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**THE RELATIONSHIP BETWEEN AUTONOMY AND ADULT MENTAL CAPACITY IN THE LAW OF ENGLAND AND WALES**

**SUMMARY**

Judges in England and Wales tell three apparently contradictory stories about the relationship between autonomy and mental capacity. Sometimes, capacity is autonomy’s gatekeeper: those with capacity are autonomous, but those without capacity are not. Sometimes, capacity is necessary for autonomy but insufficient; for voluntariness, freedom from undue external influences, is also required. Finally, sometimes autonomy survives incapacity, and a person without capacity is nevertheless treated as autonomous. These three accounts coexist, so no story of evolution, in which one account comes to replace another, can be told. Similarly, no story of judicial factions is plausible, for judges switch account to suit the facts of a particular case. This article gives examples of all three accounts, traces their recent history, and shows how each serves one or two characteristic purposes. It then shows how they can be combined into a coherent descriptive account of the relationship between autonomy and mental capacity in domestic law.

**KEYWORDS**

Autonomy, Court of Protection, Inherent Jurisdiction, Mental Capacity, Undue Influence, Voluntariness.

**I. INTRODUCTION**

This article is about a gap between judicial rhetoric and behaviour. Judges in particular cases describe the relationship between autonomy and mental capacity in a variety of ways, but if their decisions across the full range of cases are to be coherently accounted for, then the relationship cannot be as simple as they say it is. The existence of this gap does not imply that the judiciary have done anything wrong. Judgments are, as Harrington says, ‘exercises aimed at persuading specific audiences of the truth of certain facts and the desirability of certain courses of conduct’;[[1]](#footnote-1) and published judgments are directed towards a variety of readerships with a variety of interests and needs.[[2]](#footnote-2) In particular, those audiences (especially the parties) primarily interested in the outcome of the particular case can have different needs to those audiences more interested in the case’s implications for the law as a whole. In mental capacity law, where the consequences of a decision are often profound and controversy is seldom far away, the needs of these two audiences can be in tension. The immediate audiences need final resolution of an often prolonged conflict in a way that acknowledges that their concerns matter.[[3]](#footnote-3) This demand is often met by simple, unequivocal declarations of principle: for instance, ‘the purpose of the best interests test is to consider matters from the patient's point of view’.[[4]](#footnote-4) There is nothing wrong with such declarations. They serve some purposes well. This article, however, shows that they do not always serve an audience attempting to understand the wider legal regime well. They focus attention too tightly on whatever issue is controversial in the particular case, neglect what is irrelevant to it, emphasise certainty over complexity; and so present a distorted view. When most published judgments, justifiably,[[5]](#footnote-5) prioritise the immediate audience in this way, then extracting a coherent description of the legal regime from the patchwork of partial accounts can take some work.

One aspect of domestic mental capacity law exhibits such a patchwork of partial accounts. Judges tend to use whatever ideas about personal ‘autonomy’, a word that is not legally defined, best suit their rhetorical needs in the immediate case, whether or not their usage can coherently account for the law as a whole. As a result, three apparently contradictory accounts of the relationship between mental capacity and autonomy coexist. On one account, people with mental capacity about a matter are autonomous enough to make their own decisions about it, but those without such capacity are not. Mental capacity alone decides the issue of autonomy. On the second account, however, mental capacity alone is not enough for someone to be considered autonomous. Freedom from coercion and undue influences is also required. Finally, in the third account, even when someone lacks mental capacity about a matter, they may be autonomous with regard to it. At first sight, these accounts appear to contradict one another; but all the cases in which they appear were decided within the current law, and it is possible to draw them together into a coherent structure that captures the important features of each. One of the unique contributions that this article makes is to give this unified account in section V. This article, then, is not an argument for legal reform. It is, instead, a corrective account of how the law currently treats the relationship between autonomy and mental capacity.

In particular, this article evaluates a gap between how ‘autonomy’ appears if judicial comments in certain cases are taken at face value, and how it appears if the law is treated as consistent across the full range of cases. It is not an attempt to evaluate practice against any already-determined philosophical account of autonomy, valuable as such work may also be.[[6]](#footnote-6) Instead, it is an attempt to take seriously Wittgenstein’s suggestion to start not with conceptual analysis, but in practice: to ‘*look and see’* how a word is used.[[7]](#footnote-7) As he notes, ‘looking’ sometimes does not reveal a common core to a concept, one which would be present in all uses of it, but rather ‘a complicated network’ of overlapping similarities.[[8]](#footnote-8) He goes on to suggest that when the uses of a concept lack a common core, then the scholarly assumption that a short, precise definition can capture the entire concept becomes hard to justify.[[9]](#footnote-9) Nevertheless, it is often useful to start with a rough definition, if only to indicate a broad area of interest. For the purposes of getting started, then, autonomy is a person’s capacity for self-government, in the sense that they are able to be in control of their own life.[[10]](#footnote-10) This definition is broad enough to capture the judicial uses of the word that follow, but narrow enough to have an interesting feature. If autonomy is capacity for self-government, then it is not the same thing as the simple freedom from external restraints.[[11]](#footnote-11)

In the courts, self-government and freedom from external restraints have an intimate, justificatory relationship,[[12]](#footnote-12) which allows a typology of arguments that rely on autonomy to be made. There are two major types. First is the ‘appeal to respect for autonomy’:[[13]](#footnote-13) if someone is believed to be capable of self-government, and self-government is believed to be good, then that is a reason to refrain from interfering in their life against their will. Such arguments are common in capacity cases, and can even determine their outcome.[[14]](#footnote-14) Attention to this type of argument is central to the methodology here; for if it is to be successful, then that person must already be plausibly considered to be autonomous.[[15]](#footnote-15) In other words, paying attention to when the appeal to respect for autonomy is successful offers a way to assess who is considered autonomous by the courts, one that that need not take individual judicial comments at face value. This appeal should, however, be distinguished from another argument, the ‘appeal to the value of autonomy’, which simply asserts that autonomy is valuable and should be promoted.[[16]](#footnote-16) This latter argument can also determine the outcome of domestic cases,[[17]](#footnote-17) but it operates differently. Basing a decision on the idea that autonomy is valuable and should be promoted does not require belief that the person is already autonomous. For that reason, although appeals to the value of autonomy are fascinating in their own right, they are not useful here.

In addition to excluding appeals to the value of autonomy, this article also takes the process of mental capacity assessment as largely unproblematic. This is not because assessments of capacity are an uncontentious matter. They are not.[[18]](#footnote-18) Indeed, the Mental Capacity Act 2005 (MCA) directly ties incapacity to ‘an impairment of, or a disturbance in the functioning of, the mind or brain’;[[19]](#footnote-19) and, although this is often broadly read, it is almost certainly a case of unjustified discrimination on the grounds of disability.[[20]](#footnote-20) The focus in this article, however, is on what follows from a finding of incapacity, not on the finding itself; so these questions are largely put to one side. Similarly, none of the three accounts of the relationship between autonomy and capacity that appear in the courts directly address the Mental Health Act 1983 (MHA). That Act is undoubtedly sometimes relevant to whether or not a person will be considered autonomous by the courts; but the relationship between it and the MCA is too complex to give adequate detail here.[[21]](#footnote-21) Finally, nothing here suggests that there is any legalconflict in the cases that are used as examples of the different accounts of the relationship between autonomy and capacity. Indeed, section V, which offers a coherent account, shows that there is not even any necessary conceptual conflict. The conflict is only in the rhetoric used, but the rhetoric used matters. It can lead to misunderstandings of the law. Mental capacity cases, rightly or wrongly, often decide the most important questions in a person’s life: for instance, whether a woman will be allowed to live with her husband,[[22]](#footnote-22) what contact a young man will have with his mother,[[23]](#footnote-23) or whether a woman will be given a caesarean section against her wishes.[[24]](#footnote-24) Clarity about both the law and its justification is therefore essential. With that in mind, it is best to start with the most oversimplified account.

**II. THE GATEKEEPER ACCOUNT**

The least complex account of the relationship between autonomy and capacity is to treat mental capacity as the threshold for autonomy. On this view, if someone has mental capacity with regard to a particular decision, then they are autonomous with regard to that particular matter, so the state should not interfere with their decision. If, conversely, they do not have mental capacity with regard to the decision, then they are not autonomous, so the state need not exercise such restraint. As Donnelly says, capacity acts as autonomy’s ‘gatekeeper’.[[25]](#footnote-25) Usually, gatekeeper accounts acknowledge that those without mental capacity have some capability for self-government. They only deny that it is sufficient to be overriding in law. In other words, their distinguishing feature is not whether or not they think those without capacity have any capability for autonomy, but that they treat the presence or absence of mental capacity as the sole criteria for deciding whether an appeal to respect for autonomy will be successful.

*A. Recent Examples of the Gatekeeper Account*

The gatekeeper account was dominant by the end of the last century. In *Bland,* Lord Mustill stated that ‘if the patient is capable of making a decision …his choice must be obeyed’;[[26]](#footnote-26) but someone’s ‘inability to make’ a necessary decision allows someone else to decide in that person’s ‘best interest’.[[27]](#footnote-27) This idea was expressly linked to autonomy in *Re C (Adult: Refusal of Medical Treatment)*: ‘if the patient's capacity to decide is unimpaired, autonomy weighs heavier, but the further capacity is reduced, the lighter autonomy weighs’.[[28]](#footnote-28) In *Re MB*, Lady Justice Butler-Sloss made it clear that this is an exclusive test: ‘the only situation in which it is lawful for the doctors to intervene is if it is believed that the adult patient lacks the capacity to decide’.[[29]](#footnote-29) These cases all deal with medical treatment, but a Law Commission report from the same period suggests that the gatekeeper view already had broader application: ‘a person with capacity is entitled to refuse community care or other protective services’.[[30]](#footnote-30) That report, and the concurrent case law, eventually contributed to the definition of incapacity found in the MCA.[[31]](#footnote-31)

The MCA does not mention autonomy. Nevertheless, a gatekeeper account of the relationship between autonomy and capacity helped to justify the Act. On the second reading of the Mental Capacity Bill in the House of Lords, the Lord Chancellor stated that its first aim was to allow ‘adults to take as many decisions as they can for themselves’ but that ‘where adults cannot make decisions …the Bill ensures that the decisions which are made for them are made in their best interests’.[[32]](#footnote-32) By omission, this implies more than it states. In these passages, it seems as though the MCA applies to all adults who ‘cannot make decisions’, not only to those adults who cannot decide ‘because of an impairment of, or a disturbance in the functioning of, the mind or brain’.[[33]](#footnote-33) The possibility of people being unable to decide for other reasons is ignored, and this tends to imply a gatekeeper view of the relationship between autonomy and capacity: those with capacity are capable of self-determination, and those without are not. This became explicit in the Act’s Code of Practice, which says that ‘an adult …has full legal capacity to make decisions for themselves (the right to autonomy) unless it can be shown that they lack capacity’.[[34]](#footnote-34) To some extent, the Act’s test for incapacity reflects this gatekeeper view, for it treats mental capacity as an either/or concept. At the ‘material time’,[[35]](#footnote-35) someone can either make a particular decision or they cannot, and the difference between these two conditions is considerable. The Act creates many powers affecting how decisions are made for those who lack capacity: a general defence for actions made in their best interests;[[36]](#footnote-36) a section allowing the donee of a Lasting Power of Attorney to make such decisions;[[37]](#footnote-37) a power of the court to make such decisions or to appoint a deputy to make them;[[38]](#footnote-38) and a power for individuals with capacity to make an advance decision to refuse treatment at a future time when they lack capacity.[[39]](#footnote-39) It also allows the court to make interim orders in someone’s best interests where there is ‘reason to believe’ that they lack capacity in relation to a matter.[[40]](#footnote-40) In contrast, the Act creates no powers at all to make decisions for those with capacity. This contrast lends the gatekeeper account a certain plausibility.

