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# Judging Values and Participation in Mental Capacity Law

Camillia Kong <sup>1,\*</sup>, John Coggon <sup>2</sup>, Michael Dunn <sup>3</sup> and Penny Cooper <sup>1</sup>

<sup>1</sup> Institute for Criminal Policy Research, School of Law, Birkbeck College, 42 Store Street, London WC1E 7HX, UK; penny.cooper@bbk.ac.uk

<sup>2</sup> Centre for Health, Law, and Society, University of Bristol Law School, Bristol BS8 1QU, UK; john.coggon@bristol.ac.uk

<sup>3</sup> Ethox Centre and Wellcome Centre for Ethics and Humanities, University of Oxford, Oxford OX1 2JD, UK; michael.dunn@ethox.ox.ac.uk

\* Correspondence: camillia.kong@bbk.ac.uk

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**Abstract:** Judges face a challenging task in determining the weight that ought to be accorded to the person (P)'s values and testimony in judicial deliberation about her capacity and best interests under the Mental Capacity Act 2005 (MCA). With little consensus emerging in judicial practice, incommensurable values drawn from divergent sources often collide in such cases. This paper outlines strict and flexible interpretations of the MCA's values-based approach to making decisions about capacity and best interests, highlighting the problematic implications for the normative status of P's values and the participatory role of P in judicial deliberations. The strict interpretation draws a false separation between ascertaining P's values and the intrinsic value of enabling P's participation in court proceedings; meanwhile, the flexible interpretation permits judicial discretion to draw on values which may legitimately override the expressed values of P. Whether in the ambiguous form of internal and/or extra-legal judicial values, these value sources demand further scrutiny, particularly regarding their intersection with the values held by P. We offer provisional normative guidelines, which set constraints on the appeal to extra-legal values in judicial deliberation and outline further research pathways to improve the justification around judicial decisions regarding P's participation.

**Keywords:** mental capacity law; values; judicial deliberation; participation

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## 1. Introduction

The Mental Capacity Act 2005 (MCA) in England and Wales is an explicitly values-based piece of legislation designed to empower persons who are the subject of proceedings (P), by protecting the principle of autonomy for individuals with impairments and making their subjective wishes and feelings central in judgments about their best interests when they are deemed to lack mental capacity.<sup>1</sup> The imperative to protect the autonomy of individuals is evident in the presumption of capacity,<sup>2</sup> the requirement that all practicable steps are taken to enable persons to make a decision<sup>3</sup> as well as the requirement that unwise decisions are not treated as evidence of decisional incapacity.<sup>4</sup> The MCA further adheres to a best interests model of decision-making should persons be found to be lacking capacity. However, P's wishes and feelings (past and present), beliefs and values, and any other

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<sup>1</sup> Mental Capacity Act 2005 Code of Practice, para. 2.1–2.7, 5.23.

<sup>2</sup> MCA 2005 s. 1(2).

<sup>3</sup> MCA s. 1(3).

<sup>4</sup> MCA s. 1(4).

additional factors must be taken into consideration in best interests decision-making according to s. 4(6). Notably, s. 4(4) further states what could be interpreted as a separate and additional legislative requirement to empower P, by requiring P's participation, 'so far as reasonably practicable', and to help 'improve his ability to participate, as fully as possible in any act done for him and any decision affecting him'.

However, in March 2014, the House of Lords Select Committee on the Mental Capacity Act concluded that '[The MCA's] empowering ethos has not been delivered' and 'the rights conferred by the Act have not been realised.'<sup>5</sup> Moreover, the MCA's ambitions appear particularly modest with the advent of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which emphasises the necessity of reasonable accommodations in order for individuals with impairments to participate fully in decisions about their care and treatment. Much legal and scholarly attention has focused on the 'will and preferences' paradigm of Article 12 articulated in General Comment 1 and its putative rejection of substituted judgement regimes, which may or may not include the best interests model adopted in the MCA<sup>6</sup> (Arstein-Kerslake and Flynn 2016; Szmukler et al. 2014; De Bhailís and Flynn 2017). Of equal importance and academic interest is the statement in Article 13 that persons with disabilities are to have access to justice on an equal basis with others (Gibson 2010; Flynn 2016; Weller 2016).

Despite the empowering ethos evident in the MCA, as well as Articles 12 and 13 of the CRPD, the weight accorded to P's values and testimony in judicial deliberation about her<sup>7</sup> capacity and best interests remains heavily contested, with little consensus emerging in judicial practice.<sup>8</sup> It is reasonable to think that this absence of consensus may rest on the values that are drawn upon and elucidated within the process of judicial deliberation. On a strict interpretation, the values-based approach of the MCA looks to prioritise the values that emanate from P, including for best interests decisions, P's 'past and present wishes and feelings' and the 'beliefs and values that would be likely to influence his decision if [P] had capacity'.<sup>9</sup> In theory, this would seem to provide a prima facie case for P's central participation in decisions revolving around her care and treatment, but in reality, the strict interpretation typically invokes a problematic separation between ascertaining P's values (however conceptualised) from her actual participation, based on a literal interpretation of discrete and separable obligations as articulated in s. 4(4) and s. 4(6). More often than not, however, judicial deliberation around P's participation appears to begin with a flexible interpretation of the values to apply the MCA in challenging practical situations, appealing to values from multiple sources, ranging from P herself to sources that are internal or external to the law. On this interpretation of the values-based approach, the differential identification and weighting of values appears to be entirely permissible within the flexible boundaries of the MCA, highlighting the need to clarify which values and what sources motivate the procedure and content of capacity and best interests decisions, as well as the judicial interpretation of explicit statutory requirements.

The purpose of this paper is to draw critical attention to important tensions, both internal to and between the strict and flexible interpretations of the MCA's values-based approach, particularly

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<sup>5</sup> House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny* (HL Paper 139, March 2014).

<sup>6</sup> United Nations Committee on the Rights of Persons with Disabilities, 'General Comment No. 1—Article 12: Equal Recognition before the Law, UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session', April 2014: 'The "best interests" principle is not a safeguard which complies with article 12 in relation to adults. The "will and preferences" paradigm must replace the "best interests" paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others' (para. 21).

<sup>7</sup> We have referred to P as female throughout this paper for consistency and readability in preference to the use of 'his or her' or 'he or she' for example.

<sup>8</sup> Cf. *A County Council v AB & Ors (Participation of P in Proceedings)* [2016] EW COP 4 and the case commentary by Nicola Macintosh (2016) at [http://www.39essex.com/cop\\_cases/county-council-v-1-ab-2-jb-3-sb/](http://www.39essex.com/cop_cases/county-council-v-1-ab-2-jb-3-sb/). Most cases, however, do not involve P in court procedures and decisions: *YLA v PM and MZ* [2013] EWHC 3622 (Fam), *LB Haringey v FG* [2011] EWHC 3932 (COP); *W v M, S, NHS Primary Care Trust* [2011] EWHC 2443 (Fam).

<sup>9</sup> MCA s. 4(6)(a)(b).

regarding the role of judicial values in deliberations around P's participation in decisions to do with capacity and best interests. At first glance, these issues appear to be separable: The strict reading seems to revolve around the putative priority of P's values and wishes in judicial decision-making, whilst the flexible interpretation appears to focus on how procedures of the court may permit and prioritise values and wishes other than P's. Analysis of both interpretations reveals, however, that P's participation may not be central to either reading of the MCA, which can mean that the values of empowerment remain unrealised. Thus, our argument is that both interpretations raise critical questions around the purposes and nature of P's participation within a constantly shifting values framework that is expressed through court proceedings in mental capacity law. Attending to the status accorded to P's participation in this way will reveal deeper, substantive tensions at the heart of the values-based framing of the MCA.

The intent of the paper should be distinguished from debates around mental and legal capacity, particularly those which focus on what might be considered first-order issues of how the wishes and values of P are to be respectfully enacted through supported decision-making or are effectively trumped (il)legitimately through substituted judgment regimes. These cases are easily identifiable when the values deemed important to the court are used to effectively override the wishes of P, even when competent.<sup>10</sup> Although such cases raise questions about the status of P's values, in this paper, our focus is not on questions around the legitimacy/illegitimacy of these cases or the legality of such decisions, though we recognise a lively and important debate in this area.

