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## Narrative Capacity

James Toomey

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## NARRATIVE CAPACITY\*

JAMES TOOMEY\*\*

*The doctrine of capacity is a fundamental threshold to private law. The law only recognizes private decision-making—from buying or bequeathing property and entering into employment contracts to getting married or divorced—made with the level of cognitive functioning that the capacity doctrine demands. When the doctrine goes wrong, it denies individuals, particularly older adults, access to basic private-law rights on the one hand, and ratifies decision-making that is nothing but the result of dementia or mental illness on the other.*

*The capacity doctrine in private law is built on a fundamental philosophical mismatch. It is grounded in a cognitive theory of personhood, and determines whether to recognize private decisions based on the cognitive abilities thought by philosophers to entitle persons in general to unique moral status. But to align with the purposes of the substantive doctrines of property and contract, private-law capacity should instead be grounded in a narrative theory of personal identity. Rather than asking whether a decision maker is a person by measuring their cognitive abilities, the doctrine should ask whether they are the same person by looking to the story of their life.*

*This Article argues for a new doctrine of capacity under which the law would recognize personal decision-making if and only if it is linked by a coherent narrative structure to the story of the decision maker's life. Moreover, the Article offers a test for determining which decisions meet this criterion and explains how the doctrine would work in practice.*

INTRODUCTION .....	1075
I. CAPACITY CHALLENGES IN THEORY AND PRACTICE .....	1081
A. <i>The Law of Capacity</i> .....	1082

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	B.	<i>The Failure of the Capacity Doctrine</i> .....	1085
	1.	Empirical Challenges of Measuring Cognition .....	1085
	2.	Normative Challenges of the Cognitive Doctrine .....	1088
	3.	Failure To Adjudicate Between Prima Facie Plausible Stories of Apparent Normative Significance .....	1089
	C.	<i>The Medicalization of the Capacity Doctrine and the Decline of Narrative Analysis</i> .....	1094
II.		THE PHILOSOPHY OF CAPACITY .....	1098
	A.	<i>Situating Capacity Litigation in Philosophy</i> .....	1098
	1.	Capacity Litigation in the Abstract .....	1099
	2.	The Philosophy of Narrative Personal Identity .....	1101
	3.	The Philosophy of Cognitive Personhood .....	1104
	B.	<i>Personal Identity and the Private Law</i> .....	1106
	1.	Substantive Private Law and Personal Identity .....	1107
	2.	Human Flourishing, Private Ordering, and Personal Identity .....	1110
	C.	<i>Personal Identity as Narrative Continuity</i> .....	1111
	1.	Human Psychology and Life Stories .....	1112
	2.	Life's Stories and Meaning .....	1115
III.		A NARRATIVE THEORY OF CAPACITY IN PRIVATE LAW .....	1117
	A.	<i>The Narrative Doctrine</i> .....	1117
	1.	Temporality .....	1118
	2.	Causation .....	1119
	3.	Agency .....	1120
	4.	Intelligibility .....	1121
	5.	Coherence .....	1121
	6.	Theme .....	1122
	B.	<i>Procedural Rules of the Narrative Doctrine</i> .....	1123
	1.	Presumption of Capacity .....	1123
	2.	Moral Agnosticism to Private Decision-Making .....	1124
	C.	<i>Cognitive Assessments, Baseline Personhood, and the Narrative Doctrine</i> .....	1125
IV.		THE NARRATIVE DOCTRINE APPLIED .....	1127
	A.	<i>Resolving the Hard Cases</i> .....	1127
	1.	Decisions Made with Above-Threshold Cognitive Functioning That Do Not Follow from the Decision Maker's Story .....	1127
	2.	Decisions Made with Under-Threshold Cognitive Functioning That Follow from the Decision Maker's Story .....	1128

3. The Problem of Differing Lifelong Cognitive Functioning.....	1129
B. <i>Practical Considerations</i> .....	1130
1. The Determinacy of the Narrative Test .....	1130
2. Mitigating the “Worst Evidence” Problem .....	1131
3. Accessibility of Narrative Evidence .....	1131
4. Judicial Bias and Appellate Review .....	1132
CONCLUSION.....	1133

## INTRODUCTION

An older woman is in the early stages of Alzheimer’s disease. She’s forgetful and often confused. Sometimes she does things that seem out of character. For a while, she’s alright. She remembers who she is and where she came from. But she’s starting to need help. Alone and frightened, she calls her estranged and only son—like she promised, decades before, she never would. After overcoming hesitation, the son offers to take her in. Years go by, her cognitive abilities decline, mother and son reconcile. They forgive—slowly, over time. Toward the end, the woman wants to change her will to acknowledge this reconciliation. She has a vague sense this is important, but she doesn’t quite understand why, or how much she has to give. She should be permitted to make this change. Under our law, she would not be.<sup>1</sup>

Mental capacity—understood as a measure of cognitive functioning—permeates American law. Cognitive measurements tell us everything from whom we may execute<sup>2</sup> to whom we may excuse from the procedural requirements of tort law.<sup>3</sup> In the private-law doctrines of property and contract—and related doctrines that recognize personal decision-making, including trusts and estates and family law<sup>4</sup>—mental capacity operates as a

1. *See, e.g.*, *Wiesman v. Wiesman*, No. 2017AP446, 2018 WL 4943805, at \*3 (Wis. Ct. App. Oct. 18, 2018) (unpublished table decision) (declining to recognize a change to a longstanding estate plan where elderly decision makers, who suffered from moderate dementia, were deemed not to have a full understanding of their assets at the time of the change); *In re Estate of Flowers*, 88 N.E.3d 599, 619 (Ohio Ct. App. 2017) (same); *In re Estate of Lynch*, 350 S.W.3d 130, 137 (Tex. App. 2011) (same).

2. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of the mentally incapacitated).

3. *See Mount v. City of Vermillion*, 250 N.W.2d 686, 688 (S.D. 1977) (noting that filing deadlines are tolled by mental incapacity).

4. Capacity litigation most frequently arises in intimate private-law decision-making—trusts and estates, donative transfers, personal sales, housing decisions, and family law decisions. *See infra* notes 36–60 and accompanying text. Capacity challenges arise from time to time in commercial contexts involving closely-held companies, *see, e.g.*, *United Bank v. Buckingham*, No. 363481V, 2018 WL 2175806, at \*1 (Md. Ct. Spec. App. May 10, 2018) (involving the capacity of the principal of a family-run business), but do not arise in situations involving legal persons that do not have a “mental capacity” at all, for example, corporations.

threshold to the protections of law.<sup>5</sup> If you have the cognitive abilities demanded by the law, you may make any decision you want; if you do not, your decisions will not be acknowledged by the legal system.<sup>6</sup>

Capacity litigation is pervasive in the state courts.<sup>7</sup> These cases most frequently involve older people, especially those with dementia—gradual, chronic cognitive decline.<sup>8</sup> But capacity is implicated by any mental illness affecting cognition<sup>9</sup> even in cases involving temporary intoxication with alcohol or other drugs.<sup>10</sup> For instance, determinations of mental capacity kept American singer-songwriter Britney Spears in a restrictive conservatorship for the better part of her adult life.<sup>11</sup> At stake in every capacity case—from Spears’s to those of any older adult in the early stages of Alzheimer’s—is whether an individual may access the basic right of having personal decisions recognized by law.<sup>12</sup> The

5. See Liza Magley, *Clients with Diminished Capacity Seek Attorneys with Augmented Integrity*, 27 GEO. J. LEGAL ETHICS 705, 712 (2014) (describing capacity as a “threshold issue for each . . . decision”). This Article is about mental capacity as a threshold to the private law doctrines of contract and property (and related ancillary doctrines), not the distinct private law field of tort, where capacity does not act as a threshold in the same way. See *infra* note 194 and accompanying text.

6. See, e.g., *Persinger v. Holst*, 639 N.W.2d 594, 597 (Mich. Ct. App. 2001) (“A firmly embedded principle in our jurisprudence is that legal documents must be executed by one possessing the mental competence to reasonably understand the nature and effect of his action.”); *In re Estate of Smallman*, 398 S.W.3d 134, 155 (Tenn. 2013) (“Like any other civil contract, a marriage may be voided ‘for want of sufficient mental capacity.’” (quoting *Cole v. Cole*, 37 Tenn. (5 Sneed) 57, 59 (1857))); *Netherton v. Netherton*, 593 S.W.3d 654, 665 (Mo. Ct. App. 2019) (“Under the common law, a contract is deemed void if a party lacks the requisite mental capacity at the time of contracting . . . . Hence, . . . mental capacity is required to make a beneficiary designation.” (quoting *Ivie v. Smith*, 439 S.W.3d 189, 204 (Mo. 2014) (en banc))); *Munzner v. Kushner*, 375 S.W.3d 647, 651 (Ark. Ct. App. 2010) (“If the grantor is mentally competent at the time he executes the deed at issue, the deed is valid.”).

7. See John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 (1994) (reviewing DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993)) [hereinafter Langbein, *Will Contests*] (“The United States is the home of capacity litigation.”). Indeed, quick searches on Westlaw and Lexis reveal thousands of published and unpublished cases in recent years.

8. See Greg Savage, *Neuropsychological Assessment of Dementia*, in *DEMENTIA* 52, 52 (David Ames, John O’Brien & Alistair Burns eds., 5th ed. 2017).

9. See generally, e.g., *In re Gentry’s Estate*, 573 P.2d 322 (Or. Ct. App. 1978) (addressing a challenge to the testamentary capacity of an individual with paranoid schizophrenia).

10. See generally, e.g., *In re Burris*, 270 So. 3d 984 (Miss. Ct. App. 2018) (addressing a challenge to testamentary capacity of a terminally ill individual who abused alcohol and opiates).

11. See, e.g., Ronan Farrow & Jia Tolentino, *Britney Spears’s Conservatorship Nightmare*, NEW YORKER (July 3, 2021), <https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare> [<https://perma.cc/5M37-MMHD> (dark archive)].