This plausibility makes it unsurprising that judges still sometimes give the gatekeeper account when making decisions under the Act. The account can be split into two limbs: (a) the idea that those with capacity in regard to a particular decision are autonomous, so the state should not interfere with what they decide; and (b) the idea that those without capacity in regard to a particular decision are not autonomous, so this restraint is not appropriate. Sometimes, the court states the whole gatekeeper account. For instance, in *Bailey v Warren*, decided between the MCA being passed and coming into force, Lady Justice Arden held that ‘capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making’.[[41]](#footnote-41) More often, however, judges will expressly state only one of the limbs, while implying the other. For instance, in *PC v City of York Council,* Lord Justice McFarlane held that ‘unless they lack mental capacity to make that judgment, it is against *their* better judgment …the statute respects their autonomy so to decide’.[[42]](#footnote-42) Here, the emphasis is on the idea that a person with capacity is autonomous. Similarly, in *Nottinghamshire Healthcare NHS Trust v RC,* Mr Justice Mostyn found that ‘even to think about imposing a blood transfusion’ against the will of a detained patient with capacity, despite a power to do so existing under section 63 of the Mental Health Act 1983, would be ‘an abuse of power’.[[43]](#footnote-43) Although the word ‘autonomy’ does not appear in *RC*, the concept pervades it, with Mostyn J even quoting Mill on the sovereignty of the individual.[[44]](#footnote-44) These cases emphasise the autonomy of those with capacity, but others emphasise the lack of autonomy of those without capacity. For instance, in *Independent News and Media v A,* the Lord Chief Justice held that ‘the responsibility of the Court of Protection arises just because the reduced capacity of the individual requires interference with his or her personal autonomy’.[[45]](#footnote-45) This is a subtle sentence. It acknowledges that those without capacity may have some capability for self-government, while simultaneously stating that their lack of capacity is enough for appeals to respect for that autonomy to fail. Similarly, in *Re E (Medical Treatment: Anorexia)* it was found to be in a 32 year old woman’s best interests to be fed against her will, despite this representing ‘a very severe interference with her private life and personal autonomy’.[[46]](#footnote-46) She was ‘fully aware of her situation’,[[47]](#footnote-47) but because she was found to lack mental capacity, this did not restrain the court. In both of these cases, it is acknowledged that someone without capacity might have some ability to be self-determining. What is denied is that this ability is such that respect for it should restrain the state from acting against their wishes.

*B. Function of the Gatekeeper Account*

The gatekeeper account has been influential. It appeared in the appellate decisions that laid the groundwork for the MCA, and some recent examples also come from the Court of Appeal. The following sections show that it is, nevertheless, only a partial description of the law. This is not, however, to say that judges in these cases were in error. Rather, the account served important rhetorical purposes, and these are worth identifying. The two different types of case, those that emphasise the autonomy of a person with capacity and those that emphasise the lack of autonomy of the person without capacity, have two different purposes. When someone is making an unwise decision, but is felt to have capacity, as in *PC* and *RC,*[[48]](#footnote-48)then the gatekeeper account affirms that the matter is beyond the court’s jurisdiction and so absolves it, and service providers, of any responsibility for the consequences. The ability to legally act on behalf of the person is treated as completely limited by the MCA.[[49]](#footnote-49) For instance, in *PC*, ‘we must leave PC free to make her own decision, and hope that everything turns out well in the end’.[[50]](#footnote-50) In contrast, in cases where the judge has concluded that is in someone’s best interests to make a decision against their expressed wishes, the gatekeeper account affirms the court’s authority to do so. It does so by positioning the court’s determination as objective, and so decisive, but the person’s wishes as merely subjective. For instance, in *Re E,* when determining to feed a woman against her will, ‘E's life is precious, whatever her own view of it now is’.[[51]](#footnote-51) Similarly, in *An NHS Trust v CS,[[52]](#footnote-52)* Mr Justice Baker had to decide whether it was in a young woman’s best interests to have an abortion. Prior to an assault by her partner that left her with significant brain damage, she intended to have the procedure; but following the assault, she wished to ‘keep the baby’. Of these latter wishes, the judge stated that ‘it seems to me impossible for this court to attach any significant weight to them bearing in mind her patent lack of capacity’.[[53]](#footnote-53) As in *Re E*, the gatekeeper account helps to affirm the objectivity, and hence legitimacy, of the court’s decision, by contrasting it with the subjectivity of the wishes of the person who is decided for.

The gatekeeper account, then, has two uses: absolving the court from responsibility when someone has capacity, and affirming its authority to act when someone does not. It is, however, a primitive tool. It is of little use when the autonomy of someone without capacity seems to demand respect or when someone with capacity seems, nevertheless, to be incapable of self-government. The latter of these situations is dealt with in the next section, for when someone with capacity seems to lack autonomy, then the judiciary may reach for the insufficiency account of the relationship.

**III. THE INSUFFICIENCY ACCOUNT**

In the gatekeeper account, if someone has capacity, then respect for their autonomy restrains the state from interfering with their wishes. The insufficiency account modifies this. Like the gatekeeper account, it holds that people without capacity do not have an overriding right to respect for their autonomy. Unlike the gatekeeper account, however, it does not hold that people with mental capacity necessarily do have an overriding right to respect for their autonomy. They may or may not have such a right, depending on other conditions. In other words, in the insufficiency account, mental capacity is necessary but not sufficient for autonomy to be respected as a right. Something else is also needed. As Lady Hale says in *R v Cooper*, ‘Autonomy entails the freedom and the capacity to make a choice’.[[54]](#footnote-54) This ‘freedom’, the thing beyond capacity that is needed for autonomy, is consistent in the cases that give this account. It is voluntariness, freedom from undue external influences.

*A. Recent Examples of the Insufficiency Account*

The insufficiency account predates the Mental Capacity Act. In 1993, in *Re T* *(Adult: Refusal of Treatment),* Lord Donaldson found that ‘in some cases doctors will not only have to consider the capacity of the patient to refuse treatment, but also whether the refusal has been vitiated because it resulted not from the patient's will, but from the will of others’.[[55]](#footnote-55) In other words, ‘undue influence’[[56]](#footnote-56) from a third party may have such an effect on someone with capacity that it will ‘destroy her volition’.[[57]](#footnote-57) When this happens, the court will not treat the affected person as so autonomous that their expressed wishes must be abided by.

*Re T* is older than the gatekeeper cases of *Re C* and *Re MB*, and those cases applied *Re T*, so it is worth examining how an insufficiency account became a gatekeeper one.[[58]](#footnote-58) It did so by two routes, case law and Law Commission led reform. Taking the case law first,neither *Re C* nor *Re MB* concerned allegations of undue influence. As a result, when applying *Re T,* they did not mention that part of the precedent.[[59]](#footnote-59) This omission led to a gatekeeper account: for instance, in *MB,* ‘the *only situation* in which it is lawful for the doctors to intervene is if it is believed that the adult patient lacks the capacity to decide’*.*[[60]](#footnote-60)Something similar happened with the Law Commission. *Re T* envisages two separate tests, first whether the person has capacity and then whether their will is nevertheless being overborne,[[61]](#footnote-61) but the Law Commission’s report considers that someone with a mental disability who is ‘unable to exert their will against some stronger person who wishes to influence their decisions’[[62]](#footnote-62) lacks mental capacity. Combining incapacity and involuntariness in this way necessarily leads to a gatekeeper account of the relationship between capacity and autonomy. Rather than being, as in the insufficiency account, something additional to incapacity that can remove a person’s autonomy, involuntariness simply becomes part of incapacity itself. There is, however, a difference between this and the gatekeeper cases. The cases, by silence, seem to erase any consideration of involuntariness; but the Law Commission, by incorporation, draws involuntariness into the definition of incapacity itself.

The Law Commission’s combination of incapacity and involuntariness has led to some confusion; for, despite the assertion that undue influence could go to incapacity, the actual wording of the Commission’s draft Bill precludes this from happening in every case. The Bill states that someone lacks capacity if ‘unable *by reason of* mental disability to make a decision’.[[63]](#footnote-63) Similarly, the MCA, as passed, requires incapacity be ‘*because* of an impairment of, or a disturbance in the functioning of, the mind or brain’.[[64]](#footnote-64) These provisions can accommodate some, but not all, cases of undue influence. The need for a ‘clear causative nexus between mental impairment and any lack of capacity’[[65]](#footnote-65) leads to a delicate situation when someone’s ability to make a decision might be restricted by both an impairment and the influence of another party. If someone with a relevant impairment would be able to decide but for the influence of the other person, then they must be presumed to have mental capacity until all ‘practicable steps’ are taken without success to counteract that influence.[[66]](#footnote-66) This leaves at least two classes of person who have mental capacity, but might nevertheless be plausibly be thought to lack autonomy. The first are those who ‘cannot decide’ by the criteria in the Act, but because of undue influence, not because of any impairment. The second are those who can decide by the criteria in the Act, but nevertheless cannot reach free decisions because of undue influence. Judges sometimes face both of these sets of circumstances.[[67]](#footnote-67) Consequently, despite the Law Commission’s combination of capacity and voluntariness, the insufficiency account has survived, and now coexists with the gatekeeper account. It is found in two places: cases dealing with the inherent jurisdiction, and in the doctrine of undue influence.

*B. The Inherent Jurisdiction*

The inherent jurisdiction is described by the courts as a ‘protective jurisdiction’ relating to vulnerable adults,[[68]](#footnote-68) which is available in cases ‘that fall outside the MCA’.[[69]](#footnote-69) Not all of its uses are relevant here. For instance, when orders under the jurisdiction are made for people who are incapacitated under the MCA,[[70]](#footnote-70) then this is compatible with the gatekeeper account. Sometimes, however, the jurisdiction is used for people who have mental capacity, and then it relies on an insufficiency account of the relationship between autonomy and capacity.

The leading case, *DL v A Local Authority,*[[71]](#footnote-71) concerned an ‘elderly’ couple who were thought to be subjected to assaults, coercion, and financial exploitation by their son.[[72]](#footnote-72) The husband lost capacity before the case was heard, but his wife retained capacity throughout.[[73]](#footnote-73) Their Local Authority sought a wide range of injunctions restraining the son,[[74]](#footnote-74) and the Court of Appeal approved a first instance decision that the inherent jurisdiction allowed orders to be made to protect a ‘vulnerable person’ who retained capacity, despite the MCA coming into force.[[75]](#footnote-75) Two details must be treated with care here. First, notwithstanding judicial uses of the gatekeeper account, the MCA only defines capacity for its own purposes, so it does not exclude people being found ‘unable to decide’ for reasons other than those found in the Act.[[76]](#footnote-76) This is the legal space that allows the insufficiency account to coexist with the gatekeeper account. Nothing in the MCA requires those with mental capacity to be treated as autonomous. Second, it might be thought that because the injunctions made in *DL* related to the abusive son, they do not bear on whether his mother was recognised to be autonomous. This is not so.