The concern in this paper is rather with the second-order question of how both cases of invalidating as well as respecting P's participation, let alone values and wishes, are symptomatic of the interplay of multiple values from divergent sources, operating implicitly within judicial deliberations about capacity and best interests. This is not to say that the first-order questions are unrelated to our concerns here. Current discussions at this level tend to revolve around the connection between respect for P's values, recognition of equality under the law, and the illegitimacy of substituted judgement in best interests decision-making, especially under the CRPD (Bach and Kerzner 2010; Arstein-Kerslake and Flynn 2016; for a nuanced discussion in relation to the MCA, see Donnelly 2016). However, we are more concerned with the differential ways in which values impact on judicial deliberation and legal proceedings, particularly in how appropriate respect to P is to be interpreted and expressed in capacity and best interests decisions (e.g., P's participation, adherence to previous judgments, interpreting P's values based on what judges value or believe to be right, etc.). Our analysis will be a vital step towards laying bare these tensions, as well as gesturing towards future steps needed for their potential resolution and facilitating the empowerment of P in court proceedings.

The structure of the paper is as follows: Section 2 explores the empowerment ethos that grounds the CRPD and MCA, discussing ways in which this ethos is expressed through the normative values constitutive of the very act of P's participation in judicial proceedings. The ambiguous status of internal judicial and external, extra-legal values within the MCA is examined in Section 3, whilst Section 4 argues that extra-legal values have a permissible function in judicial deliberation, despite formalist objections to the contrary. As we discuss in this section, precedent as a judicial reasoning tool has a limited function within the values-based approach of the MCA. We conclude the paper in Section 5 with an outline of further research and provisional normative guidelines that are required to improve the way in which values are deployed to justify decisions around P's participation in capacity and best interests adjudications.

## 2. The Empowerment and Participation of P

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<sup>10</sup> See *LG v DK* [2011] EWHC 2453 (COP), where DK's previous refusal to provide a DNA sample whilst competent was overturned by values of the court. Sir Nicholas Wall (the then President of the Family Division) decided the case would 'require unusual facts for DK's best interests to depart from the ascertainment of the truth or the interests of justice' (para. 55). Indeed, DK's unrelated Deputy of Property and Property of Affairs sought the order to be able to make an application for a statutory will upon determining whether he did in fact have a daughter.

The notion of empowering persons with disabilities is undoubtedly a core pillar of the CRPD (Kayess and French 2008). A detailed discussion of the philosophical or legal basis of the CRPD is not the purpose of our paper,<sup>11</sup> but its emphasis on effective participation through substantive rights and reasonable accommodations provides an important normative and legal backdrop to the issue of participation under the MCA. This ethos of empowerment is evident in the explicit adoption of the social model of disability where paragraph (e) of the Preamble defines disability as the result of the interaction between impairment with environmental barriers that prevent persons' effective participation on a par with others. Moreover, its articles focus on the substantive rights of persons with disabilities in all areas of life. Under Article 12, persons with disabilities are to 'enjoy legal capacity on an equal basis with others in all aspects of life'<sup>12</sup>, such that 'appropriate measures' are to be provided so individuals have the necessary support to exercise their legal capacity<sup>13</sup>, which 'respect the rights, will and preferences of the person'.<sup>14</sup> Article 12 emphasises the equal respect for persons through supported decision-making and the provision of reasonable accommodations in the realisation of legal capacity. Such accommodations are fleshed out through a range of positive supports and obligations owed to individuals, to meet impairment and disability-related needs in the achievement of substantive equality on par with those without disabilities (Kayess and French 2008). Of further significance, Article 13 states the obligation to ensure 'effective access to justice for persons with disabilities on an equal basis with others' through various accommodations 'to facilitate their role as direct and indirect participants [...] in all legal proceedings, including at investigative and other preliminary stages'.<sup>15</sup>

The MCA's compliance with the CRPD remains debatable, particularly with regard to the legitimacy of basic concepts, such as 'mental capacity', as well as the potentially discriminatory nature of the diagnostic threshold and best interests/substituted decision-making mechanisms (Bartlett 2012; Flynn and Arstein-Kerslake 2014; Bach and Kerzner 2010; Richardson 2012; Davidson et al. 2016). Discussion of these tensions in detail would be beyond the scope or focus of our paper. For our purposes, however, the CRPD reveals a clear recognition of the substantive accommodations that are required to foster the effective participation of persons with disabilities, and one could make the case that the MCA, however imperfect its realisation, nonetheless marks a similar, if much more restrained, normative shift in the same direction. As explained above, the MCA demands that P's subjective values and perspective are placed at the heart of capacity and/or best interests adjudications, with core principles stipulating that individuals must be presumed to have capacity in the first instance<sup>16</sup> and are to be offered 'all practicable steps' to help them to make a decision.<sup>17</sup> Should persons be found to lack capacity, their participation in best interests decision-making ought to be facilitated so far as 'reasonably practicable'.<sup>18</sup>

In other words, the normative shift in the MCA and CRPD resides in the importance of protecting and promoting the decision-making autonomy of individuals with disabilities through the provision of necessary participatory mechanisms and supports that encourage their active involvement in deliberations regarding their care and treatment. This suggests that P's perspective and values have some normative status (however indeterminate) in any judicial decision-making that affects P's life. This status is indeterminate because it could mean discharging obligations to either enact P's wishes (regardless of the content), or more minimally, to facilitate her voice to be heard through face-to-face or video meetings with the judge, sometimes with the intent of providing testimony in decision-making proceedings.

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<sup>11</sup> For more comprehensive discussions of normative, historical, and/or legal basis of the CRPD, see (Flynn and Arstein-Kerslake 2014; Bach and Kerzner 2010; Dhanda 2006).

<sup>12</sup> CRPD Art. 12(2).

<sup>13</sup> CRPD Art. 12(3).

<sup>14</sup> CRPD Art. 12(4).

<sup>15</sup> CRPD Art. 13(1).

<sup>16</sup> MCA s.1(2).

<sup>17</sup> MCA s.1(3).

<sup>18</sup> MCA s.4(4).

Ambiguous as it seems in practice, effective participation in court proceedings has become a priority in recent years in the UK legal context, even beyond mental capacity law. For example, within the Family Practice Direction 3AA on vulnerable persons, the courts demand that:

[A]ll parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.<sup>19</sup>

This concept of effective participation is multi-layered, particularly in terms of its normative standards and the constitutive values it realises, as we discuss below. Indeed, further research is required to fully flesh out what P's effective participation means in the context of mental capacity law.<sup>20</sup> However, we follow the Family Practice Direction and Nuffield Foundation-funded Achieving Accessible Justice Project<sup>21</sup> in provisionally defining 'participation' in court proceedings as when individuals:

- (i) Understand the court process, their role within the process, and its significance to them;
- (ii) Have the opportunity and the ability (with assistance and reasonable accommodations for their impairment) to communicate to the court and/or court officials such decisions, evidence, views, wishes, or feelings as are relevant to their role within the judicial process;
- (iii) Are protected from significant levels of anxiety or distress during the court proceedings or meetings with relevant court officials.

Although the effective participation of P functions as a crucial mechanism to help realise the empowerment ethos in the MCA, the values-based approach of the legislation tends to be strictly interpreted to mean a process of ascertaining P's subjective values in a way that is often separable from the participation of P herself. For instance, Lady Hale discusses the need to 'ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him', where 'it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being'.<sup>22</sup> Yet ascertaining P's wishes need not entail actual participation, as Hedley J considers:

[T]he decision maker will have to make a careful judgment about the extent to which an incapacitated person can participate in decisions about their welfare. It is clear from a reading of that section that the range of participation may vary between the almost decisive at one end, and non-participation entirely at the other. It will all depend on the facts of the case, and so a finding in relation to capacity is not a finding in relation to the extent to which a person may participate in the making of decisions.<sup>23</sup>

On the one hand, the implicit logic of the strict interpretation could be understood as follows: ascertaining/according some respect to P's values can be achieved independently of the effective

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<sup>19</sup> Ministry of Justice, 'Practice Direction 3AA—Vulnerable Persons: Participation in Proceedings and Giving Evidence'. [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/practice-direction-3aa-vulnerable-persons-participation-in-proceedings-and-giving-evidence](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-3aa-vulnerable-persons-participation-in-proceedings-and-giving-evidence) (accessed on 2 January 2019).

<sup>20</sup> This articulates the principal area of research in our three-year project, *Judging Values and Participation in Mental Capacity Law*, funded by the UK Arts and Humanities Research Council.

<sup>21</sup> Penny Cooper, who is one of the authors here, was a member of the judicially led group whose report led to Family Procedure Rule 3A and Family Practice Direction 3AA on participation and she leads this Nuffield Foundation project on participation as Principal Investigator. See ICPR, 'Achieving Accessible Justice'. <http://www.icpr.org.uk/theme/courts-court-users-and-sentencing/achieving-accessible-justice-aaj> (accessed on 2 January 2019).

<sup>22</sup> *Aintree University Hospitals NHS Foundation v James* [2013] UKSC 67, para. 45.