12. Sam Boyle, *Determining Capacity: How Beneficence Can Operate in an Autonomy-Focused Legal Regime*, 26 ELDER L.J. 35, 36–37 (2018) (“For most of us, having the legal right to make . . . decisions removed would be a fundamental intrusion on our civil liberties.”).

doctrine of capacity is nothing short of the mechanism by which we circumscribe the boundaries of the community entitled to legal respect.<sup>13</sup>

Private law defines capacity as the cognitive function necessary to understand the nature of a decision and its consequences, measured at the moment the decision is made.<sup>14</sup> Notwithstanding the apparent clarity of this test, it has proven viciously difficult to apply, denying people access to the basic protections of law on the one hand and facilitating disintegration of lives, legacies, and relationships on the other.<sup>15</sup> Part of this challenge is the empirical difficulty of measuring cognition and the spectrum of ways in which dementia and mental illness affect different people differently.<sup>16</sup> But hanging over these empirical difficulties is a normative one—what does it *mean* to understand the nature and consequences of a decision?<sup>17</sup>

If we take a step back from the current doctrine, it is not obvious that private-law capacity cases must involve such a quagmire. In cases challenging an individual's capacity, the parties offer the court two familiar stories about what is going on, each of which is *prima facie* plausible. One side tells a story about an ordinary change of heart by the decision maker—he used to love his house, but no longer now that it's empty; she swore she would never fall in love again, but, well, we've heard that one before. The other side ascribes the decision to the causal power of cognitive malfunction—a story about how this

13. Private law categorically declines to recognize the decisions of minors on the basis of a presumptive generalization of their cognitive functioning. See, e.g., Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 MD. L. REV. 405, 414 (2017) (“The age-based capacity rule for contracts is, as discussed above, a bright-line, arbitrary test—a person is presumed to lack capacity . . . up until the moment she reaches the age of majority.”). The doctrinal intervention proposed in this Article similarly adopts this categorical exclusion of minors, and indeed, psychological research shows that people do not develop life stories from which their decisions could be determined to follow until adolescence or early adulthood. See *infra* notes 230–236.

14. NINA A. KOHN, *ELDER LAW* 17, 28 (2d ed. 2020).

15. See, e.g., Betsy Grey, *Aging in the 21st Century: Using Neuroscience To Assess Competency in Guardianships*, 2018 WIS. L. REV. 735, 752–53 (summarizing inconsistency of medical tests of cognitive abilities frequently relied on in litigation); Jennifer Moye, Daniel C. Marson & Barry Edelson, *Assessment of Capacity in an Aging Society*, 68 AM. PSYCH. 158, 165 (2013) (observing that “clinicians arrive at significantly discrepant judgments of capacity in dementia, focusing on different cognitive and decisional abilities in patients, or holding different values from those of patients”); Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 496, 501–02 (2016) (noting that “[f]or the last several decades, guardianship has been the subject of continual calls for reform”); Stephanie L. Tang, *When “Yes” Might Mean “No”: Standardizing State Criteria To Evaluate the Capacity To Consent to Sexual Activity for Elderly with Neurocognitive Disorders*, 22 ELDER L.J. 449, 449 (2015) (noting that “[t]he determination of consent among elders of diminishing capacity is subject to a great deal of uncertainty and discrepancy among the states”).

16. See Jody Corey-Bloom & Michael S. Rafii, *The Natural History of Alzheimer's Disease*, in *DEMENTIA*, *supra* note 8, at 453, 453.

17. See Grey, *supra* note 15, at 741 (“Fundamentally, the concept of capacity reflects our legal, social, and moral view of human agency.”).

decision is one that the “real person” would never have made; the dementia is speaking, not my father.<sup>18</sup>

The consequences of each of these stories are obvious. If the individual had a change of heart or mind, the court ought to recognize the decision like it would anyone else’s. If, however, a disease or injury is causing decisions that are not the individual’s, the law should not recognize them. Equally apparent are the facts that we would want to know to decide between the stories—facts about the relationship of the decision with prior decisions, the relationship of the decision maker with others, and the things that happened that could have caused them to change their mind. The individual’s cognitive functioning is relevant—it would tell us something about what kind of story we are dealing with—but it is not dispositive.

From a philosophical perspective, dementia and similar illnesses pose ethical and legal challenges in part because they implicate both the philosophical constructs of *personhood* and *personal identity*. The philosophy of *personhood* tells us what entitles an individual to the highest level of moral concern.<sup>19</sup> In contemporary philosophy, personhood is generally understood to be based on a measure of cognitive function.<sup>20</sup> In contrast, the philosophy of *personal identity* tells us what makes us the *same* person across time—distinct from whether we are persons in the first place.<sup>21</sup> A growing group of philosophers—supported by a convergence in fields as diverse as psychology, anthropology, and literary theory—argues that personal identity is constituted of the stories of who we are, our life stories.<sup>22</sup> Because dementia can degrade our cognitive abilities, it can

18. Cf. Agnieszka Jaworska, *Respecting the Margins of Agency: Alzheimer’s Patients and the Capacity To Value*, 28 PHIL. & PUB. AFFS. 105, 113–14 (1999) (describing an Alzheimer’s patient as ascribing certain challenges to “the Alzheimer’s at work”).

19. See CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE 45–76 (1985) [hereinafter TAYLOR, HUMAN AGENCY AND LANGUAGE]. See generally PERSONHOOD AND HEALTH CARE (David C. Thomasma, David N. Weisstub & Christian Hervé eds., 2001) (describing the philosophy of personhood as applied to healthcare).

20. See, e.g., Tom L. Beauchamp, *The Failure of Theories of Personhood*, in PERSONHOOD AND HEALTH CARE, *supra* note 19, at 59, 59–60 (observing that the capacities thought to underlie personhood are “usually cognitive”).

21. See HAROLD NOONAN, PERSONAL IDENTITY, at xi (1993) (“The nature of personal identity over time and the link, if any, between personal identity and bodily identity . . . account[] for the immense philosophical interest in the concept of personal identity.”).