Injunctions like those made in *DL* would normally be made as part of a non-molestation order under section 42 of the Family Law Act 1996. That section, however, does not permit public authorities to initiate proceedings, and the section that does enable third party interventions has never been brought into force.[[77]](#footnote-77) As Miles says, the current situation is usually that ‘victims control whether and when legal proceedings for injunctive relief should be brought’.[[78]](#footnote-78) In other words, people who require non-molestation orders are, almost by definition, subject to coercion; but if they have capacity, then they are usually considered to be so autonomous that other parties cannot initiate proceedings for them. Mrs L, and Mr L when proceedings were brought, had capacity. Neither of them initiated proceedings. The use of the inherent jurisdiction changed the situation from the usual one in which they were assumed to be autonomous into one in which their autonomy was in question.[[79]](#footnote-79) This is clear from the judgment itself. Lord Justice McFarlane says that the jurisdiction is ‘targeted solely at those adults whose ability to make decisions for themselves has been compromised’.[[80]](#footnote-80) This implies that ‘those adults’ are not autonomous, a point made explicit when he goes on to say that the jurisdiction is ‘aimed at enhancing or liberating the autonomy of a vulnerable adult *whose autonomy has been compromised by a reason other than mental incapacity*’.[[81]](#footnote-81) The possible reasons that a person’s autonomy can be ‘compromised’ are further specified as being ‘under constraint’, ‘subject to coercion or undue influence’, or ‘for some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent’.[[82]](#footnote-82) Allowing for the vagueness of the final reason, these are examples of autonomy requiring voluntariness as well as mental capacity.

*C. The Doctrine of Undue Influence*

The inherent jurisdiction has largely been exercised in decisions about a person’s health and welfare, but it has a counterpart in decisions about property and affairs: the equitable doctrine of undue influence. In certain circumstances, this doctrine allows the transactions of a person with capacity to be rendered voidable.[[83]](#footnote-83) The leading case, *Royal Bank of Scotland v Etridge (No 2)*,[[84]](#footnote-84) uses slightly different language to *DL*, but its reasoning is analogous*.* The case consisted of eight conjoined appeals, all by women alleging that their husbands had exercised undue influence when obtaining their agreement to secure loans against matrimonial property. In none of the cases was the mental capacity of the woman in doubt.

Despite the women having capacity, Lord Nicholls held that where undue influence was shown, the transaction ‘ought not fairly to be treated as the expression of a person's free will’.[[85]](#footnote-85) Later cases restate his point. For instance, in *Drew v Daniel,* Lord Justice Ward affirms that ‘there is no undue influence unless the donor if she were free and informed could say “This is not my wish but I must do it”’;[[86]](#footnote-86) and, in *Thompson v Foy,* Mr Justice Lewison held that ‘the critical question is whether or not the influence has invaded the free volitionof the donor to withstand the influence’.[[87]](#footnote-87) In these cases, as in *DL*, someone with capacity is nevertheless found not to have been in control of their own relevant actions. This falls beyond the gatekeeper account. It is, however, consistent with the insufficiency account, which requires both capacity and voluntariness for autonomy. To be autonomous, both the inherent jurisdiction and the doctrine of undue influence require that someone be free from ‘coercion’ and subtler forms of pressure by a third party.[[88]](#footnote-88) Furthermore, in both lines of cases, a special regard must be had for those persons thought to be ‘vulnerable’, but any attempt to define ‘vulnerability’ is firmly resisted.[[89]](#footnote-89) In other words, the two strands of law are motivated by the same basic understanding of the relationship between autonomy and mental capacity: one that, as the next subsection discusses, also occurs in some philosophical accounts. On this understanding, autonomy requires both capacity and voluntariness.[[90]](#footnote-90)

*D. Function of the Insufficiency Account*

After examining the cases in which the insufficiency account appears, two hypotheses can be discarded. First, this is not a case of judicial disagreement. It is not that some judges rely on one account and other judges rely on another account. Lord Justice McFarlane gave the leading judgment in both *DL* and *PC*, but the former is premised on an insufficiency account and the latter on the gatekeeper account. Similarly, Lady Justice Butler-Sloss gave judgment in both *Re T,* which relied on the insufficiency account, and in *Re MB,* which relied on the gatekeeper account. Second, no simple story about the evolution of judicial views will work here. An insufficiency account in *Re T* predates a gatekeeper account in *MB*, which predates an insufficiency account in *DL*, which predates a gatekeeper account in *PC.* Rather than differences between judges or over time, the differences between the accounts are better accounted for by paying attention to the differences between the cases in which they are used. The previous section discusses how the gatekeeper account can add rhetorical force to a judgment when someone with capacity is making an unwise choice or when the best interests of someone without capacity are felt to contradict their expressed wishes. If, however, a third party is coercing someone with capacity, then a gatekeeper account often would seem to exclude any action by the court. After all, if someone with capacity is always so self-governing that the state should not interfere with their expressed wishes, then even wishes expressed at gunpoint should be respected as autonomous. This is not a particularly attractive conclusion, nor is it one that is likely to persuade; so it is hardly surprising that when coercion may be an issue, judges instead give an insufficiency account. In doing so, they draw a distinction between the internal and external limitations on autonomy, one that also appears in the philosophical literature. For instance, Raz distinguishes between ‘capacity’ and ‘independence’,[[91]](#footnote-91) and Killmister between ‘capacity for autonomy’ and ‘ability for autonomy’.[[92]](#footnote-92) For Killmister, the former assesses someone’s potential for autonomy in ideal circumstances, and the latter their potential for autonomy in their current circumstances. The gatekeeper account emphasises ‘capacity’, in Killmister’s sense, at the expense of ‘ability’. The MCA requires an inability to decide because of an impairment,[[93]](#footnote-93) so it is largely restricted to the internal constraints on autonomy; and the gatekeeper account, by tying autonomy to capacity in the Act, adopts these limitations.[[94]](#footnote-94) In contrast, the insufficiency account, which says that autonomy requires both capacity and voluntariness, allows attention to the person’s external circumstances. From this description, it might be thought that the gatekeeper account is just a slightly inaccurate shorthand for the insufficiency account; and that when coercion does not seem to be a factor, judges just do not mention it. There is some truth to this, but it would be wrong to conclude that the insufficiency account accurately reflects the whole law. In contrast to what it would predict, judges sometimes hold that a person without capacity is autonomous.

**IV. THE SURVIVAL ACCOUNT**

On the survival account, unlike the gatekeeper and insufficiency accounts, respect for the autonomy of a person without mental capacity can restrain state action. Like the other accounts, it has been bluntly stated by the judiciary. For instance, in *W v M,* Mr Justice Baker heldthat‘personal autonomy survives the onset of incapacity’.[[95]](#footnote-95) This statement is unequivocal, but the position it articulates is less simple than it appears. It should be distinguished from two opposing extremes. At one extreme is the view that all people, regardless of mental capacity, are so autonomous that the state should not act against their will.[[96]](#footnote-96)At the other extreme is the view that someone without mental capacity might have some capability for self-determination, but does not have a legal right to be treated as autonomous. This position, as noted in section II, collapses into a gatekeeper or insufficiency account. In contrast, the survival account asserts that a right to be treated as autonomous *can* survive the onset of incapacity, but not that it *must* do so. This is clear when Mr Justice Baker goes on to say:

A decision by the Court, having proper regard to the patient's personal autonomy and the expressed wishes and feelings of the patient and her family, that it would be in her best interests to withhold or withdraw treatment does not give rise to a breach of Article 8.[[97]](#footnote-97)

This suggests that appeals to respect for autonomy, arguments that a person is so self-governing that their expressed wishes must be followed, might be effective even after someone is found to lack capacity. In other words, even when someone is found to lack capacity, respect for their autonomy can restrict the decisions that can be made on their behalf. The question of respect for autonomy is not resolved by a capacity assessment, it is determined when evaluating a person’s best interests.

*A. Recent Examples of the Survival Account*

Section II showed how the gatekeeper account draws some plausibility from the MCA. The Act, however, clearly envisages that a person without capacity might be able to at least contribute to decisions made on their behalf. When a best interests decision is being made, the person being decided for should be permitted and encouraged to participate in decision making;[[98]](#footnote-98) and their ‘past and *present* wishes and feelings’ must be considered.[[99]](#footnote-99) Similarly, the Act requires that ‘regard must be had’ to making decisions in a way that is ‘less restrictive of the person's rights and freedom of action’.[[100]](#footnote-100) These sections require more attention to someone’s preferences than was evident in the pre-Act case law.[[101]](#footnote-101) They do not, however, straightforwardly translate into any right to be treated as autonomous. Someone’s wishes and feelings must only be considered, not followed, and they have no priority over other factors.[[102]](#footnote-102) Similarly, the Act only requires regard to what is ‘less restrictive’. It does not require decision-makers to act in the least restrictive way unless that is in the person’s overall best interests.[[103]](#footnote-103) In theory, then, the Act requires consideration of the person’s point of view, but does not require treating the person without capacity as so autonomous that the state should not act against their will. In practice, however, attention to the person’s point of view has tended to dissolve this distinction.

There are two leading cases on the current ‘wishes and feelings’ of a person without capacity. The first, *Re P (Statutory Will)*, establishes that, although they carry ‘great weight’, ‘the only imperative is that the decision must be made in P's best interests’.[[104]](#footnote-104) This adds little to the plain words of the Act, but the second case, *ITW v Z*, [[105]](#footnote-105) fills in more detail. In it, Mr Justice Munby noted that the weight attached to someone’s wishes and feelings is always case-specific,[[106]](#footnote-106) then gave a non-exhaustive list of factors bearing on the issue:

a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings…

b) the strength and consistency of the views being expressed by P;

c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to…

d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and

e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.[[107]](#footnote-107)

The first and last of these factors directly bear on the structure of the relationship between autonomy and capacity. The remaining three do so indirectly, by directing attention to the content of a person’s wishes. The first factor, stating that more weight should be given to the wishes and feelings of people closer to the borderline of capacity, may seem obvious, but even it tends to undermine the gatekeeper account. Instead of a simple binary where those with capacity have autonomy and those without capacity do not, autonomy becomes a matter of degree; and if you are close to the ‘borderline’, then you are also closer to your expressed wishes being legally determinative.[[108]](#footnote-108)

The other structural factor from *ITW*, the requirement that a person’s wishes can ‘be accommodated within the court's overall assessment of what is in her best interests’, may seem to limit how far the gatekeeper account can be softened. If someone’s expressed feelings are not in accord with their overall best interests, then their wishes will not prevail; so it can seem that, after all, only those with capacity have a right to be treated as autonomous. This appearance is deceptive, and anyone led astray by it has failed to ask whether the wishes and feelings of a person without capacity are a factor in determining their overall best interests. They are. As already mentioned, the Act requires that the person’s present wishes are considered;[[109]](#footnote-109) and sometimes this consideration leads to a judge treating those wishes as determinative of the person’s objective best interests.[[110]](#footnote-110) For example, in *Re EU*, Senior Judge Lush found that ‘The factor of magnetic importance in this case is EU's own wishes and preference’.[[111]](#footnote-111) In *Wye Valley v B*, Mr Justice Peter Jackson held that ‘the wishes and feelings, beliefs and values of a person with a mental illness can be of such long standing that they are an inextricable part of the person that he is’,[[112]](#footnote-112) and this determined best interests in the case.[[113]](#footnote-113) Finally, in *SAD v SED*, District Judge Glentworth found ‘the Respondent’s [current] wishes and feelings are central to my decision’[[114]](#footnote-114) when abiding by the desire of someone without capacity to revoke a Lasting Power of Attorney that they had made when they had capacity. Overall best interests cannot entirely limit the determinative power of someone’s current wishes because sometimes the person’s current wishes determine their overall best interests.[[115]](#footnote-115) This may seem a modest point, but it cannot be accounted for by the gatekeeper and insufficiency accounts, both of which require mental capacity for a person’s autonomy to restrain interference with their expressed wishes.