<sup>23</sup> *LB Haringey v FG* [2011] EWHC 3932 (COP), para. 15. Importantly, Hedley J states later that notwithstanding his finding of incapacity 'that does not for one moment mean that she does not have an important role in participating in the decision making that is ultimately done' (para. 18).

participation of P, yet both are equally desirable on their own terms under the MCA.<sup>24</sup> Ascertaining P's values—regardless of whether she actually participates in deliberations regarding capacity and best interests—is important both epistemically (in that assessors/decision-makers know P's wishes) as well as morally (in that it is an important consideration in making an appropriate best interests decision). The value of P's participation, meanwhile, lies in its assurance that P remains involved in decision-making, so decisions about her care and treatment are transparent and connected to the individual in question.

On the other hand, this separation between ascertaining P's values and P's participation in proceedings can be problematic. The process of ascertaining P's values and P's participation may be interpreted as conceptually distinct, but equally valuable within the MCA in an ideal sense; however, the actual practical consequence of upholding this conceptual distinction is that the good of effective participation often falls by the wayside if P's values can be ascertained outside of court proceedings. Even more importantly for our purposes, the conceptual distinction at the heart of the strict interpretation disregards the interplay between P's values and participation as a form of empowerment. For instance, some of P's values may only be expressible, communicable, and thereby rendered visible within court proceedings, through the very act of participating, particularly in ways that are meaningful to her. Though we are interested in more robust forms of effective participation in this paper, P's participation might be even nominally conceived in terms of her mere presence in court. Notably, in *London Borough of Redbridge v G & Ors*<sup>25</sup>, P's presence in court had a significant impact on Russell J's perception of her as a proud and dignified person, which then explicitly influenced her assessment of P's values in deciding about her best interests.<sup>26</sup> This case reveals that P's participation even at the level of just being present can affect judicial deliberation on P's values.

Participation as a means of empowerment can be understood to contain its own internal normativity, two features of which are notable: first, these normative standards are context-dependent, involving a dynamic process of meaning-making between the individual and her environment; second, constitutive values of participation include the importance of first-personal 'voice', perspective, and experience, where subjective narratives are treated as valid sources of knowledge and practical agency (Hammel et al. 2008).

The normative standards of participation are flexible and context-dependent: their significance will depend on a dynamic interaction between subjective meaning and environmental supports. The dynamic process tends to be lost, however, in the context of disability classifications, which tend to focus on fixed measures of participation that are related to the presentation or performance of activity. For example, practical applications of the International Classification of Functioning, Disability, and Health (ICF) tend to use participation as a central measure that tracks disablement via an individual's execution of activities (Hammel et al. 2008; Jette et al. 2003; Whiteneck and Dijkers 2009). However, empirical evidence clearly reveals that participation measured as the performance of activities leads to a fixation on the capabilities of the individual and her body, rather than how the environment supports the individual, or how she perceives her own agency in the world (Hammel et al. 2015, 2008; Perenboom and Chorus 2003; Dijkers 2010). Those who are not performing certain activities, for example, can still feel as though they are participating due to their perceived sense of involvement or control (Perenboom and Chorus 2003). Individuals can engage in 'very different patterns of participation [that] can still reflect full participation' once participation is understood as involving the dynamic interaction between environmental supports which enable one to participate as well as the ability to participate in ways that are subjectively meaningful (Hammel et al. 2008, p. 1455). A range of practical methods could be considered for P, but, compared to the criminal justice system where legislation has provided a range of 'special measures'<sup>27</sup> which in turn has given rise to

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<sup>24</sup> Thanks to an anonymous reviewer for making this point.

<sup>25</sup> *London Borough of Redbridge v G & Ors* [2014] EWCOP 17 (para. 87). This case reveals that P's participation even at the level of just being present can affect judicial deliberation on P's values.

<sup>26</sup> *London Borough of Redbridge v G & Ors*, para. 28 and 87.

<sup>27</sup> Youth Justice and Criminal Evidence Act 1989, sections 24 to 30.

innovative ‘extra special measures’ (Marchant 2017), the Court of Protection has no such supporting legislation (Ruck Keene et al. 2016).

These normative dimensions of participation give the act of participating both instrumental and intrinsic value. Participation has instrumental value in the sense that it enables individuals to pursue or realise certain goods (e.g., political activity, friendships, individual autonomy), yet at the same time, it has intrinsic value, in so far as participation is inherent to the realisation of many of these goods. For example, being part of a political community is a constitutive feature of being politically active, contributing to friendly conversation is part and parcel of being a friend, taking part in decisions that affect one’s life is inherent to what it means to be an autonomous agent. Conversely people participate in all sorts of activities that may be objectionable or lack value, such as a person participating in abuse or bullying, or a reluctant conscript participating in war. These nuances around the instrumental and intrinsic value of participation reveal ways in which its normative significance often appeals to other substantive values, which seem to possess some gravitational force for us as individuals and in society. Likewise, P’s participation in judicial deliberation is to have this same, overlapping instrumental and intrinsic value: it is instrumental, in as much as contributing to judicial deliberations about her capacity and best interests may enable her to stress the importance of certain subjective goods (e.g., her independence, relationship with her partner, life at home, and so on). Equally, the value of P’s participation is intrinsic in the sense that her agency and involvement in such deliberations are necessarily part of becoming empowered and exercising autonomy around decisions that affect her life.

Second, the normativity of participation, in the context of capacity and best interests deliberations, rests on the conferral of epistemological and moral standing to the participant through the validation of first-personal narratives and phenomenological experience. A vital part of human life is to be able to express experienced phenomena, or to communicate our own perceptions and the values or goals that matter to us—generally, where we can give account to others. This is especially true of P’s participation when matters of her personal life are at stake and have been deemed significant enough to require engagement with the judicial process. When others accept the account as true and accurate, some epistemological standing is conferred to us as individuals in what Brandom calls the ‘social space of reasons’ (Brandom 1995, pp. 902–3; Brandom 1998; Kong 2017, pp. 100–45).

Some might think that such epistemological standing would exclude individuals who, for example, experience delusions or hallucinations, but this is not necessarily so, as seen in *Wye Valley NHS Trust v B*.<sup>28</sup> This best interests case revolved around the refusal of Mr B to consent to life-saving treatment on grounds of his religious faith, including his hearing of angelic voices. Psychiatrists had found these beliefs to be a symptom of his mental disorder. Yet Jackson J made an extraordinary opposing statement about the presumed delusional religious beliefs of Mr B:

... 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. It is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.<sup>29</sup>

Here, Jackson J recognises the epistemological standing of Mr B, effectively treating as valid Mr B’s beliefs and reasons regarding his religious faith. Of essence to the reasoning seems to be an essentialist claim about Mr B’s identity and the authenticity (and thus normative authority) that may therefore be associated with his reasoning. It is of material significance that Mr B’s beliefs are an ‘inextricable’ part of who he is. His moral personhood is the relevant point of reference, and by establishing (through observation) that Mr B’s values should be considered authentic, the judge establishes a vehicle with which to import Mr B’s values. By conferring this standing publicly within the social space of reasons, Jackson J moreover shows the intersubjective nature of gaining assurances

<sup>28</sup> *Wye Valley NHS Trust v B* [2015] EWCOP 60.

<sup>29</sup> *Wye Valley NHS Trust v B*, para. 13.

regarding the accuracy of one's perceptions and experiences—that one genuinely knows what one perceives and experiences. In other words, we come to trust and view ourselves as knowers when others validate and accept our testimony as true and accurate (Fricker 2007).

The normative significance of the first-personal perspective also lies in its conferral of a certain moral standing to individuals, where we are recognised as possessing dignity, which warrants deliberative respect. We are recognised as equal persons whose views are competent, valued, and worthy of consideration. However, this analysis highlights a precarity for P, discussed further in the next section. Part of this precarity hinges on the very question of inclusion in the process, and following from that, the recognition (or otherwise) of what is intrinsic to P as a person, as well as what is extraneous and may be disregarded as inauthentic and irrelevant (regardless, in principle, of questions, for example, of harm). Citing s. 4(4) of the MCA, Jackson J notably met with Mr B in person because:

There is no substitute for a face-to-face meeting where the patient would like it to happen. The advantages can be considerable, and proved so in this case. In the first place, I obtained a deeper understanding of Mr B's personality and view of the world, supplementing and illuminating the earlier reports. Secondly, Mr B seemed glad to have the opportunity to get his point of view across. To whatever small degree, the meeting may have helped him to understand something of the process and to make sense of whatever decision was then made.<sup>30</sup>

As the second part of Jackson J's comment suggests, it matters that we function as central participants in a decision that affects our lives because it provides the sense that we can engage in deliberation on equal terms with others and can take ownership of that decision or we can at least influence the determination of potential outcomes.

