

NEGOTIATING RELATIONALITY: MENTAL CAPACITY AS NARRATIVE CONGRUENCE

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ABSTRACT

The concept of capacity that emerges from the Mental Capacity Act (2005) is conceptually flawed and places practitioners in an impossible situation regarding its application. The continued support by the UK government and others for the Act strengthens the idea that the capacity/incapacity distinction is natural and that incapacity is an intrapsychic feature of an individual. This paper proposes an alternative model for understanding capacity and its assessment based on a narrative theory that recognises the role of the practitioner and identity negotiation. Although this more nuanced approach may at first appear more complex, it avoids the conceptual and practical difficulties raised by the notion of mental capacity.

I. INTRODUCTION

The Mental Capacity Act 2005 (MCA) established a legal framework for the identification and classification of human action as either capacitous or incapacitous. This framework however can be understood in a broader context, as part of a movement in health and social care for greater protection of those experiencing vulnerability, whilst also empowering individuals to act with self-determination.¹ In outlining the conditions under which an individual's actions are to be respected but also under which interference is permitted, the MCA attempts to distinguish between autonomous and non-autonomous action. Where an individual is found to have capacity, they are permitted to have their actions respected and as such mental capacity is "gatekeeper to the right to autonomy".² The definition of capacity adopted in the MCA, the culmination of a lengthy deliberation, is but one of many definitions which could have underpinned capacity legislation. Although the Act has received political praise and support, at both its coming into law and by a House of Lords Select Committee in 2014, the argument can be made that for such a rigorously debated piece of legislation, considerable difficulties remain. The difficulty of achieving compliance or implementation is compounded by the non-binding status of the Code of Practice and the lack of a definitive guide for compliance with the MCA.³ The recommendation that greater effort needs to be placed on achieving compliance has beckoned in considerable emphasis on training. The issue of implementation is itself subject to a more serious concern, namely whether it is possible to achieve what the Act sets out in the first place. The allocation of considerable financial resources to

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¹ It is this political and social agenda associated with the MCA that is considered "ground breaking", see T Williamson, 'Capacity to Protect – the Mental Capacity Act explained' (2007) 9(1) *Journal of Adult Protection* 31, or the "spirit of the MCA" in M Graham and J Cowley, *A Practical Guide to the Mental Capacity Act 2005: Putting The Principles of the Act Into Practice* (Jessica Kingsley Publishers, London, 2015) 16.

² M Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, New York, 2010) 2.

³ Department for Constitutional Affairs. *Mental Capacity Act 2005: Code of Practice* (TSO, London 2007).

training and implementation would appear questionable at the least, if it is unclear whether a capacity assessment in accordance with the Act can be performed.

The MCA arguably can be read as adopting a Millian understanding of the liberal self, inviting capacity to be considered in regard to liberty and non-interference.⁴ The presence of capacity prohibits interference in an individual's action. The establishment in the MCA of a cognitivist two-stage assessment process for the identification of incapacity in respect of a decision at a specific time, places constraints on the attempt to justify interference in the life of another. The two-stage process is comprised of diagnostic and functional elements. For an individual to be found to lack capacity they must have an "impairment of, or a disturbance in the functioning of, the mind or brain" which leads to an inability to "understand the information relevant to a decision", "to retain this information", to use or weigh this information", and to "communicate his decision" or simply understanding, retention, weighing and communication (URWC).⁵ Where assessment is called for, individuals with impairments of the mind or brain must demonstrate all four abilities in respect of a proposed decision to be held capacitous. As Catriona Mackenzie and Wendy Rogers observe however, the expectation of the MCA for mental capacity to be assessed at a specific time, (synchronically), is challenged by the parallel commitment to understand the self and consequently mental capacity over time, (diachronically).⁶ In section 1 the principles for the application of the Act are set out. Principle 3 of the MCA requires that a person be engaged with over time and supported in making a decision, while in respect of best interests determinations in section 4(6) there is a requirement to consider the individual over time so that a best interests decision is founded on an appreciation of the individual's values, beliefs, etc. Further challenges to the MCA's understanding of the self cognitively and discretely are advanced in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and in approaches which view the MCA in a broader context of care and the promotion of self-determination.⁷ The tension in the MCA between viewing the self cognitively at a specific time and viewing the self as having values and beliefs through time, coupled with the acknowledgment that capacity assessments consider an individual over time, suggest that incapacity is not located within an individual simply at a specific time.⁸ The MCA can be read as relying on particular conceptions or philosophies of the self, some of which are inconsistent with each other, the demands of practice and other legal frameworks including the UNCRPD.⁹

The adoption of a narrative approach to selfhood allows for an interrogation of mental capacity practice and highlights inadequacies and limitations in the cognitivist

⁴ JS Mill, *On Liberty and other writings* (Cambridge University Press, Cambridge, 1989) 13.

⁵ Department of Health. *Mental Capacity Act*. (HMSO, London 2005) Part 1, Section 2(1) & 3(1).

⁶ C Mackenzie and W Rogers, 'Autonomy, Vulnerability and Capacity: a philosophical appraisal of the Mental Capacity Act' (2013) 9 (Special Issue 1) *International Journal of Law in Context* 37-52.

⁷ See P Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75(5) *Modern Law Review* 752-778; Gerard Quinn. "Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD." Paper presented at HPOD Conference, Harvard Law School, Cambridge, MA, USA, 20 February 2010.

⁸ S Stefan, 'Silencing the Different Voice: Competence, Feminist Theory and Law' (1993) 47 *U. Miami Law Review*, 766 and Donnelly, above, n 2, 147.

⁹ This paper does not seek to address the compatibility between the MCA and UNCRPD. For such a discussion see L Series, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) *International Journal of Law and Psychiatry* 80-91.

approach of the MCA. Paul Ricoeur's understanding of narrative identity, as developed in *Time and Narrative* and *Oneself as Another*, allows for mental capacity practice to be evaluated from a perspective distinct from both the cognitive model of the MCA and recent relational approaches to mental capacity.¹⁰ Ricoeur argues that the activity of narrative identity, as something we engage in alongside others, is that which provides integrity or coherence to people's lives by drawing together different aspects of experience.¹¹ Crucially though, narrative is inter-subjective and can thus be seen as posing a challenge to the individualistic understanding of the self espoused in the MCA. The problems associated with implementing the MCA including instigating capacity assessment, assessing functional understanding, assessor bias and in particular the call for understanding capacity as internal to an individual and the requirement to view the self both diachronically and synchronically, places a burden and seemingly impossible expectation on practitioners. The narrative interpretation defended here makes two claims. First, capacity assessment can be considered as a mimetic activity and second, capacity assessment is a site of identity negotiation. This challenges the notion that capacity assessment is strictly about the individual assessed but calls for recognition of the social context and identity of the assessor and questions the idea that capacity is a claim about an individual. This narrative reading of mental capacity, comprised of mimetic and identity negotiation claims, challenges the coherence of the MCA's cognitivist approach. The practice of conferring capacity or incapacity is not defended or critiqued here, rather a narrative approach is proposed as providing a more accurate description of practices in capacity assessment. In highlighting the inadequacies of the MCA's approach, a narrative approach problematizes the instigation of capacity assessment, the nature of what is assessed and the conception that capacity is time-specific. Although this approach adds a complexity to understanding the assessment process, it identifies practical and conceptual difficulties and as such provides a more coherent account of practice.