*B. Subjectivity, Intelligibility, and Authenticity*

In *ITW,* beyond the two points that directly address the relationship between capacity and autonomy, are three factors that indirectly address the relationship. Each of these expresses a conception of autonomy that is not easily assimilated into the gatekeeper view. The three conceptions are subjectivity, intelligibility, and authenticity; and the first of these, subjectivity, is expressed as ‘the possible impact on P of knowledge that her wishes and feelings are not being given effect to’. The issue here is simple. Best interests decisions are made for people, not objects, and people have their own perspectives on the world. As District Judge Eldergill says, the ‘law requires objective analysis of a subject not an object’.[[116]](#footnote-116) The Supreme Court agrees. In *Aintree v James,* Lady Hale held that the ‘purpose of the best interests test is to consider matters from the patient's point of view’.[[117]](#footnote-117) In *Aintree* itself,Mr James’s current wishes did not play a prominent role,[[118]](#footnote-118) but attention to the person’s ‘point of view’ has naturally led to their wishes being given weight in other cases. For instance, in *A NHS Foundation Trust v Ms X*, Mr Justice Cobb ‘endeavoured to put myself in the place of Ms X’.[[119]](#footnote-119) In doing so, he carefully considered her current wishes and the likely effects of overruling them.[[120]](#footnote-120) Similarly, in *Wye Valley,* Mr Justice Peter Jackson observed that if he found it in a man’s best interests to have a severely infected leg amputated against his will, then ‘the loss of his foot will be a continual reminder that his wishes were not respected’,[[121]](#footnote-121) and this counted against the operation being performed. Sometimes, for instance in *Ms X*,[[122]](#footnote-122) these concerns are linked to autonomy, but the nature of this connection has never been made entirely clear. In an older case concerning someone found to have capacity, however, the President of the Family Division did give some indication of the connection between subjectivity and autonomy.[[123]](#footnote-123) She quoted at length an article by the philosopher Kim Atkins, including the following passage:

If we accept that the subjective character of experience is irreducible and that it is grounded in the particularity of our points of view, then we are bound to realise that our respect for each other’s differences and autonomy embodies a respect for the particularity of each other’s points of view.[[124]](#footnote-124)

It might be thought that the word ‘respect’ in this sentence is relatively weak, and that ‘respect for the particularity’ of someone’s point of view does not entail that their wishes should necessarily prevail. This conclusion should be resisted. In *Ms B,* this respect for autonomy entailed allowing her to make a decision that would almost certainly result in her own death.[[125]](#footnote-125) It seems likely that cases such as *Ms X* and *Wye Valley* now apply a parallel line of thought to some people without capacity;[[126]](#footnote-126) and in these cases, too, respecting the wishes of the person risked their death. Attention to subjectivity increases the likelihood of a person’s wishes determining their objective best interests, for considering things from the person’s point of view tends to make their wishes central, instead of merely one view among many. When the person’s perspective determines their best interest in this way, a right to autonomy has survived incapacity, and restrained third parties from acting on their behalf.

Intelligibility, ‘the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances’, is the second factor from ITW that addresses the content of the person’s wishes. Once again, this factor tends to undermine the gatekeeper account. If someone without capacity can be expressing a ‘rational, sensible, responsible’ preference, this calls into question the idea that those without capacity lack autonomy.[[127]](#footnote-127) The Court of Protection can be open to people without capacity having good reasons for their preferences*.* For instance, in *A London Borough v VT,* District Judge Ralton found that ST’s wish to return to Nigeria ‘to die in the land of his birth’[[128]](#footnote-128) was ‘an expressed consistent rational intention’,[[129]](#footnote-129) one that he shared with many peers with capacity.[[130]](#footnote-130) This is an important detail. People do not make sense of one another in a void. In everyday life, they interpret one another by referring to their shared social context, social practices, and personal narratives;[[131]](#footnote-131) and when interpreting the preferences of someone without capacity, they necessarily start in the same way. *Ms X* provides another example. In this case, Mr Justice Cobb considered the wishes of a woman with anorexia nervosa who refused life-sustaining nutrition despite having ‘no wish to die’.[[132]](#footnote-132) At first, such a decision might seem incomprehensible, but the judge rendered it intelligible by describing Ms X’s long history of unsuccessful similar admissions to specialist units.[[133]](#footnote-133) By describing what her experiences were like, he made her apparently contradictory wishes part of a coherent, understandable, story. This attention to someone’s ‘narrative’ is not unique. It appears in an increasing number of cases,[[134]](#footnote-134) and telling someone’s story in this way often renders their wishes intelligible. Intelligible wishes are far more likely than unintelligible ones to determine overall best wishes; so, as with subjectivity, this process tends to add weight to the survival account. When, as in *VT,* someone without capacity is described as having ‘an expressed consistent rational intention’ and that intention decisively determines their best interests,[[135]](#footnote-135) then the language of autonomy has invaded the land of incapacity.

The final factor from *ITW*, ‘the strength and consistency of the views being expressed by P’, is authenticity. This reflects an idea often associated with autonomy. For philosophers, autonomy is often taken to require a second-order identification with one’s own desires, or at least that the person would not feel alienated from their own preferences if they happened to critically reflect on them.[[136]](#footnote-136) In many ways these theories, which point towards internal coherence, merely formalise an everyday practice. When, in the normal course of things, people interpret one another’s behaviour, they sometimes rely on the idea that the more strongly or consistently someone expresses a desire, the more that they ‘really’ want that thing. Things that are authentically wanted in this way are usually considered more important to the person than things that are not. Similar reasoning occurs in the cases.[[137]](#footnote-137) *Wye Valley* is particularly striking:

…the wishes and feelings, beliefs and values of a person with a mental illness can be of such long standing that they are an inextricable part of the person that he is. In this situation, I do not find it helpful to see the person as if he were a person in good health who has been afflicted by illness. It is more real and more respectful to recognise him for who he is: a person with his own intrinsic beliefs and values.[[138]](#footnote-138)

In this case, even acknowledging that Mr B’s wishes followed from ‘delusions arising from mental illness’ did not mean that they should be given any less weight.[[139]](#footnote-139) Despite their apparent irrationality, Mr B’s desires were an ‘inextricable’ and ‘intrinsic’ part of him, and so worthy of respect. Similarly, in *SAD v SED*, District Judge Glentworth found of a woman with bipolar affective disorder that ‘it cannot be said that her wishes and feelings can be delineated in a way which gives more weight to those expressed in a phase when the hypomania is absent than when …[it] affects her behaviour’.[[140]](#footnote-140) Both her symptomatic and asymptomatic selves were ‘part of who she is’.[[141]](#footnote-141) In these cases, the authenticity of someone’s wishes and feelings allows them to determine that person’s overall best interests. As with subjectivity and intelligibility, authenticity allows autonomy to survive incapacity.

*C. Function of the Survival Account*

Sometimes, after considering a person’s subjectivity and the intelligibility and authenticity of their wishes and feelings, a judge in the Court of Protection will find that those wishes and feelings determine the person’s objective best interests. This is not consistent with the gatekeeper and insufficiency accounts. In these cases, someone without capacity demonstrates that they are so capable of self-determination that the state should not interfere with their decision. An appeal to respect for autonomy is successful. This conclusion might provoke some resistance. Restricting a judge to abiding by someone’s wishes only when it is in that person’s overall best interests might not be thought strong enough to be called the law ‘respecting autonomy’. Such resistance would be misplaced. Having a legal right that is subject to conditions (here, the person’s overall best interests) does not mean that there is no legal right. It means that there is a conditional legal right.[[142]](#footnote-142) In capacity law, this is not unique. If people with capacity have a legal right to make autonomous decisions, then that right is dependent on them being presumed or found to have capacity. It, too, is a conditional right. It is true that best interests decisions leave a lot of discretion to the decision-maker, but so do capacity assessments, and in the Court of Protection they are performed by a small group of expert witnesses.[[143]](#footnote-143) It is also true that there are reasons to doubt whether best interests decisions are consistently made with due rigour,[[144]](#footnote-144) but there are corresponding reasons to doubt the consistency of capacity assessments.[[145]](#footnote-145) Whatever the state of practice, in law autonomy can survive incapacity.[[146]](#footnote-146)

It is easy to use the survival account to tell a comforting story. In this story, the law is progressively realising the rights of people without capacity by recognising autonomous decisions where before it only saw irrational desire. This kind of fairy tale is better avoided. Since the passing of the MCA, the law now pays more attention to the wishes of the person who is being decided for. This is admirable, but it is not necessarily empowerment. Control remains with whoever is taken to be the authoritative interpreter of the person’s wishes. This is not the person themselves. It is a wide range of professionals and, ultimately, a judge.[[147]](#footnote-147) Furthermore, attention to someone’s wishes requires finding out what those wishes are. For some people without capacity, this might require intrusive questioning;[[148]](#footnote-148) and some may feel that strangers, no longer satisfied with merely monitoring their outward behaviour, are now prying into their mental life. Although it is possible to tell a story about how attention to wishes and feelings will empower people, it is also possible to tell a story in which it leads to a new form of domination. In the darker story, authenticity slowly becomes the central criteria for decision-making, and professionals are freed from just dictating what individuals in a ‘benighted state’ can do.[[149]](#footnote-149) Instead, they also dictate what those people ‘really’ want, whether or not the people in question know it.[[150]](#footnote-150) Even in this darker future, the process will undoubtedly still be called ‘empowerment’; but, in truth, it will offer nothing but the freedom of a political re-education camp.[[151]](#footnote-151)

Rather than reading cases through a narrative of future empowerment, it is better to focus on their current effect. Doing so highlights an important detail. The survival account has not replaced the other accounts. It coexists with them, but is used in different circumstances. When the facts mean that it would be artificial to hold that someone can understand or ‘use or weigh’ the information relevant to a decision, yet they seem relevantly autonomous, it allows the judge to recognise this broader type of self-determination. *Wye Valley* is prototypical. It would have been difficult for Mr Justice Peter Jackson to hold that a man with treatment-resistant schizoaffective disorder who did not ‘understand the reality of his injury’, and became agitated when it was even discussed, had capacity to make decisions about treatment for that injury.[[152]](#footnote-152) The survival account nevertheless allowed him to abide by the man’s intelligible and authentically held wishes.[[153]](#footnote-153) To hold that autonomy survives incapacity seems to contradict the gatekeeper and insufficiency accounts, just as they seem to contradict one another. This does not, however, mean that the relationship between autonomy and mental capacity is incoherent. It is not. Rather, the courts emphasise the particular elements of the relationship that they find relevant in the case before them, and this has led to three partial accounts of a coherent whole.