With this account, we can see what is at stake in considering P's participation in capacity and best interests proceedings. Rather than simply a means to an end, which helps ensure that P's values are heard and considered when making decisions that will affect her life, participation can function as the constitutive expression of substantive values potentially shared by P and those involved in the court proceedings. These include the shared values of autonomy, of deliberative respect and recognising the epistemic and moral standing of individuals. The implicit nature of these constitutive values makes it all too easy to begin with a strict interpretation of the values-based approach of the MCA, focused on ascertaining P's values, whether or not P participates in deliberations themselves. However, such a strict interpretation may not be warranted according to the empowering ethos of the MCA and CRPD.

### 3. The MCA as Values-Based Legislation

So far, we have suggested how the strict interpretation of the MCA's values-based approach tends to rest on a false separation between ascertaining P's values and enabling P to participate in proceedings. This means the normative focus is on determining and weighing up P's values rather than fostering her effective participation in making decisions about her care and treatment (Donnelly 2009; Butler-Cole and Hobey-Hamsher 2016). Yet P's values can and do often overlap with the intrinsic values of participation, such as the need to have one's epistemic and moral standing recognised by others, particularly in deliberations that affect one's life.

Even as the strict interpretation tends to be espoused as a matter of principle, the reality has revealed a much broader, and at times inconsistent, interpretation of the values-based approach of the MCA, leaving significant scope for judicial discretion. From a flexible interpretation of the MCA's values-based approach, the interjection and weighing up of these additional value systems may be unavoidable, given the context-specificity and flexibility demanded of judges in adjudicating capacity and best interests cases. However, this also suggests a precarity that ought to be considered problematic. English mental capacity law is predicated on a functional understanding of decision-making competence: the grounding of a capacitous decision is not (in principle) the wisdom, or even the reasons (if any), that underpin it. As a mechanism for empowerment of P, the framing is skeletal;

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<sup>30</sup> *Wye Valley NHS Trust v B*, para. 18.

putatively empty of values. This value-neutrality is presumed to be part and parcel of the functional framing of mental capacity, which purportedly embeds procedural rather than substantive values. However, the procedural and functional intent of the mental capacity test is questionable, particularly when further scrutiny is applied to the relational conditions and criteria of reasoning and epistemic justification (see Kong 2017). Moreover, in practice, and with greater force when determinations of incapacity have been made, identification of and respect for the values that may fill in the gaps are contingent on P's values' being recognised as 'truly' held; authentic in the way described above by reference to Mr B's case. In the context of capacity determinations, we may compare this to findings of incapacity, where a person's apparent will may be characterised as not 'her own', for example, because of the influence of another party, as in *Re T*<sup>31</sup> or because of an impairment to reasoning, such as a phobia, as shown in *Re MB (Caesarean Section)*.<sup>32</sup>

Judges, and the values they deem significant, can legitimately override the expressed values of P in judicial decision-making under the MCA, revealing the ways in which judicial values can intersect and conflict with those of P. Ultimately, the values that a judge deems significant (which may include the values held by the judge herself) may be productive or unproductive deliberative sources in decisions about P's participation, capacity, and best interests. The presumed priority of P's values and participation might come into conflict with what we might call (i) internal judicial values (i.e., values inherent to what the law is and is not supposed to do) and (ii) extra-legal judicial values (i.e., values drawn from additional social, political, and moral sources).

Internal judicial values tend to be associated with particular ideals regarding fidelity to the rule of law, constituting what Fuller calls the 'internal morality of the law' (Fuller 1969). These values include impartiality (the ability to remain neutral between different positions), integrity (the ability to preserve the law's logical coherence), and situation sense or legal vision (an intellectual grasp of the law and its purpose to match the law to the specifics of a case) (Whitehead 2014, p. 23). Internal judicial values track broader normative ideals around the rule of law, such as appealing to history, precedent, and available interpretations (Dworkin 1986). The extent to which judges uphold fidelity to the rule of law likewise leads to an interpretive spectrum of the ways in which internal judicial values ought to inform judicial deliberation. From one end, formalist approaches claim internal values demand decisions to stem from an objective sense of what is required to remain faithful to the law. From the other end, more intuitionist approaches provide scope for the discretionary, and indeed, at times legislative, mode of judicial deliberation.<sup>33</sup>

At first glance, one might presume variable decisions regarding P's participation are unlikely to stem from internal judicial values, particularly considering the MCA's requirement that P's participation is to be facilitated so far as it is practicable. This clearly is not the case, however. In *YLA v PM & MZ*, Parker J was charged with determining the decision-making capacity of PM, a woman with global learning disabilities. Specifically, her capacity to marry, consent to sexual relationships, and decide on her place of residence were under question. PM had been married to a man whose immigration status was unclear, and she had given birth to a child who was subsequently put into foster care. It was PM's 'deep and profound wish to live with her husband and baby'.<sup>34</sup> Parker J declined an invitation to meet PM to ascertain her wishes and feelings, stating:

I was particularly concerned [...] that I was being asked to form my own assessment of the strength of her wishes and feelings: and indeed capacity. In children's cases the court sees the child for the purpose of allowing wishes and feelings to be expressed and to allow the child to feel part of the proceedings: the meeting is not to be used for gathering evidence. I have met adults without capacity in other proceedings for that purpose. I thought that there was risk that I might form a view which I was (i) not entitled to take and (ii) might be

<sup>31</sup> *Re T (Adult: Refusal of Medical Treatment)* [1992] EWCA Civ 18.

<sup>32</sup> *Re MB (Caesarean Section)* [1997] EWCA Civ 1361.

<sup>33</sup> Here we depart from Whitehead's value-laden spectrum of 'formalist—good-faith—cynical—rogue' values. We discuss some deeper implications of formalist—intuitionist approaches to the law below.

<sup>34</sup> *YLA v PM & MZ* [2013] EWHC 3622 (Fam), para. 33.

adverse to PM in the sense that I formed the view that her views were repetitively expressed, the subject of influence, or did not convey understanding. YLA disagreed with my seeing PM being particularly concerned as I was that there was a confusion in the communications on behalf of the Official Solicitor between permitting PM to feel that she is part of the proceedings, and forming an evidential view as to her wishes and feelings.<sup>35</sup>

In this case, internal judicial values of impartiality and situation sense appear to guide Parker J's refusal to meet PM and allow her participation: impartiality would be potentially compromised if in meeting PM, the judge would be swayed by her wishes and feelings, or generate an impressionistic (but legally invalid) judgment regarding capacity. Parker J cites the need to remain neutral between the different parties. In contrast to P's evidentiary submissions in *KK v STCC*,<sup>36</sup> the judge states that seeing PM privately in this case 'would not have permitted the other parties to be part of the process'<sup>37</sup>, hence violating the procedural mechanisms (such as the presence and balanced submissions of both parties), which help maintain and realise the value of neutrality. Situation sense further informs Parker J's refusal when she provides her legal interpretation of permissible reasons for meeting PM within the confines of the MCA (i.e., to allow wishes and feelings to be expressed and enable a sense of being part of proceedings). Parker J's justification reveals how even relatively non-contentious internal judicial values—values viewed as integral to upholding the rule of law—could lead to contentious decisions regarding P's participation in capacity and best interests adjudications.

Yet, under another judge, these internal judicial values could be interpreted in a way that leads to an entirely different conclusion, as we see in *Re X (Court of Protection Practice)*<sup>38</sup>, where the Court of Appeal discussed similar formal, procedural questions of P's participation in deprivation of liberty (DoL) cases. This case revolved around the appropriate scope of the judiciary to develop new rules of procedure—in this case, the then President's streamlined procedure for DoL proceedings which, amongst other suggestions, deemed it not always necessary for P to be party to proceedings. The Court of Appeal held the President's conclusions to be a consultative exercise that lacked legal authority.<sup>39</sup> Similar to Parker J, the value of impartiality and situation sense emerged here in the judicial reasoning, but in the direction which favoured P's participation as a matter of objective procedure in accordance with (i) CoP rules, (ii) s. 4 of the MCA, and (iii) Article 5 of the European Convention on Human Rights (ECHR).

In her judgment, Black LJ appealed directly to the procedural rules in the Court of Protection Rules 2007, designed with the 'overriding objective of enabling the court to deal with the case justly; dealing with a case justly includes, so far as is practicable, ensuring that P's interests and position are properly considered and ensuring that the parties are on an equal footing (Rule 3).'<sup>40</sup> She also outlined the appropriate process of P's participation, particularly with the appointment of a litigation friend focused on representing P's interests. As party to the proceedings:

[P and his litigation friend] will be served with documents and, where necessary, will be able effectively to question the premise upon which the proceedings are brought and, if matters cannot be resolved without a contested hearing, to challenge the case put before the court, including by obtaining his own expert evidence where required. What is more, the court will have done what is reasonably practicable to permit and encourage him to participate as fully as possible in any decision affecting him, fulfilling section 4 of the MCA 2005.<sup>41</sup>

<sup>35</sup> *YLA v PM & MZ*, para. 34.