22. See, e.g., MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES 2 (1996); PAUL RICOEUR, TIME AND NARRATIVE 3, 65–69 (Kathleen McLaughlin & David Pellauer trans., 1990) (1984); ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 204–05 (2d ed. 1984); TAYLOR, HUMAN AGENCY AND LANGUAGE, *supra* note 19, at 45–76; Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 103 (2014) [hereinafter Matsumura, *Binding Future Selves*] (“Scholars in various fields have converged on an appreciation of the role that narrative plays in the establishment of personal identity.”).

threaten whether we are philosophical persons.<sup>23</sup> Because it can disrupt the stories of our lives, it can threaten our personal identity.<sup>24</sup>

This Article argues that the doctrine of capacity has failed because it is based in the philosophy of personhood rather than personal identity. More specifically, the doctrine is theoretically grounded in a *cognitive theory of personhood* where it should be based in a *narrative theory of personal identity*. This is so for two reasons. First, substantive private-law doctrines are essentially concerned with personal identity rather than personhood.<sup>25</sup> A gatekeeping doctrine like capacity will necessarily fail if it tries to measure a philosophical category different from those on which the substantive doctrines rely. Second, private law is based on the fundamental commitment of facilitating human flourishing through private ordering<sup>26</sup> by respecting and enforcing private decision-making.<sup>27</sup> The law accomplishes this, in part, by establishing mechanisms and adopting default rules that coincide with ordinary people's ways of thinking.<sup>28</sup> And my empirical research has shown that, overwhelmingly, seniors—the group most closely affected by the capacity doctrine—think of the question of when the law should intervene in their decision-making as one of the disruption of their personal identity.<sup>29</sup>

23. See PETER SINGER, PRACTICAL ETHICS 175–217 (1st ed. 1980).

24. See SCHECHTMAN, *supra* note 22, at 148 (arguing that the loss of narrative capacity in individuals with late-stage dementia can disrupt narrative identity).

25. See *infra* Section II.B.1.

26. This principle is most widely asserted by the “progressive property” school of contemporary private-law scholarship. See generally, e.g., GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING, at xiv (2018) (arguing that property law exists to promote human flourishing). But it is widely accepted, at least implicitly, in contract scholarship, see HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 1–2 (2017) (arguing that contract law is designed to promote self-determination), the law and economics literature in private law, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1110 (1972) (arguing that the selection between “property rules” and “liability rules” in private law is one of welfare maximization), and contemporary conceptualist theory, see, e.g., Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012) (arguing that property law advances welfare by promoting our “interest in using things”); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 5–6 (2d ed. 2015) (arguing that contract law advances our interest in having promises honored). This disagreement is rooted in different substantive understandings of human flourishing, beside the point for our purposes here.

27. See generally Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002) (discussing the principle of private ordering).

28. Cf. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 891 (2012) (“Although there are notable exceptions, intestacy statutes tend to reflect the probable intent of most individuals.”). See generally DAGAN & HELLER, *supra* note 26, at 1–2 (explaining that states enforce contracts “to enhance people’s autonomy so that they can make their lives meaningfully their own”).

29. See James Toomey, *Understanding the Perspectives of Seniors on Dementia and Decision-Making*, 12 AJOB EMPIRICAL BIOETHICS 101, 106 (2020) [hereinafter Toomey, *Perspectives of Seniors*]; see also James Toomey, *How To End Our Stories: A Study of the Perspectives of Seniors on Dementia and Decision-Making*, 29 ELDER L.J. 1, 1–2 (2021) [hereinafter Toomey, *How To End Our Stories*].

Under the new doctrine of capacity I propose, the law would recognize decisions if and only if they are linked by a coherent narrative structure to the story of the person making them. As explained in more detail below, a decision follows as a narrative if it forms an intentional, intelligible, and coherent chain of causation thematically related to the past and future of an individual's life.<sup>30</sup> To be clear, this test is concerned with the *causal structure* of a decision, not its substance. As such, the narrative doctrine can accommodate a tremendous amount of human change, so long as it has the right kind of cause. Telemachus grows up,<sup>31</sup> decisive Lady Macbeth ends despondent,<sup>32</sup> and Rick sticks his neck out.<sup>33</sup> Under the narrative doctrine, the law would recognize decisions—no matter how substantively new or different from the choices the individual had made in the past—that relate to the individual's life through a chain of plausible narrative causes such as love, anger, learning, growth, reconciliation, and estrangement. In the background of this standard, cognitive testing would still play a role in extreme cases of cognitive weakness where an individual's philosophical personhood is questionable—after all, you can't be the same person if you are not a person at all.<sup>34</sup>

Thus, under the narrative doctrine of capacity, the law would respect a decision following the reconciliation of a mother with a son where the cause of her decision was narrative—a story of forgiveness, perhaps. The law would consider the relationship between the decision and the past and future of the mother's life, whether the cause of the decision was her agency or something else, and whether the decision is understandable as a coherent story of human causation. Courts would draw on a wide range of narrative evidence—testimony from the decision maker, if possible, and testimony from family and friends either way. Sometimes the test would be met—*she* really forgave—and sometimes it wouldn't be—something else is going on. For example, the law would respect the decision-making of Britney Spears so long as her decisions coherently build an evolving story of who she is—maybe a story about a woman who became famous too young who is making a life she prefers for herself in private relationships with her children.<sup>35</sup>

This Article proceeds in four parts. In Part I, I analyze the capacity doctrine in black-letter law and practice, excavating the extent to which its narrow focus on contemporaneous cognitive functioning misses the point. Further, I show that the highly medicalized contemporary approach to capacity litigation is not inevitable—indeed, courts in the first half of the twentieth

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30. See *infra* Section III.A.