**V. A COHERENT ACCOUNT**

In *W v M,* Mr Justice Baker saysthat‘personal autonomy survives the onset of incapacity’;[[154]](#footnote-154) but in *Bailey v Warren,* Lady Justice Arden says that ‘capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making’.[[155]](#footnote-155) In *DL*, McFarlane LJ talks about the ‘adult whose autonomy has been compromised by a reason other than mental incapacity’; [[156]](#footnote-156) but, in *PC,* he affirms that ‘unless they lack mental capacity …the statute respects their autonomy’.[[157]](#footnote-157) It would be easy to read these statements and conclude that there is no coherent relationship between autonomy and mental capacity in domestic law. Some might even conclude that ‘autonomy’ is simply used to excuse decisions made on other grounds, and that a person’s mental capacity or incapacity is only as significant the judge chooses to make it. Such cynicism should be resisted. It does not fit the evidence. All of the cases discussed here give an impression of anxious moral scrutiny, not of sophistry or arbitrary choice. Furthermore, each account has characteristic uses. Each reliably appears in response to certain types of concern; and these concerns, for instance coercion by a third party, are things that judges should be responsive to. More fundamentally, cheap cynicism makes the same sort of oversimplification as the three accounts.

*A. A Coherent Account*

The cynic and three previous accounts all make the same simple but common error. Midgley describes it as expecting a ‘single plain litmus-paper test’ for a complex moral concept.[[158]](#footnote-158) The gatekeeper account gives the impression that there is such a simple test for the concept of autonomy: if you have capacity then you are autonomous, and if you do not then you are not. The insufficiency and survival accounts each complicate one limb of the gatekeeper account, but neither abandons the ideal of a single test for autonomy. In the insufficiency account, the single test is whether the person has both capacity and freedom, and in the survival account, the test is part of the best interests assessment. The cynic rightly observes that there is no single test, and wrongly infers that there is no moral concept. As with the three accounts, the assumption is that unless the test is relatively simple, there is no such thing as autonomy. Instead, it is better to recognise with Midgley that moral concepts can lack any simple test, yet have an ‘underlying structure’ in practical reasoning.[[159]](#footnote-159) To tease out the underlying structure of autonomy in mental capacity law, a narrow focus on what a judge says in any one case must be replaced with a descriptive account of how the concept is used across a range of cases. On this broader view, a coherent account of the relationship between mental capacity and autonomy is visible. To the question, ‘when is a person so capable of self-government that the state will not interfere with their wishes?’ the answer is as follows:

**In civil law, an adult in England and Wales has a legal right to be treated as autonomous with regard to a particular matter if they are not detained under the Mental Health Act 1983 and:[[160]](#footnote-160)**

**(1)** They have capacity **and** are not a vulnerable person subject to coercion or undue influence,[[161]](#footnote-161) **or**

**(2)** They lack capacity **but** the character of their wishes and feelings is such that it determines their objective best interests.[[162]](#footnote-162)

Mental capacity, then, is not the gatekeeper to autonomy, but it is an important part of the legal threshold for autonomy as a right. Rather than determining the question of whether a person should be treated as autonomous, the concept of mental capacity creates two presumptions. If a person is found to have capacity, then they will be presumed to be autonomous, but that presumption may be rebutted if they are found to be vulnerable and subject to coercion. If a person is found to lack capacity, then they will be presumed not to be autonomous, but that presumption will be rebutted if their wishes and feelings show such subjectivity, intelligibility, and authenticity that they must be respected.[[163]](#footnote-163)

*B. Implications for the Mental Capacity Act 2005*

The coherent account of the relationship lacks the simplicity of the three accounts that judges have relied on. In many ways, this is down to a difference of purpose. Judges are concerned with those aspects of the relationship between autonomy and capacity that are relevant in the particular case, but this article is focussed on the relationship as a whole. This bird’s eye view may, however, have implications for judicial practice, without requiring legal reform. The coherent account lends itself naturally to being used as a decision tree. First, determine whether the person has capacity. If they do, consider whether they are subject to undue influence and coercion: if they are not coerced, then they may act ‘for reasons which are rational, or irrational, or for no reason’;[[164]](#footnote-164) if they are coerced, then measures to address the coercion may be available under the inherent jurisdiction. If the person lacks the relevant capacity, then their wishes must be taken seriously when determining their best interests, and questions of undue influence and coercion should still be considered.

This outline of the relationship between autonomy and mental capacity is both coherent and relatively determinate. It too, however, should avoid the temptation to posit a simple test for a complex concept; for in the details, indeterminacy appears. If someone is truly acting for reasons that are ‘irrational’, then will they be found to have capacity? In many cases, it is unlikely; so the, often-quoted, passage from *Sidaway* that asserts a right to act this way must be treated as another example of judicial rhetoric,[[165]](#footnote-165) one that may work to great effect in particular cases while distorting a realistic assessment of the law as a whole. Furthermore, this article takes both capacity and undue influence as relatively unquestioned matters of fact, but any judge must also decide what counts as ‘understanding’ the relevant information or what makes influence ‘undue’ in the particular circumstances of a case. In other words, they do not merely apply a test to the facts. In every case, they are partially responsible for the content of the test itself.

Having judges make the legal standards as they apply them is an old response to an old problem, one noted by Aristotle: ‘all law is universal, and yet there are some things about which it is not possible to make correct universal pronouncements’.[[166]](#footnote-166) Any determinate test risks injustice, but to acknowledge an unending list of exceptions, and exceptions to exceptions, risks losing the rule in an avalanche of particular cases. An appreciation of this tension was incorporated into English law, through the principle of equity, by the Middle Ages; and at some points, for instance during the sixteenth century, it has been the central issue in legal thought.[[167]](#footnote-167) In the modern era, however, its prominence has faded, and judicial discretion often meets academic suspicion.[[168]](#footnote-168) Nevertheless, there is a parallel between the traditional idea that equity mitigates the inflexibility of the common law and the development of capacity law since the passing of the MCA. It would have been open to the court in *DL* to find that the inherent jurisdiction did not survive the passing of the Act, and in *ITW* to hold that the requirement to ‘consider’ a person’s wishes as part of a best interests decision never entailed that those wishes determine the person’s objective best interests. If the courts had taken these severe lines, then the gatekeeper account would have been true. They did not, and the inflexibility of that account has been mitigated.

The parallel with the principle of equity cannot be drawn too closely. Many of the post-MCA cases have precedential force, so the coherent account is not merely a description of how discretion is exercised. It is hardening into binding law. This raises a serious question. One rationale for the MCA was that it would simplify an area of law that had become ‘confusing, often incomplete, and much misunderstood’.[[169]](#footnote-169) This article excludes children, the criminal law, and those subject to the Mental Health Act 1983;[[170]](#footnote-170) yet, even with those restrictions, determining whether an individual should be treated as autonomous requires considering the MCA, the inherent jurisdiction of the High Court, the equitable doctrine of undue influence, and the list of factors found in *ITW.* Furthermore, this article discusses only the consequences of a finding of capacity or incapacity. It treats the actual assessment process as unproblematic. In reality, capacity assessments face a variety of legal uncertainties, tangles, and paradoxes.[[171]](#footnote-171) Most people applying the Act are not legally trained, so it seems optimistic to expect them to successfully navigate these intricacies.[[172]](#footnote-172) By the criterion of simplifying a law that had become confusing, the MCA has manifestly failed.[[173]](#footnote-173)

The Act faces a more fundamental challenge than the observation that it has failed to simplify the law. Article 12(2) of the UN Convention on the Right of Persons with Disabilities (UNCRPD) requires state parties to ‘recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’.[[174]](#footnote-174) The UN Committee that oversees the Convention has argued that this is incompatible with any system in which a decision-maker ‘can be appointed by someone other than the person concerned’ to make decisions in the person’s best interests rather than according to their ‘will and preferences’.[[175]](#footnote-175) This interpretation is controversial,[[176]](#footnote-176) but it is premised on a different account of the relationship between autonomy and mental capacity to any found in domestic law. The survival account holds that those without mental capacity might retain such autonomy that their wishes determine their best interests, but the Committee may be committed to a universal account of autonomy. In this, everyone, regardless of mental capacity, always retains enough autonomy to restrain the state from acting against their will. Decisions must be made on the ‘best interpretation’ of a person’s ‘will and preferences’:[[177]](#footnote-177) a standard that, at least formally, ascribes autonomy even to those who cannot communicate. Commentators have doubted how ‘realistic’ the universal account is,[[178]](#footnote-178) and it is arguably motivated by analysis that incorrectly treats the gatekeeper account as literally true.[[179]](#footnote-179) Nevertheless, it captures a significant point. It echoes the affirmation found in Kant that all humans are ‘endowed with freedom’[[180]](#footnote-180) and in Article 1 of the Universal Declaration of Human Rights that ‘all human beings …are endowed with reason and conscience’.[[181]](#footnote-181) The central insight of the universal account is that to deny that someone is capable of choice, even only for one decision or in a relatively small way, is to deny they have something often considered essential to being a full human being. Given the long history of marginalisation faced by those with mental disabilities, this concern should be taken seriously. Nevertheless, the universal account makes the same error as the three accounts found in domestic law. It assumes that a ‘single plain litmus-paper test’[[182]](#footnote-182) can capture all the relevant features of the concept of autonomy.

The Mental Capacity Act was to some extent motivated by a similarly reductive account of the relationship between autonomy and capacity, the gatekeeper one,[[183]](#footnote-183) but those ambitions of laying down a simple rule did not survive even a few years contact with reality. They did not deserve to. Issues of voluntariness, subjectivity, and the intelligibility and authenticity of a person’s wishes are important moral concerns; and it is right that judges have taken them seriously. The issue of personhood, which the UNCRPD makes it almost impossible to avoid, is at least as important. It is, however, no more capable of articulating all the details of the complex moral dilemmas that arise across the country hundreds of times every day than the concept of mental capacity has been. Legal reforms that take personhood seriously may be welcome, but any reform attempting to remake the law around that one concept can be expected to fail.