In Part II a narrative approach to selfhood is developed from a reading of Paul Ricoeur and linked to the work of Marya Schechtman and Hilde Lindemann. Part III begins with a brief overview of difficulties in the application of the MCA. In Part III.1 four ways in which narrative identity can be applied to mental capacity practice are identified. In section III.2 a mimetic account of assessment is developed. The challenges such an approach poses to the functional model of the MCA are outlined in III.3. In Part IV the second claim of the narrative approach is proposed, namely that mental capacity assessment involves identity negotiation for at least two people. Finally, in Part V the narrative identity theory of mental capacity is set out and its relation to the functional model of capacity developed.

¹⁰ Paul Ricoeur's understanding of narrative identity is developed across multiple works. See P Ricoeur, *Time and Narrative* Vol. I, II, III, (K Mclaughlin and Pellauer tr, University of Chicago Press, Chicago 1984, 1985, 1988) & P Ricoeur, *Oneself as Another*, (K Blamey tr, University of Chicago Press, Chicago 1992).

¹¹ P Ricoeur, 'Life in Quest of Narrative' in D Wood (eds), *On Paul Ricoeur: Narrative and Interpretation*, (Routledge, London: 1991).

II. NARRATIVE SELFHOOD

The opportunity to understand the self and selfhood outside of a liberal conception of the self is offered by vulnerability¹² and relational approaches.¹³ In drawing attention to the role of others and context, purely internal approaches to understanding the self are challenged. Paul Ricoeur's understanding of narrative identity echoes this concern with how the self is viewed and can be read as offering an alternative to internal accounts of the self. A reading of Ricoeur's understanding of narrative leaves some ambiguity as to how narrative identity is negotiated. Schechtman's conception of narrative self-constitution and Lindemann's account of the relational practice of identity negotiation it is proposed here complement Ricoeur's understanding and provide additional support for the application of a narrative approach to mental capacity. In Part III, mental capacity assessment is considered through the lens of narrative identity.

In *Time and Narrative (TN)* Ricoeur develops his most detailed account of the function of narrative and crucially the mechanics of narrative practice. The practice of narrative, whether fictive, historical or personal, has as its theme time or the "temporal character of human experience".¹⁴ It is the mediating function of narrative that allows temporality to be accessible to consideration. The activity of narrative attempts to but does not resolve the "paradoxical nature of time".¹⁵ The first problem is the conflict between phenomenological and cosmological time, or between lived and objective time. The second problem is the dissociation or distention caused by the past, present and future in awareness that "the future is not yet, the past is no longer, and the present does not remain".¹⁶ The third problem is the 'inscrutability' of time, that for all the efforts of narrative, time evades constitution. In Ricoeur's later works on narrative, the focus is on the primacy of narrative identity for lived experience, the function narrative identity plays in synthesizing two aspects of selfhood and an understanding of the relation between selfhood, narrative and narrative identity.

In Book One of *TN*, Ricoeur introduces his threefold understanding of mimesis as the process through which time becomes refigured and productive. Whereas the action of telling a story is often associated with narrative, Ricoeur develops a broader approach. *Mimesis₁*, as the first stage of narrative corresponds to the preconditions for any act of narrative emplotment. Before an individual can narrate their identity there must be in play a "pre-understanding of the world of action", comprised of structural, symbolic and temporal dimensions.¹⁷ An individual must be versed in the "conceptual network" through which action can be talked about, understand that action is symbolically

¹² See F Luna, *Bioethics and Vulnerability: A Latin American View* (Rodopi, New York 2006) and C Mackenzie, W Rogers and S Dodds, (2014) *Vulnerability: New Essays in Ethics and Feminist Philosophy*, (Oxford University Press, New York 2014).

¹³ See C Kong, *Mental Capacity in Relationship: Decision-Making, Dialogue and Autonomy* (Cambridge University Press, Cambridge 2017); B Clough, 'Vulnerability and Capacity to Consent to Sex- Asking the Right Questions?' (2015) 26(4) *Child and Family Law Quarterly*, 371-397; C Mackenzie and N Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self*, (Oxford University Press, New York 2000).

¹⁴ P Ricoeur, *Time and Narrative* Vol. I (K Mclaughlin and Pellauer tr, University of Chicago Press, Chicago 1984), 3.

¹⁵ D Wood, 'Introduction: Interpreting Narrative' in D Wood (eds), *On Paul Ricoeur: Narrative and Interpretation*, (Routledge, London: 1991) 1.

¹⁶ Ricoeur, above, n 14, 7.

¹⁷ *ibid*, 54.

articulated and appreciate the temporal aspects of experience which are considered to require a narrative response.¹⁸ *Mimesis*₂ refers to the stage of emplotting an account of action and serves to synthesise events and occurrences and impose a configurational order on to events. As a cultural practice, narrating is governed by a tradition of available schemas through which one can create a narrative account. Finally, *Mimesis*₃ refers to the final stage where the proposed narrative is brought to the world. It is only at this stage of “application”, that narratives become complete.¹⁹ At this stage the text or narrative of the author intersects with the “world of the hearer or reader”.²⁰ The narrative proposed projects a particular horizon or understanding of the world.

Ricoeur's later discussions of narrative identity can be read as complementary to the exposition of the mimetic function and its relation to time. In ‘Life in Quest of Narrative’, narratives are considered to address three relations; man’s relationship with the world, others and himself.²¹ Narrative identity corresponds to the third and as such is self-understanding. It is in the activity of interpreting one’s experiences through narrative that human existence becomes lived. Life becomes meaningful and life itself through the activity of telling stories about it. Although narrative identity relates to self-understanding, Ricoeur is not suggesting that it is a distinctly first personal or private activity.

In two chapters of *Oneself as Another* Ricoeur advances an understanding of narrative identity as a response to difficulties in personal identity debates. Ricoeur proposes two poles of identity: “identity as sameness (*idem*)” and “identity as selfhood (*ipse*)”.²² The traditional approach to personal identity seeks to look for that which provides continuity through time or that which remains the same and allows for identity over time to be observed. The focus on identity as sameness at the expense of selfhood fails to appreciate the activities persons alongside others engage in to negotiate and maintain identities. Identity as selfhood corresponds to two aspects which allow for persons to persist through time. Selfhood as character refers to “the set of lasting dispositions by which a person is recognized”.²³ Selfhood as ‘keeping one’s word’ designates the activity of self constancy in the face of change. It refers to the who of identity. Between these two, the sameness of character by which individuals are recognised and the selfhood of keeping one’s word lies an interval in which narrative identity operates. It serves to unify both the way in which the self and others view the self as having a character, and the activities of selfhood through time.

In telling stories or offering narratives, individuals plot accounts that involve the identity of characters including their own character. Narrative provides a space where individuals talk about their character in the midst of action. In talking about one’s own character alongside events and other characters, the narrator imposes an imaginative account which seeks to bring a unity or coherence to their life. The activity of narrative identity acts to blur the lines between “author, narrator and character” and at times

¹⁸ *ibid*, 55.