31. See HOMER, *THE ODYSSEY*, BOOKS I–IV (Robert Fagles trans., Penguin Books 1996) (1614).

32. See WILLIAM SHAKESPEARE, *MACBETH*.

33. See *CASABLANCA* (Warner Bros. Pictures 1942).

34. See *infra* Section III.C.

35. See Farrow & Tolentino, *supra* note 11.

century were much more likely to rely on narrative facts than they are now, though they often did so in an atheoretical way that was objectionable on other grounds.

In Part II, I philosophically evaluate the premises of the capacity doctrine. I find that the law's understanding of capacity is grounded in a cognitive theory of personhood but argue that personal identity is what matters in private-law decision-making. Further, I argue that the narrative theory of personal identity is the right one.

In Part III, I outline a new doctrine of capacity grounded in the narrative theory of personal identity. The proposed rule is that the law would recognize any decision that follows through a coherent narrative structure from the story of an individual's life but would decline to recognize decisions without a narrative cause. I look to philosophy, psychology, and literary theory to distill an objective structural definition of story.

Finally, in Part IV, I explore how this test would work in practice. I show that the narrative test resolves errors incident to the cognitive doctrine and argue that the narrative test would not be materially more difficult, more expensive, or more susceptible to bias than the current doctrine.

#### I. CAPACITY CHALLENGES IN THEORY AND PRACTICE

Capacity is a threshold doctrine in private law—to avail oneself of the protections of the law with respect to a particular decision, one must have the capacity to make the decision.<sup>36</sup> In our aging society, courts spend a great deal of time litigating questions of capacity.<sup>37</sup> This part offers an overview of the doctrine and its failures in theory and practice. First, I summarize the current doctrine of capacity—a measure of contemporaneous cognitive functioning. Next, I show that the doctrine is failing to coherently adjudicate between decisions entitled to the respect of law and those that are not. Finally, I argue that things weren't always this way—without the benefit of modern medicine, courts a century ago frequently relied on narrative facts, and although some of

36. The doctrine of capacity must be distinguished from the doctrine of undue influence, though they are frequently litigated together. *See, e.g.*, *Estate of Fabian*, 222 A.3d 1143, 1152 (Pa. Super. Ct. 2019) (distinguishing capacity and undue influence). The doctrine of undue influence, specifically designed to protect vulnerable individuals from abuse or exploitation, does not recognize donative transfers where a “wrongdoer exerted such influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made.” *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 (AM. L. INST. 2003). The doctrine of undue influence is narrower than the capacity doctrine (only pertaining to a subset of decisions), requires a malicious third-party, and is more substantively normative. *See, e.g.*, JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 180–81 (8th ed. 2009). The doctrine has been subject to scholarly criticism in its own right, *see id.*, but this Article sets aside for future research the implications, if any, of the narrative theory of personal identity for the doctrine of undue influence.

37. *See supra* note 7 and accompanying text.

these decisions were objectionable on other grounds, the case law was in many ways more coherent than it is now.

#### A. *The Law of Capacity*

Decisions made without sufficient capacity will not be enforced by private law.<sup>38</sup> At a high level of abstraction, the law understands decision-making capacity to be a measure of an individual's "physical ability to think and reason."<sup>39</sup> Adults are generally presumed to have the required capacity to make private-law decisions.<sup>40</sup> Although there is some variation among the standards of capacity required for different kinds of decisions, "the default question tends to be: 'Does the individual understand the nature and consequences of the decision he or she is making?'"<sup>41</sup> In seeking to answer this question, the law thinks of capacity as a binary concept—the individual either had the mental capacity required to make a particular decision or not.<sup>42</sup> And an individual's capacity is considered at the moment of a challenged decision.<sup>43</sup> Evidence about the individual at other times may be admissible, but only to the extent it is probative of their cognitive function at the time.<sup>44</sup>

38. See, e.g., *Kinsel v. Lindsey*, 526 S.W.3d 411, 419 (Tex. 2017) ("Documents executed by one who lacks sufficient legal or mental capacity may be avoided."); *Larson v. Larson*, 192 N.E.2d 594, 597 (Ill. App. Ct. 1963) ("A marriage contract will be invalidated by the want of consent of capable persons; it requires the mutual consent of two persons of sound mind, and if at the time one is mentally incapable of giving an intelligent consent to what is done, with an understanding of the obligations assumed, the solemnization is a mere idle ceremony."); *Bond v. Branning Mfg. Co.*, 140 N.C. 381, 383, 52 S.E. 929, 929 (1906) ("To execute either a will or a deed, it is abundantly established that the party must have sufficient mental capacity . . .").

39. KOHN, *supra* note 14, at 17; see also 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.6 (2d ed. 1998) ("The traditional test is a 'cognitive' one.").

40. See, e.g., KOHN, *supra* note 14, at 153 ("It is generally presumed that all adults have the ability and right to make their own decisions.").