**VI. CONCLUSION**

Judges have told three simple but contradictory stories about the relationship between autonomy and mental capacity in the law of England and Wales. Sometimes, capacity is autonomy’s gatekeeper: those with capacity are autonomous, and those without capacity are not. Sometimes, capacity is necessary for autonomy but not sufficient, for voluntariness is also required. Finally, sometimes autonomy survives incapacity, and the wishes of a person without capacity can reflect their ability to be self-determining. These three accounts coexist in the current law; so no story of evolution, in which one account comes to replace another, can be told. Similarly, judges will switch between accounts depending upon the facts that they face in a particular case, so no story of judicial factions is plausible. Instead, each account should be taken as a partial description of a consistent whole.

On a coherent account, a person will be regarded as autonomous if they have capacity about the matter in question and are not subject to undue influence or coercion *or* if they lack capacity about the matter but the character of their present wishes and feelings nevertheless determines their objective best interests. This account lacks the simple force of judicial statements such as ‘autonomy survives incapacity’ or ‘the statute respects their autonomy’, and such statements have their place. They are a way that a judge can show that the case before them is profoundly important not only to the person it concerns but also, because that person is part of society, to the law itself. Nevertheless, the overall relationship between autonomy and mental capacity is also important, for these cases go to the very heart of the relationship between state and citizen. To understand that relationship, statements largely intended to address the facts of particular cases must be put to one side. When this is done, the relationship that emerges may be considered good or bad, depending on the criteria that it is evaluated by. It is, however, undoubtedly complex. The purpose of this article has been to draw attention to this complexity. The direct implication of this analysis for reform is to be suspicious of easy answers, no matter who offers them and what those answers might be.