<sup>36</sup> *KK v STCC* [2012] EWHC 2136 (COP).

<sup>37</sup> *YLA v PM & MZ* [2013] EWHC 3622 (Fam), para. 34.

<sup>38</sup> *Re X (Court of Protection Practice)* [2015] EWCA Civ 599. Thanks to an anonymous reviewer for alerting us to this case.

<sup>39</sup> *Re X*, paras. 127 and 146.

<sup>40</sup> *Re X*, para. 77.

<sup>41</sup> *Re X*, para. 105.

In addition, the necessity of providing objective protection of P's Art. 5 rights under the ECHR was emphasised, in a manner that could, interestingly, justify overriding P's own resistance to participating in DoL proceedings:

It is not appropriate, in my view, for P's participation in proceedings to turn in any way upon whether he wishes to participate or indeed upon whether he expresses an objection to the form of care that is being provided or proposed. There is too high a risk of slip ups in such a scheme. Article 5 requires a greater guarantee against arbitrariness.<sup>42</sup>

Black LJ further interpreted ECHR Art. 5 as imposing positive obligations to foster effective participation. She stated that the President's streamlined procedure:

Amounts to placing an additional hurdle in the way of P participating in the proceedings— instead of being a party automatically, there is an additional process to be gone through before he is joined, namely the collection/provision of material to persuade the court that he wishes/needs to be joined. [...] P is therefore in a position which is the opposite of what the Strasbourg jurisprudence requires, namely that the essence of the Article 5 right must not be impaired and there might, in fact, need to be *additional assistance provided to P to ensure that it is effective*.<sup>43</sup>

She asserted that '[g]iven the tools presently available in our domestic procedural law, I see no alternative [to P being party to the DoL proceedings]'.<sup>44</sup>

Another recent case appealing to Art. 5 rights similarly stressed the importance of P's participation in court proceedings. In *DR v Lithuania*<sup>45</sup>, the European Court of Human Rights ruled that DR's Art. 5 rights had been violated, both in her deprivation of liberty for the purpose of conducting psychiatric assessment, as well as her involuntary psychiatric hospitalisation. DR was not examined in person and indeed, the psychiatrists who recommended her not to be summoned did not violate Lithuanian law. Through an appeal to precedent in the European Court the judges found these domestic procedures to be invalid, arguing that 'It is, however, the Court's established case-law that in proceedings concerning compulsory confinement of individuals of unsound mind the individual concerned must be allowed to be heard either in person, or, where necessary, thorough some form of representation (see *Winterwerp*, § 60; *Shtukaturov*, § 71; and *Stanev*, § 171)'.<sup>46</sup> Contrary to Parker J's worry of forming an impressionistic conclusion with regard to P's capacity in *YLA v PM & MZ*, the European Court stressed that DR's 'participation was [...] necessary not only to enable her to present her own case, but also to allow the judge to form a personal opinion about her mental capacity'.<sup>47</sup> Particularly significant to the judges was the fact that DR had sent a letter to the Tauragė District Court, requesting the opportunity to attend the hearing in her case to which she received no response from that court.<sup>48</sup>

Unlike Parker J's decision, the judgments in *Re X* and *DR v Lithuania* both asserted the importance of P's participation in a manner that, on the face of it, adheres closely to internal judicial values, with a particular focus on appropriate procedures, integrity and coherence of the law, impartiality, and so on. However, judicial decisions even on this basis lack clear consensus around the form and procedure of P's participation. Indeed, the fact that *Re X* and *DR v Lithuania* both revolve around the contested deprivation of individual liberty may be significant. Black LJ in *Re X* stated, for example, '[I]t is noteworthy that P is not routinely made a party to Court of Protection proceedings concerning him...'.<sup>49</sup> Black LJ further continued:

<sup>42</sup> *Re X*, para. 103.

<sup>43</sup> *Re X*, para. 106, emphasis added.

<sup>44</sup> *Re X*, para. 104.

<sup>45</sup> *DR v Lithuania* [2018] ECHR 548. Thanks to an anonymous reviewer for drawing our attention to this case.

<sup>46</sup> *DR v Lithuania*, para. 90.

<sup>47</sup> *DR v Lithuania*, para. 91.

<sup>48</sup> *DR v Lithuania*, para. 91.

<sup>49</sup> *Re X*, para. 81, emphasis added.

A degree of participation by P is contemplated in that he is to be informed of certain things and *may be heard sometimes* but it is nothing like the degree of participation that a party has in proceedings. If we were to be of the view that it was necessary for P to be a party to Court of Protection proceedings relating to his liberty, the MCA 2005 and the Rules present no obstacle and he could be joined.<sup>50</sup>

This suggests that the triggering of Art. 5 rights in DoL cases may require robust participatory measures, as a means of offering objective protections of individuals, which may or may not be viewed to be relevant in bread and butter capacity cases focused on day-to-day care and treatment plans. Equally, the fact that the judges acknowledge the exceptional nature of cases triggering Art. 5 could be interpreted as gesturing towards the magnetic importance of certain extra-legal values held in common. We cannot fully explore or justify this particular point, as this would divert us from the primary focus of the paper. However, we gesture towards it to reiterate how relatively uncontroversial values embedded within the law (such that they are seen as ‘internal’ to the law) can appeal to extra-legal values to justify its lexical priority.

The status of extra-legal values in judicial deliberation remains controversial, yet even these are not necessarily ruled out as illegitimate from the perspective of the MCA’s values-based approach. Extra-legal values are drawn from diverse normative standards external to the law, such as socio-cultural norms, moral values (e.g., the value of human life, or the requirement to respect a person’s autonomy and/or to maximise his or her welfare), and political ideas. These norms and values can conflict and challenge, as well as intersect and provide external justification for, internal judicial values. Indeed, these values might become internalised within the law itself, such that they evolve to become part of internal legal justification. Some engagement with extra-legal values is seen by most commentators to be necessary to make legal decisions around fraught welfare matters, which, by their very nature, reveal extra-legal conceptual and ethical issues at stake, though their final determinative weight remains highly contentious (Dworkin 1986; cf. Raz 1971, 1995; Foster 2011; Smith et al. 2017). For instance, the flexibility inherent to the MCA appears to permit considerable scope for the discretionary opinions on the identification and weighting of pertinent extra-legal values in capacity and best interests cases, whereby judicial discretion can determine how much weight should be accorded to P’s values.<sup>51</sup> Munby J in *ITW v Z & Ors* provides an account of how such values ought to be weighted, stating:

[T]he weight to be attached to P’s wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular *a priori* weight or importance to P’s wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P’s wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the test of incapacity under the 2005 Act is, as under the common law, ‘issue specific’, so in a similar way the weight to be attached to P’s wishes and feelings will likewise be issue specific.<sup>52</sup>

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<sup>50</sup> *Re X*, emphases added.

<sup>51</sup> Hedley 2016 states: ‘The [statutes’] message is: get to know the child or [protected person] as well as you can. What the statutes do not do, however, is [...] make the lists exhaustive or [...] provide for any hierarchy of importance between them, let alone suggest any answers. So long as the judge has taken account of all matters mentioned in the statute, the judge decides both the priority and also the relevance of other factors. In practice the discretion, if not actually unfettered, is in truth very flexible’ (p. 49).

<sup>52</sup> *ITW v Z & Ors* [2009] EWCOP 2525, para. 35.

