is necessary if we are to ensure that mental capacity as a medico-judicial concept is properly responsive to the realities and challenges of exercising autonomy within the context of impairment.

Some might question the validity of this methodological approach on grounds that legal analysis eschews the phenomenological and normative ethical levels of analysis. If we are to draw any normative conclusions about cases, these should surround issues about procedural mechanisms and judicial reasoning within the confines of the legal discipline and its traditions. The *legal* significance of specific cases is not coextensive with their *normative* significance. The naturalistic fallacy is committed when we conflate the two, thus confusing descriptive and normative endeavours. If true, the normative ambitions of this book would have to be scaled back dramatically.

Awareness of the constraints of legal analysis is important, particularly if my argument is to convince medico-judicial practitioners and legal scholars. Yet I will not confine myself to the first level of analysis for three important reasons. First, a legal-procedural analysis would overdetermine the priority of an intrapersonal, individualistic reading of mental capacity, particularly as legal precedent more recently has begun to sideline issues having to do with the impact of relationships on individuals’ ability to decide, assigning them to legal mechanisms *outside* mental capacity law, that is, the court’s inherent jurisdiction in England and Wales. Focusing on legal procedure – and how jurists are interpreting these procedural boundaries – unduly restricts the questions we choose to ask and the answers we give about mental capacity.

Second, the objection artificially restricts the scope of legal analysis. To be clear, I do not claim that normative insights can be *derived directly* from what is said in legal judgments, nor that *the cases themselves* bear the