¹⁹ *ibid*, 70.

²⁰ *ibid*, 71.

²¹ Ricoeur, above, n 11, 27.

²² Ricoeur, 1992, above, n 10, 116.

²³ *ibid*, 121.

one is all three.²⁴ However, as the ability to narrate is governed by tradition and the culture one inhabits offers ways of narrating, Ricoeur argues that at best one should be considered a co-author of their own narratives.

Narrative selfhood refers then to the narrative activity that selves are involved in as they seek self-understanding through the interpretation of experience and in doing so draw together identity as selfhood and sameness. Although Ricoeur fails to address the mimetic component of personal identity in his later writing it is evident from Part IV of *TN* that he intended narrative identity (both community and personal) to be read through a mimetic lens. In Part III of *TN* Ricoeur claims that fictional and historical narratives are preceded by a use of narrative in daily life. As co-authors, individuals are not just engaged by narrative selfhood in their own self-understanding but act as members of the culture that offer available narratives to others and provide critical readership of other's narrative accounts. This approach to narrative selfhood allows for a distinction between individuals, narratives and narrative identities. Individuals exist within cultures with traditions of understanding and ways to make sense of personal experience. Alongside others, individuals tell stories or offer narrative accounts which project particular interpretations of their own character, their world and relationships for readership. However, others are implicated in this process as both those who offer narrative schemas but also those who read their narratives. Furthermore, individual's narratives must include not just their own selfhood but also their sameness, which involves both how others and they see and identify themselves. Narrative identity refers to that which acts to bring together the two poles of one's identity and can be considered to include varying narratives which are continually being negotiated. The practice of narrative selfhood can be considered self-constituting, as it is through this activity that an attempt to make sense of one's self is performed, which can then go on to inform how both the individual and others understand the individual.

Although a critical examination of Ricoeur's account is not the aim of this paper, it is important to acknowledge that debates concerning the role of narrative as it relates to the self are common.²⁵ Ricoeur's work can be considered alongside others as calling for the primacy of narrative in understanding the self which itself is subject to sustained debate in philosophy and the medical humanities. Bringing the discussion back to personal narrative identity, further questions remain. At what point might it be appropriate to say an individual is engaged in narrative identity or narrative selfhood? This work proposes that the practice of mental capacity assessment can be understood through the language of mimesis and more generally as an activity of mimesis₃, the stage of critical readership. At the point of application, where the proposed narrative meets the world, the basis on which narratives are accepted or rejected requires clarification. It is proposed here that Marya Schechtman's *The Constitution of Selves* and Hilde Lindemann's *Holding and Letting Go* complement Ricoeur's understanding of the act of critical readership.²⁶ Three questions can be

²⁴ *ibid*, 159.

²⁵ See J McCarthy, *Dennett and Ricoeur on the Narrative Self*, (Humanity Books, New York 2007), 230-231; G Strawson, 'Against Narrativity' (2004) 4 *Ratio* 428-452; A Woods, 'Post-narrative – An Appeal' (2011) 2 *Narrative Inquiry* 399-406.

²⁶ See M Schechtman, *The Constitution of Selves*, (Cornell University Press, Ithaca 1996) and H Lindemann, *Holding and Letting Go: The Social Practice of Personal Identity*, (Oxford University Press, New York 2014).

raised about this critical stage of readership. Who gets to perform critical readership of another's narratives and narrative identity? When do personal narratives and narrative identity receive critical readership? What are the criteria with which personal narratives and narrative identity are evaluated?

The act of mental capacity assessment it is argued here can be considered to engage with the first and second question. This is not to suggest that mental capacity assessment is the only site of critical readership or that assessors are the only persons permitted to assess narrative identity. Echoing Ricoeur, Schechtman proposes a narrative self-constitution view which affords central importance to others. While narrative self-conceptions can be considered personal, Schechtman observes that individuals must comply with "The Articulation Constraint" and "The Reality Constraint".²⁷ This suggests that narrative accounts at times are required to be articulated and where this is not provided there is scope for one's narrative identity to be questioned. A further constraint on the content of narratives is that they must comply with norms concerning narrative construction. Narratives must not violate clear facts about the world or be guilty of interpretive inaccuracies. Lindemann further complements this notion of identity being subject to critical readership in developing an account of the process of holding and letting go. Central to the development of identity, itself a process of personhood, is the importance of recognition by others. Lindemann argues that the performance of identity is itself a regulated behaviour wherein others can have four grounds on which identity can be denied. These are "malfunctioning mental states", "misleading expressions", "misfiring recognition" and "misshapen response".²⁸

In the remainder of this paper, Ricoeur's notion of narrative identity, narrative selfhood, mimesis and identity negotiation are applied to the practice of mental capacity assessment. The approaches of Ricoeur, Schechtman and Lindemann offer a vocabulary which allows for a new description of what happens in mental capacity assessment.

III. CAPACITY ASSESSMENTS AND NARRATIVE IDENTITY

The uptake of a two-stage diagnostic and functional approach to assessing capacity in the MCA is drawn from the Law Commission's examination of different approaches to mental capacity.²⁹ The Act requires that for a person to be found to lack capacity they must be 'unable to make a decision for himself in relation to the matter because of an impairment, or a disturbance in the function of the mind or brain'. The inclusion of a diagnostic threshold serves to forbid the use of capacity legislation to interfere in the lives of those without a disability. The two-stage approach establishes the need for a causal nexus between the inability and the impairment to be identified for a finding of incapacity. The two-stage approach gives rise to two interpretations about the order in which assessment takes place. On one reading of Section 2(1), the functional ability to make a decision is the primary concern and when lacking it becomes appropriate to assess whether it is caused by an impairment. An alternative reading is to follow the structure of the Act whereby the diagnostic threshold is first considered (Section 2)

²⁷ Schechtman, above, n 26, 114- 121.

²⁸ Lindemann, above, n 26, 106-117.

²⁹ Law Commission, *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (Law Com No 128, Consultation Paper No. 128, 1992), 22.

and when an impairment is present then an assessment of functional capacity (Section 3) is to be undertaken. The adoption of either approach to stages of capacity assessment however fails to clarify what triggers or instigates a capacity assessment. Unless all healthcare decisions are assessed through a diagnosis and then function approach or vice versa, then a justification for the initial decision to assess capacity in respect of some decision is required.

The functional model of capacity endorsed in the MCA constitutes decision making ability as composed of four abilities: understanding, retaining of information, use or weighing of information and communication. The first requirement holds that decision makers must have the ability to understand information relevant to the decision.³⁰ The second requirement that persons retain information introduces complexity in relation to duration in two regards. Firstly, where a person lacks the time to retain information or that ability is inconsistent, then the notion of fluctuating capacity is considered to arise. The second issue relates to the duration of decisions to be made and the relevance of retention of information if capacity is always decision specific.³¹ Where a decision involves a duration such as where a person should live or whether to force feed a patient for a period of time, the role of retention of information concerns the decision making itself. The third requirement that persons use or weigh information expects decision makers not just to understand information but to be able to reflexively appropriate and endorse the decision.³² The fourth component of communication is a residual requirement that speaks to situations where an individual is incapable of communication which prevents judgement on the other three abilities.³³ Although the decision maker is required to demonstrate the functional abilities, they are entitled to support in respect of each ability as the second guiding principle of the Act requires that “all practicable steps be taken to help the person in making the decision”.³⁴ These abilities correspond to the internal requirements the decision maker must demonstrate but the decision itself must be already identified as a matter which must be decided upon. Although this paper is unable to explore this question, the issue of the appropriateness of decisions put to persons seems central to discussion of capacity.