41. See *id.* at 28.

42. See, e.g., KELLY PURSER, CAPACITY ASSESSMENT AND THE LAW: PROBLEMS AND SOLUTIONS 14 (2017) ("[L]egal professionals see capacity . . . as a dualistic construct in that the person either has capacity to make the decision, execute the document, or enter the transaction, or they do not.").

43. See, e.g., *Paine v. Sullivan*, 950 N.E.2d 874, 883 (Mass. App. Ct. 2011) ("It is John's capacity at the time he executed the will that is at issue."); *Stephan v. Millennium Nursing & Rehab Ctr., Inc.*, 279 So. 3d 532, 540–41 (Ala. 2018) ("The more important question is whether Stephan has overcome her burden of demonstrating contractual incapacity at the very time of the transaction." (emphasis added)); *In re Nurse*, 160 A.D.3d 745, 747 (N.Y. App. Div. 2018) ("Instead, it must be determined that the individual was incompetent at the specific time of the challenged transaction.").

44. See, e.g., *England v. Cary*, No. 05-17-00724-CV, 2018 WL 3342694, at \*1 (Tex. Ct. App. July 9, 2018) ("Courts may also look to the state of mind at other times if it tends to show ones' state of mind on the day a document was executed.").

Legal capacity is a test of *actual* cognitive functioning, and no particular clinical diagnosis is dispositive to establish a lack of capacity.<sup>45</sup> Indeed, the law does not require that people undergo cognitive testing, and, formally speaking, any evidence suggestive of the decision maker's cognition is admissible.<sup>46</sup> However, the law's focus on facts about the individual's contemporaneous cognitive function has led courts to rely heavily on medical testimony in adjudicating capacity questions.<sup>47</sup>

The specific level of cognitive functioning the law requires to make each kind of private-law decision varies.<sup>48</sup> Challenges to testamentary capacity—the cognitive functioning required to execute a valid will—appear to be the most common form of capacity litigation.<sup>49</sup> Testamentary capacity generally requires that an individual know and understand “(1) what property they own, (2) the natural objects of their bounty, and (3) the nature of the act performed.”<sup>50</sup> The threshold for testamentary capacity is frequently contrasted with that of the capacity required to enter into a contract, give a gift, convey property by deed, or otherwise conduct business, which is higher.<sup>51</sup> In the other direction, courts

45. See, e.g., *In re Estate of Schlueter*, 994 P.2d 937, 940 (Wyo. 2000) (joining “several other states” in holding that a diagnosis of senile dementia is not sufficient proof of lack of capacity); see also Jalayne J. Arias, *A Time To Step In: Legal Mechanisms for Protecting Those with Declining Capacity*, 39 AM. J.L. & MED. 134, 140 (2013) (“[U]nder a majority of capacity definitions, a diagnosis of dementia alone is not conclusive evidence that an individual lacks capacity.”).

46. See, e.g., *In re Estate of Clemence*, No. 332099, 2017 WL 4938814, at \*12 (Mich. Ct. App. Oct. 31, 2017) (“[O]ur Supreme Court has specifically found lay opinion testimony admissible to establish a decedent’s testamentary capacity.”).

47. See, e.g., *In re Giaquinto*, 164 A.D.3d 1527, 1529 (N.Y. App. Div. 2018) (“Respondent has failed to present any evidence, including the medical records and affidavits, that showed that decedent lacked testamentary capacity or mental competency at the time of the execution of the 2013 will.”); *In re Estate of Washburn*, 690 A.2d 1024, 1027 (N.H. 1997) (“All the testifying physicians agreed that the medical evidence indicated that the testatrix had Alzheimer’s disease in April 1993, a year after the will’s execution.”); *In re Will of Cernigliaro*, No. 2016-34, 2017 WL 6763159, at \*4 (N.Y. Sur. Ct. Dec. 28, 2017) (unpublished table disposition) (“[T]he objectants have not produced any credible medical evidence demonstrating that the decedent lacked testamentary capacity.”). However, formally, “[d]etermination of incapacity is a legal and not a medical decision.” 18 AM. JUR. 3D PROOF OF FACTS § 7 (1992).

48. See MIKE E. JORGENSEN, *ELDER LAW* 49 (2008) (“Because legal capacity is generally determined in light of the transaction involved, courts have developed different legal standards for capacity for different legal documents.”).

49. Cf. Forrest J. Heyman, *A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in Light of Alaska’s Recent Ante-Mortem Legislation*, 19 ELDER L.J. 385, 406 (2012) (arguing that if testamentary capacity challenges had to be brought *before* the death of the individual whose capacity is challenged, they would be less common).

50. JORGENSEN, *supra* note 48, at 49.

51. See *id.* at 50 (“The standard for contractual and donative capacity in most states is a higher and more demanding standard of conduct than the standard for testamentary capacity.”); see also, e.g., *In re Martinico*, 177 A.D. 882, 884 (N.Y. App. Div. 2019) (“Less capacity is required to enable one to make a will than to make other contracts.”). *But see* *Marback v. Marback*, 235 Cal. App. 2d 354, 356 (Dist. Ct. App. 1965) (“The degree of mental competency requisite to sustain the validity of a deed has been held to be the same degree of competency required to execute a will.”).

have held that the mental capacity required to enter into or end a valid marriage is low, and that an individual who lacks the capacity to enter into other contracts may still be able to get married or divorced.<sup>52</sup>