Interestingly, Munby J cites one of his pre-MCA decisions (*Re MM; Local Authority X v MM (by the Official Solicitor) and KM*)<sup>53</sup> to justify further caveats within s. 4(2) of the MCA. These include ‘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’, as well as ‘strength and consistency of the views being expressed by P’.<sup>54</sup> Munby J adds as further conditions, ‘the possible impact on P of knowledge that her wishes and feelings are not being given effect to’, ‘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’.<sup>55</sup> He concludes this qualifying list with ‘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’.<sup>56</sup>

This line of reasoning again exposes the precarity for P, as a participant and as a person whose values ought to be protected. Munby J’s graded concept of capacity appears compelling, but in logic, does not dispel the binary nature of legal determinations here: in regard to a particular decision, P either has or lacks capacity.<sup>57</sup> This becomes all the more problematic because Munby J’s reasoning promotes an elision of two formally and practically separate components of decision making in mental capacity law: determinations of capacity, and establishing which values should count (whether as applied in a decision made by P because the assumption of capacity has not been displaced, or by another decision-maker because it has). In other words, Munby J suggests that the relative ‘strength’ of capacity (given his framing of capacity as a graded concept) can determine the relative ‘weight’ that is due to P’s values. Yet there is no necessary link, either from the logic of ethical or legal reasoning, between these two. To use a simple example, we may still accord 100% weight to a Jehovah’s Witness refusal of a blood transfusion with 0% capacity on Munby J’s scale, whereby a judge might deem such a person’s religious convictions to be an overriding consideration in the best interests decision, even if there is little doubt that the individual lacks capacity and that a blood transfusion could save her life. Indeed, the elision between ‘strength’ of capacity and ‘weight’ attached to P’s values requires an additional, hidden premise around how proximal measurements of capacity can accurately track ‘authenticity’—or more precisely, whether P’s expressed values meet implicit tests of ‘authenticity’ in order to be warranted deference in best interests decision-making. To use the example above, even as the Jehovah’s Witness lacks capacity, a judge could nonetheless assume her refusal of blood accurately tracks authentic values constitutive of religious faith that are central to her identity.<sup>58</sup> One may or may not deem such claims legitimate, but notably, such justification will inevitably rest on philosophical and ethical grounds.

A stark example of the discretionary weighting of extra-legal values, where this hidden premise around ‘authenticity’ plays out explicitly, can be found in *A Local Authority v E & Ors* [2012] EWCOP 1639, where Jackson J’s best interests decision was to forcibly treat E, an individual with severe and long-standing anorexia. The decision went against her wishes as well as the recommendations of persons who knew her well—her parents and carers both supported the palliative care route currently in place (Kong 2014; Coggon 2013).<sup>59</sup> In this highly difficult case, the judge described balancing the factors for and against treatment, where ‘the balance to be struck places the value of E’s life in one scale and the value of her personal independence on the other, with these transcendent factors being weighed in the light of the reality of her actual situation’<sup>60</sup>, thus demanding an ‘intuitive’

<sup>53</sup> *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

<sup>54</sup> *ITW v Z & Ors* [2009] EWCOP 2525, para. 35.

<sup>55</sup> *ITW v Z & Ors*, para. 35.

<sup>56</sup> *ITW v Z & Ors*, para. 35.

<sup>57</sup> Though the MCA does frame capacity as a black-and-white matter, this does not exhaust the positive obligations owed to individuals on either side of the capacity divide. Kong and Keene (2018) specifically endorses a spectrum view of capacity/best interests to capture the range of duties and obligations of assistance owed to persons, regardless if they are found to have or lack capacity.

<sup>58</sup> See *Malette v Shulman* [1990] (Ont. C.A.) 72 OR (2d) 417.

<sup>59</sup> *A Local Authority v E & Ors* [2012] EWCOP 1639.

<sup>60</sup> *A Local Authority v E & Ors*, para. 118, emphasis added.

rather than ‘mechanistic’ balancing exercise.<sup>61</sup> Discussing the case for preserving E’s life, Jackson J observed that ‘[w]e only live once—we are born once and we die once—and the difference between life and death is the biggest difference we know. E is a special person, whose life is of value. She does not see it that way now, but she may in future’.<sup>62</sup> The discussion of transcendent factors is notable, not least in the explicit suggestion that extra-legal values beyond P’s must be taken into consideration to make what the judge believes to be the right decision. It is compounded, furthermore, by taking a counterfactual P-as-she-might-have-been as a reference point from whom the relevant values might be drawn. Jackson J holds the following in his decision, which reads interestingly alongside his determinations in relation to Mr B discussed above:

The beliefs and values that would be likely to influence E’s decision if she had capacity are not easy to articulate. It depends upon the assessment of her true identity. Has she been ill for so long that her illness would remain part of who she is, even if she had capacity? Or is she still the person she was before anorexia took its grip? Looking ahead, will E always see herself as a victim, or can she come to see herself as a survivor? In the end, only E can know the answers to these questions.<sup>63</sup>

The reasoning here is both challenging and poignant. The judicial search for E’s ‘true identity’ in order to establish the compelling values is difficult, and in no way made easier by the MCA. Additionally, despite the claim that in the end only E can know the answers, the legal process into which she was placed suggests that the law—as interpreted if not as written—rests on an entirely contradictory premise, as explained below. We may accept Jackson J’s claim in the following paragraph of the judgment that there is ‘nothing in E’s statements to indicate a belief that, if she were well, she would not want efforts to be made to save her.’<sup>64</sup> However, the normative—and legal—weight that should be given to this begins to come into question. This point is accentuated when we note the relevance that Jackson J sees in observing that ‘E would by now be a doctor but for her illness’ and that doctors often willingly accept high risk interventions.<sup>65</sup> This ‘alternative E’ and her values are coming into play in a way that is not simply a principled extension of temporary incapacity as established in, for example, needle phobia cases. Rather, the ‘authentic’ values are being established by reference to a factually and historically impossible hypothetical construction of E. We arrive at a position where the skeletal framework provided by the MCA is being populated with extra-legal values that are at once given as belonging to E and not.

Such means of appealing to and applying extra-legal values is challenging from a judicial perspective (we may assume) partly because the doctrine of precedent has limited place within judicial deliberations about matters relating to health and welfare decision-making, which call for the judge to consider factors that are necessarily sensitive to complex and often unique circumstances. For instance, Hedley J in *LB Haringey v FG*<sup>66</sup> states:

I have been referred to the decision of Mr Justice Baker in *PH v A Local Authority* [2011] EWHC 1704 (Family). [...] I have deliberately not referred to it in this judgment, not because it is unhelpful or because I disagree with it, but because it seems to me that unless and until there is any binding authority available, courts may be safest in an approach to this case by ascertaining the facts, applying the statutory principles and reasoning a conclusion from that, and treating each case as one to be decided on its own facts. I say that so as to avoid a multiplicity of first instance judgments being cited as a matter of course in these cases.<sup>67</sup>

<sup>61</sup> *A Local Authority v E & Ors*, para. 129.

<sup>62</sup> *A Local Authority v E & Ors*, para. 137.

<sup>63</sup> *A Local Authority v E & Ors*, para. 78.

<sup>64</sup> *A Local Authority v E & Ors*, para. 79.

<sup>65</sup> *A Local Authority v E & Ors*.

<sup>66</sup> *LB Haringey v FG* [2011] EWHC 3932 (COP).

<sup>67</sup> *LB Haringey v FG*, para. 21.

Likewise, Jackson J explicitly justifies his setting aside precedent or cases with seemingly similar best interests adjudications, stating:

In balancing these factors, I do not gain direct assistance from the facts of reported welfare decisions. In contrast to the case of *W v M* (above), where the patient was in a stable, minimally conscious state, E is in an inexorably deteriorating, highly conscious state. In contrast to the cases of *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* CA [1993] Fam 64 and *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, E is not a teenager but an adult with an entrenched history of acute difficulties. In further contrast to many medical treatment cases, the psychological impact of the proposed treatment upon E is of a different order to many other cases. The treatment would not consist of a single operation or procedure, but a wholesale overwhelming of her autonomy for a long period whose exact length could only be measured in hindsight once it was known whether treatment had succeeded or failed. Further, because of the complexity of her condition, the success of treatment is particularly uncertain. Perhaps finally, in distinction to more recognised situations, there is the fact that E and her family and her medical team had already firmly embarked on the course of palliative care and had psychologically adjusted to the prospect of imminent death.<sup>68</sup>

Indeed, because judges are required to arbitrate irreducibly unique circumstances in capacity and especially in best interests decisions, where the particularities of individuals and their circumstances demand differential responses, internal judicial values (such as the importance of precedent and maintaining consistency between like cases) necessarily have limited force. More specifically, there is no simple legal pathway to finding P's values; problematised further where we find reference to multiple personifications of P. One size does not fit all in this area of the law. As such, good judgments will demand acknowledging the extra-legal values at stake and societal circumstances that contextualise such hard cases (Hedley 2016). Despite the competing factors being 'almost exactly in equilibrium', Jackson J concludes that the 'balance tips [...] unmistakably in the direction of life-preservation treatment [where] the presumption in favour of the preservation of life is not displaced'<sup>69</sup>—yet at no point does he justify this presumption. Such a statement makes sense only when held up against a backdrop of socio-cultural, and indeed moral, values, which places presumptive importance on the sanctity of life. The mere fact that this value has been invoked and applied across a number of previous cases, such that it might be said that the presumption in favour of life is a settled common law value, does not itself justify giving special weight to the value here, at least not without further reasoning.