The implementation of the MCA, the move from theory to practice, can be considered both in regard to what practice is performed in its name but also what practice the MCA actually calls for. The application of the MCA is guided somewhat by the Code of Practice; however, it is non-binding. Critical discussions of the first four sections of the Act reveal several challenges facing would-be assessors of capacity. As noted by Mackenzie and Rogers, the Act appeals to a synchronic conception of capacity assessment as capacity is specific to a “material time”.³⁵ This notion of time however is challenged as the person is to be considered through time in respect of retaining information,³⁶ to be supported in making the decision with ‘all practicable steps’,³⁷ to be evaluated in relation to the likelihood of having capacity at a later time,³⁸ and to

³⁰ Mental Capacity Act 2005, s 3(1)(a).

³¹ Mental Capacity Act 2005, s 3(1)(b)

³² Mental Capacity Act 2005, s 3(1)(c)

³³ Mental Capacity Act 2005, s 3(1)(d)

³⁴ Mental Capacity Act 2005, s 1(2).

³⁵ Mental Capacity Act 2005, s 2(1).

³⁶ Mental Capacity Act 2005, s 3(1)(b).

³⁷ Mental Capacity Act 2005, s 1(3).

³⁸ Mental Capacity Act 2005, s 4(3)(a)

have their past and present wishes considered in relation to best interests decision.³⁹ The feasibility of testing the four functional abilities in accordance with the MCA, which seemingly allows for a distinction between an incapacitous decision and a simply unwise decision, has received considerable scrutiny and outstanding questions remain as to how it is to be performed.⁴⁰ The expectation that the assessor of capacity act with a degree of objectivity and to avoid preconceptions suggests either an unwillingness to acknowledge that capacity assessments might reflect the assessor's values or that the person doing the judging is without perspective.⁴¹ At a more general level, the concern has been raised that "inherent tensions" exist between the MCA in law and theory and the assessment of capacity in practice.⁴² Manthorpe et al argue that for this tension to be overcome a more nuanced understanding of the Act to guide practice is required.⁴³ A common feature of the difficulties confronting the implementation of the Act rather obviously is the role of the assessor. Difficulties in relation to how to see the patient, evaluate mental processes, act without bias and begin the capacity assessment need to be addressed if capacity assessment is to coherently enact the MCA.

III.1 Situating Narrative Identity

The adoption of a functional and diagnostic approach to capacity, coupled with insufficient guidance for the assessor, may be seen to leave little scope for applying a narrative identity approach to capacity assessment. Arguably the subjectivity or perspective of the assessor is avoided. The adoption of relational approaches to mental capacity in recent years, alongside the UNCRPD and associated claims for a social model of disability, challenge the traditional liberal conception of the self. The different uses of narrative identity in theorising mental capacity assessment offer both complementary and critical perspectives on the liberal/functional approach adopted in the MCA.

In the first approach, narrative identity can be considered a resource for assessors of capacity as they seek to identify the wills and preferences of a person found to lack capacity. As Jeffrey Blustein notes, a "continuer view" can understand the role of others as extending the individual's narrative identity where the individual's ability to do so is lacking.⁴⁴ For example, where a person is diagnosed with advanced dementia

³⁹ Mental Capacity Act 2005, s 4(6)(a-b)

⁴⁰ J Craigie, 'Competence, Practical Rationality and what a patient values' (2011) 25(6) *Bioethics and T Thornton*, 'Capacity, Mental Mechanisms and Unwise Decisions', (2011) 18(2) *Philosophy, Psychiatry and Psychology* 127-132.

⁴¹ See M Donnelly, 'Capacity Assessment under the Mental Capacity Act 2005: Delivering on the Functional Approach?' (2009) 29(3) *Legal Studies* 464-491; D Gibson, 'Conceptual and Ethical Problems in the Mental Capacity Act 2005: An Interrogation of the Assessment Process' (2015) 4 *Laws* 229-244; M Minow, *Making All the Difference: Inclusion, Exclusion and American Law*, (Cornell University Press, New York 1990), 51; S Stefan, 'Silencing the Different Voice: Competence, Feminist Theory, and Law' (1993) 47 *University of Miami Law Review* 763-815, 780.

⁴² K Hinsliff-Smith, R Feakes, G Whitworth, J Seymour, N Moghaddam, T Denning & K Fox 'What we know about the application of the Mental Capacity Act (2005) in healthcare practice regarding decision-making for frail and older people? A systematic literature review' (2017) 2 *Health and Social Care in the Community* 295-308, 306.

⁴³ J Manthorpe, K Samsi, H Heath & N Charles "Early days": Knowledge and use of the Mental Capacity Act 2005 by care home managers and staff' (2011) 3 *Dementia* 283-298.

⁴⁴ J Blustein, 'Choosing for Others as Continuing a Life Story: The Problem of Personal Identity Revisited', (1999) 27 *Journal of Law, Medicine and Ethics*, 20.

and found to lack capacity about where to live, the person's narrative identity could be viewed as limiting of potential choices, such that whatever choice is made is consistent with the person's wishes as previously expressed. While this approach may be intuitively appealing for those seeking to honour a person's narrative identity, a range of issues need to be clarified, including the issue of whether wills and preferences or an individual's life narrative should have priority, how an individual's narrative is to be discerned, that is if there is only one, how to deal with conflicting narratives and finally how to choose between actions which all are consistent with an individual's narrative identity.⁴⁵ This narrative approach however does complement contemporary attempts to distinguish between mental capacity and legal capacity.⁴⁶ An appreciation of a person's narrative identity in cases of mental incapacity allows for their legal capacity to be preserved as it is their values and identity guiding decision making.

A second approach is to view the capacity assessment process as the production of a narrative identity account, whereby the assessor is engaged in the co-construction of a patient's narrative identity. Research drawing on this approach could seek to examine conventions and traditions informing how a patient's narrative identity are articulated but also examine the reading that capacity assessors perform of a patient's narratives. Carol Johnston and others draw attention to the role capacity assessors and judges play in determining what a patient's narrative involves, which can then influence best interest decisions.⁴⁷ This approach highlights how capacity assessors in asking certain questions and focusing on some issues over others, in effect, construct and/or limit the narrative identities of the person in question. The questions of assessors can be understood as having an editorial function.