Finally, the law provides a mechanism, known as guardianship or conservatorship, to address the needs of individuals considered to lack capacity globally.<sup>53</sup> The terminology varies by jurisdiction,<sup>54</sup> but the essential idea is the same—through procedures established by statute, courts may, upon petition, appoint an individual legally empowered (called a “guardian” here, for convenience) to make decisions (or some class of decisions) on behalf of an “incapacitated” individual.<sup>55</sup> In other words, a guardian is an individual appointed by the court to handle the private-law needs of someone whose decisions do not meet the thresholds of capacity in general. The standards and procedures required to establish guardianship vary from state to state, but all require the court to find that the allegedly incapacitated person is *generally* incapacitated.<sup>56</sup> In addition, some states require guardianship to be the least restrictive alternative, require courts to find the possibility of harm to the person or others absent guardianship,<sup>57</sup> or require a diagnosis of certain conditions.<sup>58</sup>

Because a guardianship is, in many ways, a finding of generalized legal incapacity, guardianship proceedings look similar to challenges to specific decisions on capacity grounds. For example, although any evidence tending to prove cognitive deficits is admissible, courts rely most heavily on medical

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52. See 177 AM. JUR. 3D PROOF OF FACTS § 4 (2019) (“[C]ourts have pointed out that the threshold of mental capacity is relatively low, so that even though a person might be under conservatorship and thus could not enter into an ordinary contract, he or she may have capacity to get married.”).

53. The guardianship system has been subject to wide-ranging criticism in recent years and many scholars have advocated replacing it with a system of “supported decision-making” under which a “supporter” is appointed to help an individual with cognitive impairments make their own decisions. See, e.g., Megan S. Wright, *Dementia, Autonomy, and Supported Healthcare Decisionmaking*, 79 MD. L. REV. 257, 272 (2020). This system has been adopted by some states. *Id.* But for the most part, guardianship remains the system we have, and some scholars have questioned whether supported decision-making would be substantially different in practice. See, e.g., Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship*, 117 PENN ST. L. REV. 1111, 1112 (2013). Because this Article is about the threshold question of incapacity, not how guardianships ought to be conducted after that determination, I need not resolve this debate here.

54. See KOHN, *supra* note 14, at 154.

55. See *id.* at 154–57.

56. Arias, *supra* note 45, at 147.

57. See, e.g., N.Y. MENTAL HYG. LAW § 81.02 (McKinney 2022).

58. See Grey, *supra* note 15, at 749.

testimony.<sup>59</sup> And guardianship petitions are adversarial.<sup>60</sup> Much like other capacity challenges, guardianship hearings involve contestation between parties advancing competing stories about the allegedly incapacitated person.<sup>61</sup> In short, the doctrine of capacity—in all its iterations—is based in a momentary cognitive test and is most often adjudicated between competing medical testimony.

### B. *The Failure of the Capacity Doctrine*

This section argues that the doctrine of capacity, understood as a test of contemporaneous cognitive functioning, is failing to coherently adjudicate between those decisions the law ought to respect and those it need not. First, the doctrine encounters enormous practical difficulties in consistently measuring cognitive function. Second, even if such measurements could be made consistently, the doctrine has never answered important normative questions about its demands and how it affects people differently. Finally, if we look at the cases, we can see that the doctrine—even if it were reaching consistent results on its own terms—misses the point by failing to call upon courts to adjudicate between the *prima facie* plausible stories presented by the parties.

#### 1. Empirical Challenges of Measuring Cognition

Courts applying the doctrine of capacity reach wildly inconsistent results, particularly in cases involving individuals with some cognitive dysfunction short of extreme decay.<sup>62</sup> Indeed, whether an individual with *some* cognitive decline will be entitled to have a particular decision recognized—or will be denied access to basic legal protections—appears to turn as much on the judge that oversees the case, the clinicians that conduct a medical evaluation, and whether the individual is medically tested at all as anything about the reality of their underlying cognitive mechanics.<sup>63</sup> Although the doctrine is not hard to

59. See, e.g., *In re DiCillo*, No. 2006-G-2718, 2007 WL 1113964, at \*2 (Ohio Ct. App. Apr. 13, 2007) (chiding appellants for “present[ing] no contrary expert medical testimony” but only “br[ing]ing forth a number of lay witnesses” and finding the evidence sufficient for a guardianship).

60. See KOHN, *supra* note 14, at 156 (“The guardianship process is, by design, an adversarial one.”).

61. See, e.g., *In re Guardianship of Miller*, 932 N.E.2d 420, 422, 425 (Ohio Ct. App. 2010) (resolving a question of capacity between a story of ordinary, family-induced stress, and a claim of the degradation of the individual’s identity as the result of dementia).

62. See Grey, *supra* note 15, at 752–54.

63. See, e.g., *id.*; see also LAUREN BARRITT LISI & SAIDY BARINAGA-BURCH, CTR. FOR SOC. GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS 648–50 (1994) (finding that nearly half of all formal guardianship proceedings last less than 15 minutes); KOHN, *supra* note 14, at 185 (describing as “well-founded” the observation that some courts are “too quick to appoint guardians, and do not properly oversee them”); Bradley E.S.

apply in extreme cases—where an individual is either plainly healthy or cognitively far gone—it struggles in the more frequently-litigated gray areas between these poles.<sup>64</sup>

Part of this inconsistency arises from the difficulty medicine has in measuring cognitive abilities.<sup>65</sup> Indeed, the most commonly relied upon medical tests of cognitive function are inconsistent and difficult to interpret.<sup>66</sup> And although recent advances have made it easier to diagnose the biological *causes* of dementia (for example, whether an individual *has* Alzheimer’s disease), there have not been corresponding advances in measurement of symptomatic decline, or the actual cognitive functioning with which the doctrine is concerned.<sup>67</sup> Moreover, these medical tests can be expensive and difficult to access for many individuals of questionable cognitive ability, particularly in medically underserved areas.<sup>68</sup>

The complex nature of dementia and other mental illnesses also contributes to the inconsistency in courts’ decisions regarding the capacity

Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 111 (2007) (discussing the “arbitrary results that are based more on fact-finder bias than on well-defined rules of law” that often appear in testamentary capacity litigation).