1. J Harrington, *Towards a Rhetoric of Medical Law* (Taylor and Francis: Abingdon, 2017) 2. [↑](#footnote-ref-1)
2. For a discussion see EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press: Cambridge, 2005) Ch 10. [↑](#footnote-ref-2)
3. M Hedley, *The Modern Judge: Power, Responsibility and Society’s Expectations* (LexisNexis: Bristol, 2016) Ch 2. [↑](#footnote-ref-3)
4. *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2013] 3 WLR 1299 [45] (Hale L). [↑](#footnote-ref-4)
5. After all, the function of the court is to decide the case. It ‘should not be used as a general advice centre’. *R (Burke) v GMC* [2005] EWCA Civ 1003, [2006] QB 273 [21] (Lord Phillips MR). [↑](#footnote-ref-5)
6. See, for instance, C Kong, *Mental Capacity in Relationship: Decision-Making, Dialogue, and Autonomy* (Cambridge University Press: Cambridge, 2017). [↑](#footnote-ref-6)
7. L Wittgenstein, *Philosophical Investigations* (GEM Anscombe and others tr, 4th ed, Wiley-Blackwell 2009) §66 (emphasis in original). [↑](#footnote-ref-7)
8. *Ibid.* [↑](#footnote-ref-8)
9. *Ibid* §69-71. [↑](#footnote-ref-9)
10. Similar definitions occur in the courts. For example, Lord Sumption grounds autonomy in the ‘moral instinct’ that ‘individuals are entitled to be the masters of their own fate’: *R(Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200 [208]. [↑](#footnote-ref-10)
11. I Berlin, ‘Two Concept of Liberty’ in *The Proper Study of Mankind: An Anthology of Essays* (first published 1958, Pimlico: London, 1998) 191, 194; J Coggon and J Miola, ‘Autonomy, Liberty, and Medical Decision-Making’ (2011) 70 Cambridge Law Journal 523. [↑](#footnote-ref-11)
12. This justificatory relationship also occurs in other contexts: For example:JS Mill, *On Liberty* (Yale University Press: New York, 2003) 80-82 (and throughout). [↑](#footnote-ref-12)
13. G Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge University Press: Cambridge, 1997) 16. See also M Sjöstrand and others, ‘Paternalism in the Name of Autonomy’ (2013) 38 Journal of Medicine and Philosophy 710. [↑](#footnote-ref-13)
14. For example, *PC v City of York Council* [2013] EWCA Civ 478; [2014] 2 WLR 1 [53], discussed in section II. [↑](#footnote-ref-14)
15. Another way of framing this point might also be to ask who, in domestic law, has ‘legal capacity’, the ability to hold and exercise legal rights and duties: Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (UNCRPD) art 12(2). ‘Legal capacity’ is, however, a term seldom seen in the domestic case law. In contrast, ‘autonomy’, and related concepts such as ‘self-determination’ and ‘sovereignty of the individual’, are extremely common. [↑](#footnote-ref-15)
16. Sher (n 13) 16. [↑](#footnote-ref-16)
17. For example, *Northamptonshire Healthcare NHS Foundation Trust v ML* [2014] EWCOP 2, [2014] COPLR 439 [44]-[45]. [↑](#footnote-ref-17)
18. UN Committee on the Rights of Persons with Disabilities, ‘General Comment No 1’ (2014) UN Doc CRPD/C/GC/1 para 27. [↑](#footnote-ref-18)
19. MCA s2(1). [↑](#footnote-ref-19)
20. Essex Autonomy Project, ‘Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next?’ (University of Essex: Colchester, 2014) 31–36. [↑](#footnote-ref-20)
21. In brief, the Act allows detention for the patient’s ‘health and safety’ (ss2, 3) and involuntary treatment ‘for the mental disorder’ (s63) regardless of capacity, but it does not grant any general power to treat a person as lacking autonomy. For instance, the ability to treat does not extend to unconnected physical disorders and has exceptions (ss57, 58, 58A, 60). Furthermore, the Act’s Code of Practice makes the ‘least restrictive option and maximising independence’ and ‘empowerment and involvement’ overarching principles; so, insofar as the Act generates exceptions to the law outlined here, they should be narrowly constructed: Department of Health, Mental Health Act 1983: Code of Practice (Norwich: The Stationery Office 2015) paras 1.1-1.12. The complex three way relationship between the MCA, MHA, and autonomy is further complicated by international human rights law, see Peter Bartlett, ‘”The Necessity must be Convincingly Shown to Exist”: Standards for Compulsory Treatment for Mental Disorder under the Mental Health Act 1983 (2011) 19 Medical Law Review 514. [↑](#footnote-ref-21)
22. *PC* (n 14). [↑](#footnote-ref-22)
23. *Re PL* [2015] EWCOP 44. [↑](#footnote-ref-23)
24. *The NHS Acute Trust v C* [2016] EWCOP 17. [↑](#footnote-ref-24)
25. Mary Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity, and the Limits of Liberalism* (Cambridge University Press: Cambridge, 2010) 90. [↑](#footnote-ref-25)
26. *Airedale NHS Trust v Bland* [1993] AC 789 (HL) 891. [↑](#footnote-ref-26)
27. *Ibid* 892. [↑](#footnote-ref-27)
28. [1994] 1 WLR 290 (Fam) 292 (Thorpe J). [↑](#footnote-ref-28)
29. [1997] EWCA Civ 3093, [1997] 2 FCR 541, 555. [↑](#footnote-ref-29)
30. Law Commission, *Mental Incapacity* (Law Com No 231, 1995) para 9.10. [↑](#footnote-ref-30)
31. MCA s2(1): ‘A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain’. ‘Unable to make a decision’ is further defined in s3(1) as an inability to understand, retain, or ‘use or weigh’ the information relevant to the decision, or an inability to communicate the decision. [↑](#footnote-ref-31)
32. HL Deb 10 January 2005, vol 668, col 12 (Lord Falconer LC). [↑](#footnote-ref-32)
33. MCA s2(1). [↑](#footnote-ref-33)
34. Department for Constitutional Affairs, *The Mental Capacity Act 2005 Code of Practice* (The Stationery Office: London, 2007) para 1.2. [↑](#footnote-ref-34)
35. MCA s2(1). [↑](#footnote-ref-35)
36. *Ibid* s5. [↑](#footnote-ref-36)
37. *Ibid* s9. [↑](#footnote-ref-37)
38. *Ibid* s16. [↑](#footnote-ref-38)
39. *Ibid* s24. [↑](#footnote-ref-39)
40. *Ibid* s48. [↑](#footnote-ref-40)
41. [2006] EWCA Civ 51, [2006] CP Rep 26 [105]. She continues, ‘although no court should rush to interfere with the power of an individual who is competent to make decisions, it must not shirk the duty of intervening where an individual is not so capable and needs to be protected by the law’. [↑](#footnote-ref-41)
42. (n 14) [53] (emphasis in original). [↑](#footnote-ref-42)
43. [2014] EWCOP 1317, [2014] COPLR 468 [42]. [↑](#footnote-ref-43)
44. *Ibid* [8] citing Mill (n 12) 80. [↑](#footnote-ref-44)
45. [2010] EWCA Civ 343, [2010] 1 WLR 2262 [18] (Lord Judge CJ). [↑](#footnote-ref-45)
46. [2012] EWCOP 1639, 2 FCR 523 [125] (Peter Jackson J). [↑](#footnote-ref-46)
47. *Ibid* [5]. [↑](#footnote-ref-47)
48. In *PC,* the unwise decision was to live with her husband, who had a history of serious sexual offences. In *RC,* it was refusal of blood transfusions when they might be clinically indicated. [↑](#footnote-ref-48)
49. In *RC,* Mostyn J does mention the inherent jurisdiction of the High Court, discussed in the next section; but neither applies it nor gives reasons why it cannot be applied (n 43) [13]. [↑](#footnote-ref-49)
50. (n 14)[64] (Lewison LJ). [↑](#footnote-ref-50)
51. (n 46) [122] (Peter Jackson J). [↑](#footnote-ref-51)
52. [2016] EWCOP 10; [2016] COPLR 187. [↑](#footnote-ref-52)
53. *Ibid* [21]. [↑](#footnote-ref-53)
54. [2009] UKHL 42, [2010] Crim LR 75 [27]. This criminal case was decided under the Sexual Offences Act 2003, but the quote is from a section that draws extensively on the MCA. ‘Capacity’ is effectively the same in ‘civil and criminal jurisprudence’: *R v A* [2014] EWCA Crim 299, [2014] 1 WLR 2469 [25] (Macur LJ). For largely pragmatic reasons, however, the test for capacity to consent to sex is treated differently. As criminal cases concern a particular past event, they assess the person’s capacity to consent to sex with a particular other person; but as civil cases concern a person’s future sexual encounters, they assess capacity to consent to sex ‘on a general and non-specific basis’ *IM v LM* [2014] EWCA Civ 37, [2015] Fam 61 [77] (Leveson P). [↑](#footnote-ref-54)
55. [1992] EWCA Civ 18, [1993] Fam 95 [37]. [↑](#footnote-ref-55)
56. *Ibid* [41] (Butler-Sloss LJ). [↑](#footnote-ref-56)
57. *Ibid.* [↑](#footnote-ref-57)
58. This is not to say that the gatekeeper account replaced the insufficiency account. The two coexist. [↑](#footnote-ref-58)
59. *Re C* (n 28) 294; *Re MB* (n 29) 549. [↑](#footnote-ref-59)
60. *Re MB* (n 29)555 (Butler-Sloss LJ) (emphasis added). [↑](#footnote-ref-60)
61. *Re T* (n 55) [37]. [↑](#footnote-ref-61)
62. Law Commission (n 30) para 3.17. This, incidentally, narrows the account of what counts as involuntariness. *Re T* allows that undue influence can also occur when the person can ‘think and decide’ but is merely attempting ‘to satisfy someone else’ as a result of their influence (n 55) [31]. [↑](#footnote-ref-62)
63. Law Commission (n 30)s2(1)(a) (emphasis added). [↑](#footnote-ref-63)
64. MCA s2(1) (emphasis added). In the Act, this exclusion of undue influence from the concept of incapacity may reflect Parliament’s intentions: Joint Committee on the Draft Mental Incapacity Bill, *First Report* (2002-03, HL 189-II, HC 1083-II) para 270. [↑](#footnote-ref-64)
65. *PC* (n 14) [52]. [↑](#footnote-ref-65)
66. MCA s1(3). [↑](#footnote-ref-66)
67. The following discussion largely focuses on cases in which the person could ‘decide’ under MCA s3(1). When the person cannot ‘decide’, then the question of causation can be finely balanced. See *NCC v PB* [2014] EWCOP 14, [2015] COPLR 118 [100]–[108]. A notable case, decided before the Court of Appeal in *PC* (n 14) stressed the need for causation between a person’s impairment and their inability to decide, probably treated the distinction between influence and impairment with less care than is required: *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam), [2011] Fam 61 [65] – [73]. [↑](#footnote-ref-67)
68. *A Local Authority v SA* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867 [37], [45] (Munby J). [↑](#footnote-ref-68)
69. *DL v A Local Authority* [2012] EWCA Civ 253, [2013] Fam 1 [63] (McFarlane LJ). [↑](#footnote-ref-69)
70. For matters beyond the jurisdiction granted by the Act, for instance non-recognition of a foreign marriage: *XCC v AA* [2012] EWHC 2183 (COP), [2013] 2 All ER 988. See also *Westminster City Council v C* [2008] EWCA Civ 198, [2009] Fam 11; *A NHS Trust v Dr A* [2013] EWHC 2442 (COP), [2014] Fam 161. [↑](#footnote-ref-70)
71. (n 69). [↑](#footnote-ref-71)
72. *Ibid* [9]. [↑](#footnote-ref-72)
73. *Ibid.* [↑](#footnote-ref-73)
74. *A Local Authority v DL* [2011] EWHC 1022 (Fam), (2011) 14 CCL Rep 441 [2, 6]. [↑](#footnote-ref-74)
75. *Ibid* [53]; *DL* (n 69) [68-69]. [↑](#footnote-ref-75)
76. MCA s2(1); *DL* (n 69) [58]-[61]. [↑](#footnote-ref-76)
77. Family Law Act 1996 s60. [↑](#footnote-ref-77)
78. J Miles, ‘Family abuse, privacy and state intervention’ (2011) 70 Cambridge Law Journal 31, 33. [↑](#footnote-ref-78)
79. Whether or not the court truly had the power to do this is questionable: B Hewson, ‘"Neither midwives nor rainmakers" - why DL is wrong’ (2013) 3 Public Law 451. *DL* has, however, not been appealed, so it must be treated as reflecting the current state of the law. [↑](#footnote-ref-79)
80. *DL* (n 69) [53]. [↑](#footnote-ref-80)
81. *Ibid* (emphasis added). [↑](#footnote-ref-81)
82. *Ibid* [22], [54] approving *SA* (n 68) [77]-[79]. [↑](#footnote-ref-82)
83. The common law tests for capacity to make a will, an inter-vivos gift, and enter a contract have survived the passing of the MCA. See the Code of Practice (n 34) para 4.31-4.33; *Re Walker* [2014] EWHC 71 (Ch), [2015] COPLR 348 [26]-[50]; *Kicks v Leigh* [2014] EWHC 3926 (Ch), [2015] 4 All ER 329 [37]-[66]. These slightly different tests for capacity do not bear directly on the focus of this article: what *follows* from a finding of capacity or incapacity? [↑](#footnote-ref-83)
84. [2001] UKHL 44, [2002] 2 AC 773. [↑](#footnote-ref-84)
85. *Ibid* [7]. This strand of law usually uses the words ‘free will’ or ‘volition’, not ‘autonomy’, but it is unlikely that anything turns on this difference, given the court’s resistance to attempts to be too ‘precise or definitive’ ([7], [92]). [↑](#footnote-ref-85)
86. [2005] EWCA Civ 507, [2005] 2 P&CR DG14 [36]. [↑](#footnote-ref-86)
87. [2009] EWHC 1076 (Ch), [2010] 1 P&CR 16 [101]. [↑](#footnote-ref-87)
88. *DL* (n 69) [61]; *Etridge* (n 84) [8]. [↑](#footnote-ref-88)
89. *DL* (n 69) [63]-[64]; *Etridge* (n 84) [11], [18]. [↑](#footnote-ref-89)
90. This does not imply that all details of the interaction between the inherent jurisdiction and the equitable doctrine are legally settled. See *OH v Craven* [2016] EWHC 3146 (QB) [36]. [↑](#footnote-ref-90)
91. J Raz, *The Morality of Freedom* (Oxford University Press: Oxford, 1986) 378-390. [↑](#footnote-ref-91)
92. S Killmister, ‘Autonomy, Liberalism, and Anti-Perfectionism’ (2013) 19 Res Publica 353, 358. Similarly, Maclean distinguishes ‘voluntariness’ and ‘competence’: A Maclean, *Autonomy, Informed Consent and Medical Law: A Relational Challenge* (Cambridge University Press: Cambridge, 2009) 139-40. [↑](#footnote-ref-92)
93. MCA s2(1); *PC* (n 14) [59]-[61]. [↑](#footnote-ref-93)
94. This point is sometimes made by saying that the MCA favours a ‘medical model’ of incapacity to a ‘social model’. B Clough, ‘People Like That: Realising the Social Model in Mental Capacity Jurisprudence’ (2014) 23 Medical Law Review 53, 56-59. [↑](#footnote-ref-94)
95. [2011] EWCOP 2443, [2012] 1 WLR 1653 [95]. [↑](#footnote-ref-95)
96. This ‘universal account’ is discussed in section V.B. [↑](#footnote-ref-96)
97. *W v M* (n 95) [95]. ‘Article 8’ refers to that part of the European Convention on Human Rights, which protects personal autonomy: *Pretty v UK* (2002) 35 EHRR 1 [61]; *Evans v UK* (2008) 46 EHRR 34 (GC) [71]. Mr Justice Baker arguably oversimplifies the law here. The Court of Appeal has since held that the ‘safe approach’ is for the court to do a full best interests assessment under the MCA *and* *then* to also assess whether any apparent interference with the person’s Article 8 rights is ‘necessary and proportionate’: *K v LBX* [2012] EWCA Civ 79, [2012] 1 FCR 441 [35] (Thorpe LJ). This two-step process is not consistently followed in the Court of Protection, even when citing *LBX*: for instance, *ACCG v MN* [2013] EWHC 3859 (COP), [2014] COPLR 11 [81]-[85]. A fuller treatment of this issue is beyond the remit of this article; for, whatever the differences between treating human rights as part of best interests or as an additional test, both approaches are premised on a survival account of the relationship between autonomy and mental capacity. [↑](#footnote-ref-97)