First-hand, phenomenological accounts of judges also provide two reasons for the crucial deliberative role of extra-legal judicial values. First, the subject matter at hand precludes mechanistic application of legal rules or principles: Questions of welfare are by nature intrinsically value-laden, raising intractable ethical dilemmas (e.g., where to live, who to marry, whether or not one can refuse treatment, and how to balance past and present conceptualisations of one's interests in light of changing value commitments over time). As such, extra-legal values must come into play. According to Sir Mark Hedley, '[t]he areas under consideration are value-laden and every outcome will have involved a value judgment made by the decision-maker' (Hedley 2016, p. 6). The domains of family and mental capacity law have long included such discretionary power given the absence of agreed norms and values, which reflects the value plurality that exists in society, often colliding in the courts (Hedley 2016, pp. 60, 92).

Second, judges are themselves situated within prevailing or changing socio-cultural values. Background characteristics, personality traits, and professional and life experiences can all influence the assumptions of judges, even amongst the most critically self-aware. Hedley claims, for instance, '[a]ll this must go into the welfare pot' (Hedley 2016, p. 52; cf. Posner 2010, p. 370ff.). The extra-legal values of a judge emerge most notably when they collide with other competing value systems, such

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<sup>68</sup> *A Local Authority v E & Ors* [2012] EWCOP 1639, para. 117.

<sup>69</sup> *A Local Authority v E & Ors*, para. 140.

as those of P or the families involved in the particular case. Even so, these extra-judicial values are ‘unlikely [...] to be referred to in the judgment; indeed they may just be those cultural assumptions of which we are so often unaware or at least do not articulate’ (Hedley 2016, pp. 50–51). In exercising discretion, ‘judges are not just reflecting society, but are making an active contribution in influencing its development’ (Hedley 2016, p. 60).

In sum, both internal and external judicial values can lead to divergent decisions around the form or procedure of P’s participation, as well as the substantive weighting of P’s values in capacity and best interests adjudication. The normative status of P’s participation remains unclear under the MCA’s values-based approach, particularly as both strict and flexible readings permit considerable judicial discretion in the weighting of both internal and extra-legal values, and how these are formulated in common rules of thumb that are adopted by judges, such as in outlining a ‘benefits and burdens balance sheet’ as part of the process of determining P’s best interests.<sup>70</sup> What seems lost, however, is a clear focus on the empowerment of P to participate in subjectively meaningful ways in core decisions that affect her care and treatment, raising crucial tensions between the practices of the MCA and the normative requirements of Article 13 in the CRPD. One possible strategy might be to question the legitimacy of extra-legal values in judicial deliberation, but in the next section, we suggest this would be misguided.

#### 4. Are Extra-Legal Values Justified in Mental Capacity Law?

Our view is that to properly identify—let alone resolve—possible tensions between P’s values and those of judges, one must first acknowledge the unavoidable influence of extra-legal values in the adjudication of P’s mental capacity and best interests. This is partly driven by the phenomenology of judicial decision-making, which appears to support claims about the deliberative influence of extra-legal values at the level of intuition. Intuitive judgements underlying a legal decision often undergo a process of retrospective rationalisation in the published legal judgment; indeed, such post hoc rationalisation appears unavoidable in legal decisions in mental capacity law, given that deeply contested and often incommensurable values, such as autonomy, respect, sanctity of life, and welfare, are continually invoked and re-interpreted<sup>71</sup>—frequently in ways that involve the unsatisfactory treatment of such values, from the standpoint of what sound ethical reasoning would demand (Coggon 2007; Dunn and Foster 2010; Smith et al. 2017). Hedley observes that an inevitable part of judging is the arbitration of competing sets of values, including those of society, of the families or persons engaged in the particular case, and of the judge (Hedley 2016). Differing intuitive judgments in ethically fraught cases can lead to diverse, and perhaps equally justifiable, decisions. This indicates the need for a more coherent strategy in dealing with intuitions and extra-legal values in judicial deliberation, which could strengthen or call into question the ethical (and possibly legal) grounds of influential judgments in areas of the law, particularly in those cases where there is a conflict between P’s values and those of the judge.

Objections to the influence of extra-legal values and intuition in judicial deliberation often stem from commitments to a particular vision of the law, depending on whether one upholds a formalist or pragmatist orientation towards it.<sup>72</sup> Pragmatist views of deliberation acknowledge the intuitionist and at times outcome-based justification for decisions, recognising that moral, political, and social values can lead to considerable judicial discretion (Duxbury 1997; Posner 2010). Formalist theories of the law, by contrast, recommend a backward-style view of deliberation, suggesting that predetermined interpretations of existing legal rules should dictate the justification for particular decisions. The law applies impartial, general standards for classes of acts, things, circumstances, or persons. By treating particular instantiations as instances of general classifications, precedent functions as an authoritative formulation of a norm that constrains subsequent judicial deliberation

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<sup>70</sup> The authors are currently drafting a critical legal and normative analysis of the balance sheet approach in best interests judgments.

<sup>71</sup> Cf. differing interpretations of ‘autonomy’ in *Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] MHLO 16 and *Cheshire West and Chester Council v P* [2011] EWCA Civ 1333.

<sup>72</sup> These two poles are also referred to as legalist or realist positions.

and decisions (Hart 2012; Schauer 1987). Adherence to the authority of precedent potentially eliminates subjectivity and arbitrariness in judgment, treating personal values, political ideology, and subjective ethical commitments as invalid forms of legal justification. Precedent therefore demands a judicial attitude of value-neutrality and disengagement towards extra-legal values (Whitehead 2014). Setting aside of these putatively subjective influences helps attain consistency and coherence across judgments, thereby enhancing the predictability of the law (Fuller 1969).

Few would disagree with the normative commitments informing formalist approaches: applications of the law should seek to attain some degree of impartiality in order to mitigate personal or political motivations that might generate arbitrary, discriminatory decisions, especially in legal jurisdictions where judicial appointments are highly politicised (Hart 1976; Epstein and Segal 2005). However, precedent as the core deliberative mechanism for achieving this impartiality is highly problematic, not just in the practice of mental capacity decisions, but in light of the (necessarily) under-specified normative requirements of the MCA. First, the practice of mental capacity judgments is intrinsically contextual, decision- and individual-specific; the complex phenomena demand a similarly complex form of deliberation. Conscientious judging in light of irreducible particulars requires consideration of substantive reasons drawn from a 'shared stock of values' (Summers 1978, p. 769). For instance, precedent has limited force in the decision to forcibly treat E in *A Local Authority v E & Ors*—such a decision requires some form of judgement between two fundamentally incommensurable values—autonomy vs. sanctity of life—as they pertain to a particular individual—E—and her circumstances—such as her family context, the availability of heretofore untried treatment, and so on. This remains so despite previous cases giving greater or less visibility to these values, and the weight that should be accorded to them, but concerning individuals confronting a different set of circumstances. Indeed, the decision-specific nature of the MCA's approach means that precedent has at most limited application within P's own biographical history: the invocation and weighting of values at one time has no necessary bearing at another point in time. Only through a judge's own interpretive understanding of personal and commonly held ethical values can decisions be justified in such deeply fraught cases, where there is the necessary intrusion of pragmatic outcomes of decisions, as well social and ethical concerns.

Second, precedent as a deliberative mechanism would violate the base normative requirements of the MCA's values-based approach. As Section 2 explored, the empowering ethos that animates the MCA justifies a person-centred focus, enjoining respect for P's views and P's meaningful participation. This person-centred, contextualised approach is fundamentally at odds with a rule-driven framework to judicial deliberation. Is it possible—or even desirable—for judges to generalise, or abstract away from, a person's circumstances, her living situation, her complex values and perspectives? A mechanistic approach to deliberation might satisfy rule-of-law concerns of the formalist, yet at the same time, infringe core normative obligations to consider the unique values and perspectives of P in judicial deliberation. This tension is apparent in *YLA v PM & MZ*: Baker J's understanding of preceding cases and legal rules in family law cases involving children may legally justify her refusal to meet PM, yet on another reading, not meeting PM means departing from the empowering ethos of the MCA, depriving the individual in question the opportunity to express her own account of her values and experiences, to participate in deliberations about decisions that fundamentally affect her life. Even in cases where the circumstances seem similar on the face of it, applying earlier judgments as precedent could lead to discounting the unique subjective voice of P. Such a disempowering consequence contradicts the normative intent of the MCA.