A third approach, as set out by Michael Bach and Lana Kerzner, proposes that a definition of decision-making ability should include a narrative component.⁴⁸ In rejection of an individualist conception of selfhood, Bach and Kerzner argue that the assessment of decision-making ability should be based on whether an individual has the capacity to express their wills and intentions to others, who can then recognise and ascribe agency to the individual's actions, and secondly, the individual's ability to answer who they are, articulate a life story, and for that narrative account, to "direct the decisions that give effect" to a person's intentions.⁴⁹ Here, the adoption of a relational approach to agency and selfhood recognises narrative identity as central to deciphering decision making ability or its lack, crucially though by locating the ability within an individual's interaction with their community. Therein inability to make decisions is a feature of the individual and community, not the individual's mind or brain.

A fourth approach can view the capacity assessment process as a narrative practice in its own right. Therein it understands that the object of a capacity assessment is a

⁴⁵ M Kuczewski, 'Narrative Views of Personal Identity and Substituted Judgement in Surrogate Decision Making', (1999) 27 *Journal of Law, Medicine & Ethics*, 34-35.

⁴⁶ UNCRPD Article 12(2). For further discussion of legal capacity see A Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold for the Past or Lodestar for the Future?' (2007) 34 *Syracuse Journal of International Law & Commerce* 429.

⁴⁷ C Johnston, N Banner and A Fenwick, 'Patient narrative: an 'on-switch' for evaluating best interests', (2016) 38(3) *Journal of Social Welfare and Family Law*, 249-262.

⁴⁸ M Bach and L Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' Report to the Law Commission of Ontario, 2010.

⁴⁹ *ibid*, 65.

person's narrative or their narrative identity, that the determination of best interests or a substituted judgement can seek to continue an individual's engagement in narrative identity, and that the resultant judgement is an act of co-authoring of a narrative identity. Furthermore, capacity assessment practices are made possible by narrative identity and narrative selfhood and such practices are in fact a stage of critical readership of the individual. This work now turns to developing the fourth approach, where capacity assessment is understood as a distinctly narrative practice comprised of mimetic (Part III.2) and an identity negotiation (Part IV) dimension.

III.2 A Mimetic Account of Mental Capacity Assessment

The practice of capacity assessment can initially be read as corresponding to *mimesis*₃, the stage of application, where a narrative is subjected to critical readership. A person's decision or lack of a decision is read by the assessor of capacity and the action either rejected or accepted. This account of assessment as critical reading allows for four mimetic stages or periods of capacity assessment to be identified.

Prior to any capacity assessment taking place however, there must already be two accepted narratives operative in the context. First, the assessor must have accepted and understood that the MCA is an appropriate symbolic, structural and temporal resource for categorising human action and secondly, there must be an accepted narrative which holds that a decision must be made. The presence of these two resources, however, is insufficient to account for the commencement of a capacity assessment. The origin of any capacity assessment can be seen to emerge because of the narrative context, of which there are three types. Where an individual's own account of what action is to be taken is the only proffered narrative, a capacity assessment will not be triggered. Where there is no account offered by the individual, as in cases of an unconscious patient, there is a *narrative deficit*. In such cases, there is an absence of a perspective to guide action and so a capacity assessment can be triggered. The third situation arises where in addition to a patient's proposed account, there are also other accounts proposed, resulting in *narrative conflict*. Only where the alternative narrative is considered to have weight or relevance does *narrative conflict* precipitate an assessment. The instigation of a capacity assessment in cases, save in cases of *narrative deficit*, is contingent on the possessor of the alternative account of action believing that it should be relevant and in doing so questions the authority of the patient's account. An example of narrative conflict would be if a patient maintains that she is unwilling to have life-saving heart surgery and yet her nurse's narrative includes the patient's commitment to being at her own daughter's wedding in five years.

The second stage of the process begins when, in the presence of *narrative deficit* or *narrative conflict*, the response of the assessor takes the form of a proposal of an alternative narrative, one which holds that the patient lacks capacity in respect of a decision. The acceptance of this incapacity narrative is dependent on the evaluation of the patient's original account about the decision. In cases of *narrative deficit*, this activity often goes unnoticed, as the patient is found to not be able to communicate a decision, and by default the incapacity narrative is accepted. In cases of *narrative conflict* however, the patient's engagement with the decision to be made is evaluated. The MCA requires that the basis on which someone can fail in this respect is where 'impairment of, or disturbance in the functioning of, the mind or brain' contributes to an

inability to perform one or more of the tasks of understanding, retention, weighing and communication (URWC). A mimetic account allows for a reinterpretation of what is being assessed under the label of URWC as whether an individual's narrative account demonstrates congruence with established narrative conventions and as such avoids an "error of fact" or "interpretive inaccuracies".⁵⁰ Where an individual is found to have performed URWC (a cognitivist approach) or avoided 'errors of fact' or 'interpretive inaccuracies' (a mimetic approach), then their narrative account will be accepted and the proposed incapacity narrative will be rejected. Where an individual is found to have failed to perform URWC (a cognitivist approach) or demonstrated 'errors of fact' or 'interpretive inaccuracies' (a mimetic approach) then the proposed incapacity narrative will be endorsed.

The third stage of the mimetic process commences after the endorsement of the incapacity narrative. This in turn beckons in the issue of what narrative account is to be supported in place of either the discredited narrative, or in cases of *narrative deficit*, an absent one. Assessors are thus confronted with the challenge of how to negotiate "substituted decision-making", of which best interests and wills and preferences are available guiding principles.⁵¹ In such cases the assessor can legitimately be considered a co-author of the individual whose decisions are being considered, as they are charged with identifying which narrative account should guide the individual in the future. Alternatively the role of the assessor can be minimised and instead a 'continuer' approach be endorsed. Therein the person's narrative identity and/or wills and preferences guide the decision.

The fourth stage or final stage can be identified where the best interests or substituted decision has been endorsed. The activity of critically reading an individual's narrative is complete, and where the individual is found to lack capacity, an alternative account endorsed. The conclusion of the activity of critically reading the individuals narrative results in the activity taking on the status of *mimesis*₁, as an established fact, which may have relevance in respect of future decisions.

The reading of the mental capacity assessment process as a mimetic activity calls for a more nuanced understanding of capacity assessment and accordingly affords central importance to the role of the assessor. The adoption of a mimetic understanding of capacity assessment allows for greater recognition of those performing the assessment. The language and rhetoric of the MCA maintain that what lies at the heart of any determination is something 'mental', clarified in the Act as relating to 'mind' or 'brain', which contributes to a view that incapacity is a feature of a person, a functional inability. A mimetic account however allows for mental capacity to be identified as a concept which grounds a practice of critical readership. To claim that mental capacity is a relational term that corresponds to the relation between people and neither the assessor or assessed discretely, is arguably irrelevant. All forms of assessment by one person of another can be viewed as being relational in general and furthermore are liable to a narrative evaluation. The claim can however be made that what makes mental capacity practice, whether strictly in accordance with the MCA or not, an essentially narrative and relational practice, is the identification of three distinctly narrative features. First, mental capacity assessment, in cases of *narrative*

⁵⁰ Schechtman, above, n 26, 121-123 and Lindemann, above, n 26, 103-117.