98. MCA s4(4). [↑](#footnote-ref-98)
99. MCA s4(6)(a) (emphasis added). Section 4(6)(b), concerning ‘beliefs and values’, addresses those that the person would have if they had capacity. It does not directly bear on whether a person without capacity can retain such autonomy that the court should treat their expressed decision as final. Sometimes decisions are made based on a person’s past wishes or values, and this is thought to protect autonomy. If, however, the person in question is expressing a *present* preference to the contrary, then this is deeply suspicious. Burch is right that such decisions ‘thereby deny her the right to make a decision on the grounds that they understand who she is better than she does. The claim that this is not a coercive denial of P’s legal capacity is a kind of doublespeak where coercion doesn’t always mean coercion’: M Burch, ‘Autonomy, Respect, and the Rights of Persons with Disabilities in Crisis’ [2016] 34 Journal of Applied Philosophy 389. [↑](#footnote-ref-99)
100. MCAs1(6). [↑](#footnote-ref-100)
101. M Donnelly, ‘Best Interests, Patient Participation and the Mental Capacity Act 2005’ (2009) 17 Medical Law Review 1. [↑](#footnote-ref-101)
102. The Law Commission has suggested a stronger duty to ascertain a person’s wishes and that they be given ‘particular weight’ among the factors evaluated in a best interests decision. Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017) para 14.10-14.21, Recommendation 40. This would not change the nature of the survival account as it appears in this section. It may, however, require decision-makers to rely on this account more frequently. [↑](#footnote-ref-102)
103. *C v A Local Authority* [2011] EWHC 1539 (Admin), [2011] Med LR 415 [61](Ryder J). [↑](#footnote-ref-103)
104. [2009] EWHC 163 (Ch), [2010] Ch 33 [41] (Lewison J). See also *Re CD* [2015] EWCOP 74, [2016] COPLR 1 [28] (Mostyn J). [↑](#footnote-ref-104)
105. [2009] EWHC 2525 (Fam), [2011] 1 WLR 344. [↑](#footnote-ref-105)
106. *Ibid* [35]. [↑](#footnote-ref-106)
107. *Ibid*. [↑](#footnote-ref-107)
108. Herring argued for this development in an early article on the Act that read it through the prism of the gatekeeper account. His article predates almost all of the case law discussed in this section. Jonathan Herring, ‘Losing it? Losing what? The Law and Dementia’ (2009) 21 Child and Family Law Quarterly 3. [↑](#footnote-ref-108)
109. MCA s4(6). [↑](#footnote-ref-109)
110. Judge Hazel Marshall QC rhetorically asks ‘What, after all, is the point of taking great trouble to ascertain or deduce P’s views, and to encourage P to be involved in the decision-making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?’ *Re S (Protected Persons)* [2010] 1 WLR 1082 (COP) [55]. Cited with approval for ‘all applications of the best interests test’ by Charles J in *Briggs v Briggs* [2016] EWCOP 53, [2017] 4 WLR 37 [59]. [↑](#footnote-ref-110)
111. [2014] EWCOP 21 [46]. Similarly, see *Re GW* [2014] EWCOP B23 [41]. [↑](#footnote-ref-111)
112. *Wye Valley NHS Trust v B* [2015] EWCOP 60, [2015] COPLR 843 [13]. [↑](#footnote-ref-112)
113. *Ibid* [42]. [↑](#footnote-ref-113)
114. [2017] EWCOP 3 [29]. [↑](#footnote-ref-114)
115. It is an open question how far this point is appreciated in practice outside the Court of Protection, but with regards past wishes some doctors are aware of this possibility: *Abertawe Bro Morgannwg University* *LHB v RY* [2017] EWCOP 2 [2017], COPLR 143 [40]. [↑](#footnote-ref-115)
116. *Westminster City Council v Sykes* [2014] EWHC B9 (COP), (2014) 17 CCL Rep 139 §10. [↑](#footnote-ref-116)
117. (n 4) [45]. [↑](#footnote-ref-117)
118. At first instance, however, his likely wishes, insofar as they could be ascertained, were taken into account: *An NHS Trust v DJ* [2012] EWCOP 3524 [79]. [↑](#footnote-ref-118)
119. [2014] EWCOP 35, [2015] COPLR 11 [58]. [↑](#footnote-ref-119)
120. *Ibid* [44]-[54]. [↑](#footnote-ref-120)
121. (n 112) [37]. Similar reasoning was critical in a decision to allow a man with an acquired brain injury to travel to Serbia for an experimental stem cell treatment, despite very little evidence of its effectiveness: *Re D (Medical Treatment)* [2017] EWCOP 15, [2017] COPLR 347 [60]. [↑](#footnote-ref-121)
122. (n 119) [2], [44], [46]. [↑](#footnote-ref-122)
123. *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam), [2002] 2 All ER 449 [81]-[83] (Butler-Sloss P) [↑](#footnote-ref-123)
124. K Atkins, ‘Autonomy and the Subjective Character of Experience’ (2000) 17 Journal of Applied Philosophy 71. [↑](#footnote-ref-124)
125. (n 123) [94]-[95]. [↑](#footnote-ref-125)
126. A detailed examination of the role of the ‘subjective character of experience’ in best interests decisions can be found in L Pritchard-Jones, ‘“This Man with Dementia”—“Othering” the Person with Dementia in the Court of Protection’ (2016) 24 Medical Law Review 518. [↑](#footnote-ref-126)
127. This development in the treatment of incapacity parallels a broader change in attitudes to mental health. As Glover says, it used to be thought that the inner lives of people with mental disorders were ‘impenetrably alien’ and beyond interpretation by others; but this idea is increasingly under challenge as efforts are made to find the ‘right interpretation’. J Glover, *Alien Landscapes? Interpreting Disordered Minds* (Harvard University Press: London, 2014) 1, 126-127. [↑](#footnote-ref-127)
128. [2011] EWCOP 3806 [35]. [↑](#footnote-ref-128)
129. *Ibid* [37], [41]. [↑](#footnote-ref-129)
130. *Ibid* [35]. [↑](#footnote-ref-130)
131. Alasdair MacIntyre, ‘The Intelligibility of Action’ in J Margolis (ed), *Rationality, Relativism and the Human Sciences* (Martinus Nijhoff: Dordrecht, 1986) 63. [↑](#footnote-ref-131)
132. (n 119) [38]. [↑](#footnote-ref-132)
133. *Ibid* [12]-[25]. [↑](#footnote-ref-133)
134. C Johnston and others, ‘Patient Narrative: An “On-Switch” for Evaluating Best Interests’ (2016) 38 Journal of Social Welfare and Family Law 249. [↑](#footnote-ref-134)
135. (n 128) [41], [68]. [↑](#footnote-ref-135)
136. J Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge University Press: Cambridge, 2009) Ch 7. [↑](#footnote-ref-136)
137. Beyond the existing practice described here, the minor reforms to s4(6) of the Act suggested by the Law Commission are intended to especially protect strong and clear wishes: Law Commission (n 102) para 14.17. More extreme is the suggestion of a legal standard based entirely on authenticity instead of best interests mentioned in Wayne Martin and others, *Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation across the UK* (University of Essex: Colchester 2016) 41-42. [↑](#footnote-ref-137)
138. (n 112) [13] (Peter Jackson J). [↑](#footnote-ref-138)
139. *Ibid*. [↑](#footnote-ref-139)
140. (n 114) [28]. [↑](#footnote-ref-140)
141. *Ibid*. [↑](#footnote-ref-141)
142. A Melnyk, ‘Is there a Formal Argument against Positive Rights?’ (1989) 55 Philosophical Studies 205; M Levin, ‘Conditional Rights’ (1989) 55 Philosophical Studies 211. [↑](#footnote-ref-142)
143. P Case, ‘Negotiating the Domain of Mental Capacity: Clinical Judgement or Judicial Diagnosis?’ (2016) 16 Medical Law International 174. [↑](#footnote-ref-143)
144. A particular worry is whether the wishes and feelings of people with learning disabilities are given as much weight as other groups: L Series, ‘The Place of Wishes and Feelings in Best Interests Decisions’ (2016) 79 Modern Law Review 1101. This is consistent with, and even suggested by, the account given here. Unlike, for instance, someone with a progressive condition, such as dementia, a person with a learning disability may not have an earlier period of capacity that autonomy can be characterised as having *survived* *from*. [↑](#footnote-ref-144)
145. Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: Post-Legislative Scrutiny* (2013-14, HL Paper 139) para 60. [↑](#footnote-ref-145)
146. This is not intended to minimise the problems of implementing the Act, which are extensive. *Ibid.* [↑](#footnote-ref-146)
147. Those who advocate moving even further towards approaches based on authenticity sometimes expressly endorse the point that others retain interpretative control. For instance: G Szmukler and M Bach, ‘Mental Health Disabilities and Human Rights Protections’ (2015) 2 Global Mental Health e20, 7. Although the final decision is judicial, Clough points out that even cases where the judge pays close attention to the person’s wishes are often deeply influenced by medical opinion: B Clough, ‘Anorexia, Capacity, and Best Interests: Developments in the Court Of Protection since The Mental Capacity Act 2005’ (2016) 24 Medical Law Review 434, 444. [↑](#footnote-ref-147)
148. This is already an issue. For instance, *Re SL* [2017] EWCOP 5 [12] (Glentworth DJ): ‘She is described as regretting that she has to contribute to the cost, that it has gone on so long and she does not like having to talk to people about the matters repeatedly’. [↑](#footnote-ref-148)
149. Berlin (n 11) 205. [↑](#footnote-ref-149)
150. Cases that emphasise someone’s past wishes or the values that they would be likely to have if they had capacity instead of the person’s *present* wishes already show elements of this attitude. For instance, such values and past feelings would have justified withdrawing artificial nutrition and hydration from a man with severe brain injuries even if he had currently demonstrated ‘contentment and happiness’: *Briggs* (n 110) [44]-[52], [117]-[119], [129]-[130]. For further comment on this tendency, see Burch (n 99). [↑](#footnote-ref-150)
151. A similar dynamic already occurs under the MCA, which is made to fit ‘clinical judgments’, ‘resource-led decision-making’, or ‘the safeguarding agenda’ instead of modifying these things: Select Committee (n 145) para 104. [↑](#footnote-ref-151)
152. (n 112) [34]. [↑](#footnote-ref-152)
153. *Ibid* [42]-[45]. [↑](#footnote-ref-153)
154. (n 95) [95]. [↑](#footnote-ref-154)
155. (n 41) [105]. [↑](#footnote-ref-155)
156. (n 69)[54]. [↑](#footnote-ref-156)
157. (n 14)[53]. [↑](#footnote-ref-157)
158. Mary Midgley, ‘The Game Game’ in *Heart and Mind* (first published 1981, Routledge: Abingdon, 2003) 154, 184. [↑](#footnote-ref-158)
159. *Ibid*. [↑](#footnote-ref-159)
160. The clause ‘not detained under the Mental Health Act 1983’ indicates that this topic is beyond the scope of this article, ***not*** that persons so detained can necessarily be treated as lacking in autonomy (n 21). [↑](#footnote-ref-160)
161. See section III. *DL* (n 69) [54], [64]; *Etridge* (n 84) [8]-[18]. [↑](#footnote-ref-161)
162. See section IV. *ITW* (n 105) [35]. Any finding that a person’s wishes and feelings do not have this character may be subject to an additional test of necessity and proportionality under Article 8 of the European Convention on Human Rights (n 97). It seems likely that when someone without capacity is subject to coercion or undue influence, then their wishes and feeling will not be determinative of their objective best interests. [↑](#footnote-ref-162)
163. If the recent Law Commission proposals (n 102) were implemented, this latter presumption would be effectively reversed to a presumption that those without capacity *are nevertheless autonomous* unless their wishes and feelings *fail to* show such subjectivity, intelligibility, and authenticity that they must be respected. [↑](#footnote-ref-163)
164. *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] UKHL 1, [1985] AC 871, 904. [↑](#footnote-ref-164)
165. *Ibid*. [↑](#footnote-ref-165)
166. Aristotle, *Nicomachean Ethics* (first published approximately 322 BC, Christopher Rowe tr, Oxford University Press: Oxford 2002) 1137b13. [↑](#footnote-ref-166)
167. SE Prall, ‘The Development of Equity in Tudor England’ (1964) 8 The American Journal of Legal History 1. [↑](#footnote-ref-167)
168. Writers with judicial experience still tend to see the tension between universal laws and justice in the particular case as important and inescapable. For example, see Thomas (n 2) 116-117; Hedley (n 3) 58-60. [↑](#footnote-ref-168)
169. HL Deb 10 January 2005, vol 668, col 13 (Lord Falconer LC). [↑](#footnote-ref-169)
170. Cave discusses the inconsistencies and gaps between the MCA, the MHA, and laws pertaining to children. E Cave, ‘Determining Capacity to Make Medical Treatment Decisions: Problems Implementing the Mental Capacity Act 2005’ (2014) 36 Statute Law Review 86. Peay gives an account of the challenges facing the relevant areas of criminal law: unfitness to plead, automatism, and the verdict of not guilty by reason of insanity. J Peay, ‘Mental Incapacity and Criminal Liability: Redrawing the Fault Lines?’ (2015) 40 International Journal of Law and Psychiatry 25. [↑](#footnote-ref-170)
171. P Skowron, ‘Evidence and Causation in Mental Capacity Assessments’ (2014) 22 Medical Law Review 631. [↑](#footnote-ref-171)
172. M Donnelly, ‘Capacity Assessment under the Mental Capacity Act 2005: Delivering on the Functional Approach?’ (2009) 29 Legal Studies 464. [↑](#footnote-ref-172)
173. The House of Lords Select Committee repeatedly observes that professionals do not understand the MCA (n 145) 6. [↑](#footnote-ref-173)
174. (n 15). [↑](#footnote-ref-174)
175. General Comment (n 18) para 27. Domestic law faces other challenges from this part of the UNCRPD. This section only addresses the challenge it poses to domestic accounts of the relationship between autonomy and capacity. For an overview, see P Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75 Modern Law Review 752. [↑](#footnote-ref-175)
176. Martin (n 137). [↑](#footnote-ref-176)
177. General Comment (n 18) para 21. [↑](#footnote-ref-177)
178. J Dawson, ‘A Realistic Approach to Assessing Mental Health Laws’ Compliance with the UNCRPD’ (2015) 40 International Journal of Law and Psychiatry 70. [↑](#footnote-ref-178)
179. General Comment (n 18) para 15: ‘The functional approach attempts to assess mental capacity and deny legal capacity accordingly’. [↑](#footnote-ref-179)
180. I Kant, *The Metaphysics of Morals* (first published 1797, Mary Gregor tr, Cambridge University Press: Cambridge, 1996) 6:280-281. An account of Kant’s position is given in P Kain, ‘Kant’s Defense of Human Moral Status’ (2009) 47 Journal of the History of Philosophy 59. [↑](#footnote-ref-180)
181. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III). [↑](#footnote-ref-181)
182. Midgley (n 158) 184. [↑](#footnote-ref-182)
183. Lord Falconer LC (n 32); Code (n 34) para 1.1-1.3. [↑](#footnote-ref-183)