Ultimately, the formalist objection hinges on a false distinction. Extra-legal values are depicted as subjective, relative, and arbitrary, whilst internal judicial values are objective, impartial, and stable. Even pragmatists can be guilty of overstating this distinction, with their descriptions of arbitrary judicial decision-making guided by subjective, unconstrained, and willful influences (Leiter 2007). As Fuller argues, the internal—extra-legal distinction should be treated merely as a heuristic tool that represents overlapping moralities in the law and 'should not be regarded as a substitute for the exercise of judgment' (Fuller 1969, p. 132). An interpretive understanding of earlier judgments grounds any appeal to precedent and authority, whereby 'supporting reasons of substance' can lead

judges to favour certain interpretations over others (Summers 1978, p. 724). Thus, simplified dichotomies of subjective-objective, unstable-stable fail to capture the complex iterations and characteristics of values (e.g., values can be subjectively held, but also stable; impartiality is also a value in and of itself). Indeed, the objective/subjective distinction in jurisprudential theory is somewhat beside the point, given that we ought not, under MCA framing, to be distinguishing objective (real) and subjective (relativist) values, but rather seek to establish objectively (i.e., by the law's measure of proven fact) what the relevant values are (whether 'internal' or 'external' to the law) and then proceed to examine the reasoning and justification for their application to the contextual circumstances of a case (see Coggon 2016).

Extra-legal values that frequently bear on capacity and best interests resist this reductive dichotomy: values, such as autonomy, dignity, respect, preservation of life, promotion of welfare, protection of privacy, and family life, and the like are affirmed and interpreted intersubjectively, grounded in socio-cultural views regarding what is important in human life. In other words, these values have resonance for Western society (and therefore are held intersubjectively), but they are not necessarily universal (e.g., many African societies would question the priority of autonomy). However, such differences do not affect the fact that certain values are viewed as objectively important in particular societies (see Taylor 1989). For instance, Jackson J's decision to prioritise preservation of life over autonomy in *A Local Authority v E & Ors* might seem arbitrary (particularly in light of the wishes of E, her family, and the palliative care plan of the medical staff). However, the justification behind his (implicit) reasoning necessarily appeals to a shared stock of values. We understand why it is a difficult ethical dilemma between these two values precisely because both autonomy and preservation of life possess such normative authority in our socio-cultural context. Extra-legal values of this sort are prior to more mundane values associated with subjective preferences (like the relative value of different activities, such as gardening as opposed to tennis, or inclinations towards certain food, such as Mexican as opposed to Persian); moreover, the substantive meaning of these values undergoes reinterpretation and renegotiation in our common language and practice. A good example of this is the value of autonomy: seen as a core pillar of medical practice and mental capacity law, it nonetheless is open to differing interpretations (e.g., the protection vs the promotion of autonomy) (see Kong 2017) and ideas of how to realise the value in practice (e.g., the first-hand participation and testimony of P vs. getting P's perspective via advocates or notes). Nonetheless, the common resonance and grip of such values remains stable.

Careful engagement with the internal and external values in judicial deliberation helps capture the 'interpretive attitude' in decisions involving cases which necessarily invoke intersubjectively held values embedded in socio-cultural norms and moral and political ideas (Dworkin 1986). Revealing the disagreement about values at the level of judicial deliberation can be productive in that it sharpens our understanding of the conceptual and ethical issues at stake around difficult questions, such as those around the role and status of P's participation in capacity and best interests adjudication. Indeed, our level of legal analysis must expand the range of values at play to critically explore further whether these normative sources accord with the ethos of empowerment within the MCA. The unavoidable presence and influence of such values on judicial deliberation must be acknowledged to properly scrutinise the ways in which these values foster or hinder the meaningful participation and empowerment of P.

## 5. Future Directions

The precise status of P's voice and participation in capacity and best interests deliberations remains unclear within the application of mental capacity law, despite its explicit importance stated in Arts. 12 and 13 of the CRPD. Recognising the urgent need for some direction on this front, Charles J issued suggestive guidance about the participation of P and vulnerable persons in November 2016, outlining issues of practical accommodation (such as communicative, accessibility, and logistical

issues) so that P may participate as fully as possible in legal proceedings (see Ruck Keene et al. 2016).<sup>73</sup> These recommendations are a crucial first step towards encouraging standard practices around P's participation in legal proceedings about her capacity and best interests, especially since judicial discretion has determined the scope and nature of P's involvement thus far. The overriding weight of judicial discretion remains nonetheless. As Charles J states: 'If P wishes to meet with the Judge, it must first be determined what the purpose of such a meeting would serve' and the Judge's views should be sought about the matter.<sup>74</sup> Indeed, as we have claimed in this paper, this discretionary scope would seem to be consistent with the MCA's values-based approach, where within its confines, multiple values intersect and conflict including the constitutive meaning and value of participation, as well as internal judicial and extra-legal values. There is no real specificity of which values have priority, and indeed, the cases indicate that judges have significant scope to adopt their own weighting of the values at play.

Three crucial areas of further research emerge as a result of our discussion. First, empirical and normative work needs to be done to identify and critically analyse the deeper values that bear on judicial deliberation in interpreting the MCA's principles and procedures. Second, such work needs to normatively ground and feed into the development of professional tools and policies, which help realise the empowering ethos of the MCA, so as to realise the substantive participation of P in capacity and best interests decisions.<sup>75</sup> Finally, the analysis within the court context may have interesting consequences for conflicts outside the courts—cases, for instance, where there needs to be closer examination of the conflict or juxtaposition of values between P and her carers or family members.<sup>76</sup>

Even at this provisional stage, however, we suggest that two norms ought to guide judicial values in mental capacity law. First, the transparency of reasons should constrain the influence of extra-legal values. As a core procedural requirement in democratic institutions, the process of reason-giving involves mutual justification, and is important from both a subjective and intersubjective standpoint. Its subjective significance lies in the process of making the implicit explicit through articulating and justifying the reasons and values underlying one's decisions. Often the values behind our deliberative process can remain hidden or unacknowledged, and only when we explain our reasons to others do these values come to the fore. Importantly, the purpose of transparent reason-giving is not to shed our values, but to open these up to productive discussion, debate, and challenge, providing an intersubjective forum, which can properly scrutinise and debate whether the appealed-to principles or values are appropriate or inappropriate to the particular case (Gutmann and Thompson 2002). Moreover, transparent reasons-giving signals our deliberative respect towards others through mutual justification, where our reasons, values, and choices are explained and justified.<sup>77</sup> Mutual justification is often viewed as a condition that applies only to equal parties capable of entering into reciprocal relations. These conditions of mutuality and reciprocity, however, ignore how unequal power dynamics make transparent reason-giving even more important as a way of according deliberative respect to individuals. Just because judges might overturn P's subjective wishes or deny P's participation does not mean that she should not be deprived of deliberative respect: transparent reasons-giving to P and others, making explicit the values that justify such decisions, communicates that P nonetheless remains within the circle of justification.

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<sup>73</sup> Charles, J. 'Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings', available: [http://www.familylaw.co.uk/system/froala\\_assets/documents/1245/Practice\\_Guidance\\_Vulnerable\\_Persons.pdf](http://www.familylaw.co.uk/system/froala_assets/documents/1245/Practice_Guidance_Vulnerable_Persons.pdf), accessed on 15 November 2016. These guidelines were drawn up in conjunction with Nicola Mackintosh QC, Penny Cooper, and Alex Ruck Keene, on the working group of the ad hoc Rules Committee.

<sup>74</sup> Charles, J. 'Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings', para. 14.

<sup>75</sup> These areas of research form the basis of our three-year project, *Judging Values and Participation in Mental Capacity Law*, funded by the UK Arts and Humanities Research Council. In addition to the authors, Victoria Butler-Cole QC (39 Essex Chambers) and Alex Ruck Keene (39 Essex Chambers and King's College London) are part of the research team.

<sup>76</sup> Thanks to an anonymous reviewer for making this point.

<sup>77</sup> Importantly this is different from the contractualist circle, which tends to presume conditions of normative competence that do not necessarily apply, particularly considering the unequal power dynamic between the judge vis-à-vis P, or the judge vis-à-vis legal advocate, see (Kong 2015).

Second, the enablement and inclusion of persons with disabilities should constrain the influence of the extra-legal values that a judge identifies as relevant to settling the decision at hand. The empowering ethos at the heart of the MCA and CRPD represents a vital normative shift in the treatment of persons with impairments, as persons entitled to positive supports as equal members of society, enabled to express their subjective views and perspectives in deliberations that affect their lives. P's involvement in capacity and best interests deliberations must reflect the fluid and dynamic nature of, and the constitutive values embedded within, what it means to participate in subjectively meaningful ways. Even where P's subjective wishes may be justifiably overturned, adherence to this normative standard will help identify and challenge those extra-legal values which may fundamentally contradict this vision of enablement and empowerment of those with disabilities in judicial deliberation.

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