⁵¹ A Buchanan, and DW Brock, *Deciding for Others: the ethics of surrogate decision-making*, (Cambridge University Press, Cambridge 1990) 10.

conflict, has as its object the person's own decision and self-understanding which may become part of their narrative identity but crucially is a product of either the person's implicit or explicit understanding of themselves. Second, the assessment of the person's decision by the assessor is an act of critical readership, of the third stage of mimesis, in which the assessor is permitted to appraise the self-understanding of another. As acknowledged by both Ricoeur and Schechtman, narrative self-constitution is an innately social activity. Third, the capacity assessment process requires the proposal of a narrative of incapacity by an assessor to instigate the process in the first place. What differentiates mental capacity assessment from some others forms of assessment is principally that it takes as its object an individual's narrative selfhood, the performance of the assessment is an activity of narrative selfhood by the assessor, and the process requires an initial proffering of an alternative narrative for another. The continued use of the term mental capacity however poses a problem for theorists seeking to acknowledge the mimetic dimensions of capacity assessment. This problem echoes the challenge faced by relational theorists challenging the traditional conception of autonomy in philosophical and legal discourse.⁵²

Practically, the mimetic reading invites consideration to turn to the initial period of concern leading to the commencement of a capacity assessment. Whereas the MCA in Sections 2-4 establishes a framework for assessing capacity and determining best interests in cases of incapacity, there is a failure to adequately explain when practitioners should assess capacity. This failure may stem from the historical context to which the MCA responds, in which it seeks to curtail or limit practices of interfering with and constraining the rights of persons. As such, the use of the MCA need not specify when the Act is to be applied, as there is a presumed set of persons to whom the Act relates. A further contributing factor to the failure to explain the impetus to doubt capacity can be traced to the limited space given to considering the role played by the assessor in the process. The mimetic interpretation invites readers to acknowledge that where neither an alternative narrative account nor an incapacity narrative is proposed, then an individual can never be found to lack capacity. As the MCA commits itself to a presumption of capacity, a decision on the part of an assessor is required before incapacity can be conferred. Accordingly, to adequately explain the assessment process, sufficient consideration needs to be given to the assessor's role in instigating an assessment.

The everyday use of the MCA places a considerable responsibility, albeit unacknowledged, on assessors to initiate the capacity assessment process. In one set of cases, those of *narrative deficit* (stage four of the functional model), the assessor is required to propose a narrative of incapacity. Although this activity is not of concern here, the issue of whether all cases of *narrative deficit* are responded to with capacity assessment is worthy of further research. In cases where an individual offers a narrative account of action, however, the issue of what provides the impetus for the assessor to doubt an individual's capacity and subsequently propose a narrative of incapacity is unclear. Not all individuals with an impairment of the mind or brain have their decisions subject to a capacity assessment. Assessors of capacity are thus tasked, in cases of people who have articulated their own narrative accounts or decisions, to recognise alternative narrative accounts of action but also recognise

⁵² Mackenzie and Stoljar, above, n 13, 4.

when in fact it is appropriate to privilege such an alternative account and thus trigger a capacity assessment. The failure within the MCA or Code of Practice to provide guidance on when alternative narratives are to be proposed might also stem from the historical context in which capacity assessment is considered to apply. An additional issue arising from this requirement to commence capacity assessment is the seeming expectation on the assessor to both know the person and be able to identify an alternative narrative relevant to that person, or to be familiar with appropriate alternative narratives to offer in certain cases or classes of people.

The theorising of capacity assessment as a mimetic process also offers an alternative account of one of the cornerstones of the MCA. In accordance with the cognitivist model adopted, a judgement of incapacity is never considered global, binding on all the actions of an individual. Rather, it corresponds to a specific decision or issue and accordingly allows for accounts of simultaneous determinations of capacity and incapacity regarding different issues. The adoption of this decision specific approach contrasts with historical practices that deprived individuals of any right to partake in decision making based on status, a global determination.⁵³ An alternative account of the move away from global determinations of incapacity is offered by a mimetic approach. As capacity assessments are cases of critical readership of an individual's action, the assessment of some decisions and not others can simply be indicative of an assessor's concern with some of an individual's decisions, not all of them. The scope of capacity determinations such as those involving psychiatric inpatient treatment for a duration, financial matters, living arrangements and the relationships one can engage in, suggest while specific decisions might be considered, those decisions can have whole life or global impacts. Furthermore, as capacity determinations have the potential to impact on how individuals are understood and treated by others going forward, the impact of any capacity assessment can be considered greater than the decision in question.

III.3 Narrative Incongruence and the Spectre of Paternalism

The mimetic reading of capacity assessment allows for an understanding of the assessor's role in conferring the status of incapacity to emerge. Whereas the MCA's approach understands the assessor's role as one of identifying incapacity by applying the two-stage test, a mimetic approach rejects the notion that incapacity necessarily involves an impairment of the mind or brain or a failure to perform a set of functional tasks. Lindemann's theory of the interpersonal practice of 'holding and letting go' complements Ricoeur's understanding of *mimesis* and provides a basis for mental capacity determinations to be considered from the perspective of the assessor.⁵⁴ Lindemann contends that personhood is conferred on an individual by others. Others, in having the power to recognise or reject aspects of one's identity on a series of grounds, are engaged in a process of holding and letting go. Thus, the ability to perform an identity is regulated through a social act of critical readership.

Lindemann sets out four grounds on which personhood is rejected. The first justification occurs in situations of "malfunctioning mental states", whereby the individual can be considered incapable of maintaining a credible understanding of self

⁵³ The Law Commission, *Mental Incapacity* 1995 (Law Com no 231), para 3.3 – 3.4

⁵⁴ Lindemann, above, n 26.

due to a cognitive deficit.⁵⁵ This approach echoes the MCA's understanding of incapacity as having its root cause in a cognitive impairment. The second basis on which an account can be rejected is "misleading expression".⁵⁶ In such cases the individual violates established social norms or accepted understanding. One form of this is "errors of fact", whereby an individual is wrong about a socially accepted fact.⁵⁷ In proposing an understanding that is inaccurate, the individual demonstrates a failure to appreciate the world they inhabit. Here we can think of a person who maintains that the world is flat. Whereas some facts are seemingly non-negotiable, there are a range of beliefs about the world, such as religious convictions, where there is more flexibility. For example, a person's belief in the existence or non-existence of god would not be deemed an error of fact.

The second form of misleading expression occurs where an individual violates an "interpretive" norm.⁵⁸ In such cases the individual might have an appreciation of the facts but their interpretation of those facts is considered inappropriate or unjustified. Here we can think of an individual who maintains that they are invincible and immortal having survived a deadly train crash. Other forms of interpretive error can involve the concealing of, or failure to disclose, issues related to oneself. An example of this can be seen where a doctor refuses to endorse a patient's understanding of themselves as clumsy or prone to falls, on the suspicion that the patient has refused to disclose incidents of domestic violence. The idea of misleading expression poses a challenge to the model endorsed in the MCA, as it separates out the evaluation of a decision from a consideration of the functional abilities. The idea of misleading expression calls for contemplation of cases whereby an assessor might seek to classify the individual's decision as incapacitous, where in fact the deficit is in their interpretation or understanding of facts alone. In accordance with the MCA such instances would not be grounds for a finding of incapacity. In accordance with Principle 2, assessors are required to provide all reasonable efforts to support an individual's understanding and accordingly prevent a finding of incapacity on the basis of error of fact alone. Furthermore, Principle 3 prohibits the conferring of incapacity where there is an unwise decision, preventing a finding of incapacity based on interpretive inaccuracy alone.

The third basis on which identity can be denied, that of "misfiring recognition", occurs when there is a failing on the part of one person to recognise or acknowledge another.⁵⁹ Cases of non-recognition can be informed by an interpretive inaccuracy or error of fact, whereby they prevent an acknowledgement of an another's account or impose a particular account on the person. Practices of oppression can be considered failures to acknowledge the perspective of another, which result in a failure to accept or permit a person's identity. The MCA can be considered to prohibit 'misfiring recognition' from guiding a capacity determination as principle 1 (section 1) requires that all individuals are presumed to have capacity until demonstrated otherwise and subsequently puts in place a framework for justifying a determination of incapacity, which relies on a concept of 'malfunctioning mental states'.

⁵⁵ *ibid*, 106.

⁵⁶ *ibid*, 106.

⁵⁷ Schechtman, above, n 26, 121

⁵⁸ *ibid*, 125

⁵⁹ Lindemann, above, n 26, 109.

The fourth form of identity denial, “misshapen response”, occurs when an oppressor refuses or denies a person of their very individuality and experience.⁶⁰ Crucially this form of response involves recognition on one level, whereby the person is recognised by a particular status, whether it is woman, child, slave, teenager, disabled or refugee. Recognition however here serves to identify what form of response is appropriate or permitted. The form of response fails to acknowledge the experience or situation of the person and uses a category to justify practices. Lindemann proposes that misshapen response can take multiple forms from atrocities of “torture, enslavement, and rape”, practices of “segregation, lack of access to decent employment or education” to personal beliefs and attitudes towards particular groups of people.⁶¹ The MCA, as an alternative to a status based approach to capacity, shifts capacity assessment practice away from generalised responses based on the status of a person, to an approach that considers the person on a decision by decision basis.

The MCA recognises a difference between denying narrative accounts on grounds of ‘mental malfunctioning’, ‘misfiring expression’ and ‘narrative recognition’, permitting malfunctioning as the only basis for a finding of incapacity. The difficulty confronting the implementation of the MCA is whether this distinction is maintained. It is possible to imagine cases of misfiring expression where an individual fails in respect of URWC or commits an error of fact or interpretation, has an identified impairment of the mind or brain, but that the former is not caused by the latter. For example, a patient with a brain tumour (an impairment of brain) who refuses chemotherapy and is identified as failing the cognitive task of weighing up of information, might be found to lack capacity on the basis of the two-stage test. However, it may be the case that the brain tumour has no bearing on the decision which is in fact related to the witnessing of a loved one undergoing chemotherapy treatment and a wish not to experience something similar. To overcome such doubts, supporters of the MCA must demonstrate how an impairment of the mind or brain is directly linked to the task of URWC and how this causal nexus is to be observed.

A further concern could be raised as to whether individuals found to fail URWC, but as such lacking the diagnostic requirement for a finding of incapacity, are subsequently submitted to examination and assessment to find an ‘impairment’ which would allow for a finding of incapacity. The failure of supporters of the MCA to explain the relationship between mental activities of the mind and brain and subsequent decisions leaves open the possibility that determinations of ‘mental malfunctioning’ may in fact be ones of ‘misfiring expression’. A further difficulty might confront the MCA if the requirement for a cognitive impairment is removed and the basis for a finding of incapacity is simply the URWC test.⁶² Here the difficulty would involve the ability to distinguish between cases of misleading expression or misfiring recognition. Even without any changes to the MCA, it is possible to imagine situations where judges, nurses, doctors or carers, in positions of power by virtue of being able to commence a capacity assessment, label their own errors of fact, interpretive inaccuracies and failure to accommodate and support individuals, as cases of ‘misfiring expression’, when in practice they are cases of ‘misfiring recognition’.

⁶⁰ *ibid*, 115.

⁶¹ *ibid*, 116.

⁶² See the approach adopted in Ireland’s Assisted-Decision Making (Capacity) Act 2015.

One interpretation of the MCA holds that it responds to the fact that there is incapacitous and capacitous action and therein sets out means to distinguish between the two, which then recognises autonomous action, or calls for a substituted/supported decision making. An alternative approach could view the MCA as implicated in the act of categorising human action. Rather than being at a distance, it defines what is permissible action over others, and then labels this as soft paternalism. The MCA permits assessors to identify that a decision has to be made, question an individual's capacity, perform the assessment of capacity and make a determination of best interests. Rather than simply identify what is capacitous or incapacitous action, it defines it, albeit somewhat unclearly. If this secondary understanding is adopted, then we can view the MCA as not simply permitting soft paternalist practice, but also opening up the possibility of cases of hard paternalism in situations of malfunctioning mental states, misfiring expression or misfiring recognition. This is disguised in the Code of Practice as the distinction between capacity and incapacity is presented as a natural distinction, rather than a product of a liberal understanding of personhood.⁶³

IV. NEGOTIATING RELATIONALITY

The activity of capacity assessment can also be considered in the context of the therapeutic relationship, specifically in regard to the ongoing identities of the individual and the assessors involved. The performance of a capacity assessment necessarily involves participants engaging in a form of identity negotiation, whereby questions of "who am I" and "what do I do" are considered.⁶⁴ Although the mimetic reading of capacity assessment reveals the limits of narrative identity for the individual being assessed, the activity can also be considered a site where the assessor's identity is itself negotiated. The result of a capacity assessment is not simply local and discrete to a particular event; rather the event can become pivotal for the individual and the assessor in how they make sense of their personal and/or professional identities. Where it is often recognised that capacity determinations are a site of balancing discourses of care and respect for autonomy, then a concern with how such determinations can impact on both individuals taking part seems justified.

In cases of *narrative conflict*, the requirement placed on individuals to give an account of one's actions, in having that account subject to scrutiny and experiencing the proposal of an incapacity narrative, demonstrates how the narrative identity of an individual can become subject to critical readership and limitation. Where an individual is found to lack capacity and an alternative narrative account is put forward to guide the decision in question, the capacity assessment process can be understood to establish *mimesis*₁ conditions for the future in three respects. In a most basic sense, a determination of incapacity establishes a fact about that patient. While a determination of capacity can be act specific, the act itself might be one that occurs over a lengthy period of time but also the fact of the determination can become a resource or feature of the individual's identity going forward and of those in the individual's life. Secondly, the determination of incapacity or capacity serves to establish guidelines around what are symbolically appropriate or inappropriate ways to talk about conditions, decisions, risk, as well as personal justifications and beliefs. Thirdly, in a determination of incapacity with a prescribed action or inaction, the

⁶³ *Mental Capacity Act 2005: Code of Practice* (TSO, London 2007) 1.

⁶⁴ K Atkins, *Narrative Identity and Moral Agency: A Practical Perspective*, (Routledge, New York 2010) 1.

individual is provided with the decision which may or may not be incorporated into their own understanding but also into the understanding of those around them going forward. Although the MCA sets an understanding of capacity as local, it should be acknowledged that determinations, the understanding of the process and the action or inaction prescribed, could have considerable global influence over the individual assessed.

Turning to the assessor's experience of capacity assessment, the implications for their own life are considerable. The assessor, in providing an alternative account of action, in proposing an incapacity narrative, in assessing the individual's capacity and determining a best-interests decision, is expressing an understanding of their professional identity. These activities, specifically in cases that lead to *narrative conflict*, are not something they do, nor can do, in every interaction they have as professionals. The activity of capacity assessment can be seen to also establish *mimesis*,¹ conditions for the assessor. The performance of the assessment, as well as the relative success of the proposed incapacity narrative, can establish symbolic resources for the assessor to guide future capacity assessments. Secondly, the assessment of an individual can become part of the assessor's own professional identity, a site whereby they can make sense of their professional responsibilities and reflect on the type of professional they are. Thirdly, a determination of incapacity can operate as a fact for the assessor in their understanding of the individual assessed going forward.

V. A NARRATIVE THEORY OF CAPACITY ASSESSMENT

In drawing on the mimetic and identity negotiating dimensions of mental capacity assessment, a narrative theory of capacity assessment can be formulated. Such a theory however, is not supportive or critical of the practice of mental capacity assessment; rather it is a descriptive account of capacity assessment. The aim therein of a narrative theory is not to attempt to justify the practice of classifying an individual as lacking in capacity, but to interrogate what is happening in capacity assessment. Although a mimetic reading is possible in cases of *narrative deficit*, the adoption of a narrative approach is here confined to situations in which the individual articulates a narrative account of action. The three principles of a narrative theory of capacity assessment are:

- i) Mental Capacity determinations are judgements arising from and sometimes relating to an individual's personal identity but always in a relational dynamic.
- ii) What is assessed in mental capacity determinations is the congruence between the narrative account of events or behaviours of the assessor and the assessed.
- iii) The impetus to assess capacity begins where alternative accounts that can lead to *narrative conflict* are shared with or identified by an assessor of capacity. *

* Where capacity assessment is commenced at the request of a colleague or family member, the assessor may be considered not to instigate the process. Such an interpretation however is rejected. The mimetic precondition for capacity assessment is the acceptance of two narratives, the narrative of the MCA and the narrative that a decision needs to be made. Where the decision to commence a capacity assessment

is at the request of another, the person who makes the request can be considered through the lens of the first two mimetic stages set out above. The assessor who commences the assessment can be viewed as accepting the truth of *narrative conflict* or *narrative deficit* and the appropriate response of assessing capacity. The only difference from the original model is that the assessor here doesn't observe or encounter *narrative conflict* or *narrative deficit* before deciding to assess. In accepting the recommendation of another and acting upon it, they instigate the assessment process.

The interpretation of mental capacity assessment from a narrative approach to selfhood allowed for the identification of capacity assessment as comprised of a four-stage mimetic process and as a site of narrative identity negotiation. Together, a reading of capacity assessment as mimesis and the negotiation of narrative identity inform a narrative theory of mental capacity assessment. Critically, this theory does not seek to endorse or justify the practice of conferring incapacity on persons but rather proposes a descriptive account of the phenomenon of mental capacity assessment. Accordingly, a narrative theory is not a guide for mental capacity practice nor a call for particular practice. The narrative reading developed here reveals that the cognitivist approach insufficiently addresses the first stage of capacity assessment, leaving assessors unclear as to when their duties to doubt capacity emerge. Furthermore, the failure to clarify the relation between a cognitive impairment in the mind or brain and an inability to perform a task of UWRC raises questions about the basis on which capacity determinations are made, whether individuals are labelled as lacking in capacity based on simply holding an alternative understanding, and challenges the language of capacity assessment which views capacity as something intrinsic or discrete to an individual.

The narrative approach to selfhood developed here allows for mental capacity to be considered a relational term which is utilised in interactions in which people are sanctioned to offer alternative accounts of others' lives and actions. The question may be raised as to whether mental capacity and incapacity, as features or aspects of a broader processes of narrative selfhood, are in fact relationally constituted. The response however is not so simple. A narrative approach supports understanding determinations of mental incapacity as relationally constituted through a mimetic process. A narrative approach however does not deny that there can be impairments that underpin determinations of incapacity, but rather that a mechanism for distinguishing cases of mental malfunctioning from cases of misshapen response, misleading expression and misfiring recognition is lacking. Regardless of the basis for a determination of incapacity, the process is mimetic in nature. In regard to capacity, a narrative approach supports the claim that some aspects of capacity are relationally constituted. Where capacity requires the competencies to avoid committing errors of interpretation and factual errors, or violating the reality and articulation constraints, the acquisition of such competences can be identified as relationally constituted. The development of these skills emerges through the assistance of others, who through acts of critical reading, not just in relation to mental capacity assessment, but also less formally, guide individuals about acceptable ways of acting and developing self-understanding. The narrative approach however does not deny that such competencies are dependent on functioning mental states. The narrative approach to mental capacity proposed here both calls for mental capacity and incapacity to be acknowledged as relationally constituted while also acknowledging aspects of both

are not so constituted. A narrative approach does not deny that individuals have and experience impairments. The narrative approach however challenges the confidence that mental capacity assessment is sufficiently developed to identify cases of mental malfunctioning and the claim that it simply evaluates decision making ability.

The appeal to narrative identity in theorising mental capacity, however, can vary from approaches which view narrative identity as something one has or that they express to those which view narrative identity as something performed and negotiated with others. As such, the appeal to narrative approaches in mental capacity discourse must be scrutinised as to whether it understands the individual in terms of what they have or are on the one hand, or whether it acknowledges the activity of individuals alongside others and the role narrative can play in this.⁶⁵ In *Re T (Adult: Refusal of Treatment)* (1992), Lord Donaldson stated that the capacity of a decision is not directly related to the “rational or irrational, unknown or even non-existent” reasons for making a choice.⁶⁶ A narrative approach alters this understanding slightly. Mental capacity is not related to whether a decision is rational or irrational, but rather about the perceived rationality of a decision as considered from the perspective of an individual sanctioned to question the decisions of others, who in this performance negotiates both the identity of the individual assessed, as well as their own.

A narrative approach to mental capacity assessment can be viewed then as both an alternative to but also complementary to the functional approach of the MCA. As an alternative, it challenges the inadequate consideration of the assessor’s responsibilities in the assessment process, suggests that capacity assessment may focus on something other than functional ability and proposes that capacity assessment involves identity negotiation. Although more complex than the MCA’s functional approach as it problematises the instigation of assessment, what is assessed and the notion that capacity assessment is decision specific, it highlights areas which need to be addressed if a ‘wider’ account of capacity assessment is to overcome tensions between theory and practice. In this latter sense, a narrative approach can be read as complementary as it identifies areas which need to be addressed within a functionalist approach to mental capacity.

⁶⁵ The call to acknowledge the role of narrative identity work through stories is not supporting the claim that narrative is the only means through which identity is negotiated. See A Woods, ‘Post-Narrative: An appeal’, (2011) 21(2) Narrative Inquiry 399.

⁶⁶ *Re “T”* [1992] EWCA Civ 18, para 37.