64. Arias, *supra* note 45, at 137 (“This not only raises concerns about how to classify those that fall between the [poles of capacity and incapacity], but also highlights the lack of legal protections for those within the gap.”).

65. See Grey, *supra* note 15, at 753 (“Primary care physicians may fail to recognize dementia in more than fifty percent of affected patients.”).

66. See, e.g., Joanne Feeney, George M. Savva, Clair O’Regan, Bellinda King-Kallimanis, Hilary Cronin & Rose Anne Kenny, *Measurement Error, Reliability, and Minimum Detectable Change in the Mini-Mental State Examination, Montreal Cognitive Assessment, and Color Trails Test Among Community Living Middle-Aged and Older Adults*, 53 J. ALZHEIMER’S DISEASE 1107, 1107 (2016) (finding inter-rater reliabilities of 0.81 and 0.75 on the same metric for the most commonly used cognitive capacity tests).

67. See, e.g., Grey, *supra* note 15, at 771–72 (discussing recent advances in neuropsychological testing that have increased diagnostic accuracy for purposes of distinguishing between Alzheimer’s disease and other causes of cognitive symptoms). The most commonly used tests of cognitive functioning, the Mini-Mental State Exam and the Montreal Cognitive Assessment, were developed in 1975 and 1995, respectively. See Marshal F. Folstein, Susan E. Folstein & Paul R. McHugh, ‘*Mini-Mental State*’: *A Practical Method for Grading the Cognitive State of Patients for the Clinician*, 12 J. PSYCHIATRIC RSCH. 189, 189 (1975); John Hobson, *The Montreal Cognitive Assessment (MoCA)*, OCCUPATIONAL MED. 764, 764 (2015). See generally Ziad S. Nasreddine, Natalie A. Phillips, Valérie Bédirian, Simon Charbonneau, Victor Whitehead, Isabelle Collin, Jeffrey L. Cummings & Howard Chertkow, *The Montreal Cognitive Assessment, MoCA: A Brief Screening Tool for Mild Cognitive Impairment*, 53 J. AM. GERIATRIC SOC’Y 695 (2005) (conducting a validation study for the MoCA).

68. See William Perry, Laura Lacritz, Tresa Roebuck-Spencer, Cheryl Silver, Robert L. Denney, John Meyers, Charles E. McConnel, Neil Pliskin, Deb Adler, Christopher Alban, Mark Bondi, Michelle Braun, Xavier Cagigas, Morgan Daven, Lisa Drozdick, Norman L. Foster, Ula Hwang, Laurie Ivey, Grant Iverson, Joel Kramer, Melinda Lantz, Lisa Latts, Ana Maria Lopez, Michael Malone, Lori Martin-Plank, Katie Maslow, Don Melady, Melissa Messer, Randi Most, Margaret P. Norris, David Shafer, Colin M. Thomas, Laura Thornhill, Jean Tsai, Nirav Vakharia, Martin Waters & Tamara Golden, *Population Health Solutions for Assessing Cognitive Impairment in Geriatric Patients*, 33 ARCHIVES CLINICAL NEUROPSYCH. 655, 671 (2018) (noting that “[t]here are deficiencies in health services in rural and economically disadvantaged America, resulting in a large gap in access to care and differences in resources such as care coordinators and cognitive specialists”).

doctrine. The course of Alzheimer's disease, the most common cause of dementia, in different individuals is markedly heterogeneous, presenting a "diverse spectrum of symptoms" at different times.<sup>69</sup> Indeed, many individuals with Alzheimer's disease are entirely asymptomatic,<sup>70</sup> the onset of symptoms can take decades,<sup>71</sup> and the disease can proceed slowly or quickly over the course of years when they arise.<sup>72</sup> The causes and course of other dementias and mental illnesses are even less well-studied and understood.<sup>73</sup> Moreover, even healthy individuals experience changes in cognition as they age, which can be interpreted as dementia by family members and medical experts.<sup>74</sup> Further, many older adults are diagnosed with Mild Cognitive Impairment, a vague diagnostic category that is often a preclinical form of dementia,<sup>75</sup> but many people with this diagnosis "do not experience a further cognitive decline and may even revert to normal status."<sup>76</sup>

Finally, although the doctrine is clear that what matters is actual cognitive functioning, there is substantial sociological evidence that the label "dementia" does a great deal of work in how those with the disease are perceived and treated

69. See Corey-Bloom & Rafii, *supra* note 16, at 453 (stating that reliably measuring progression is "difficult because of variability between and within subjects").

70. See Grey, *supra* note 15, at 765 ("AD pathology can be present in individuals who do not show cognitive symptoms.").

71. See Corey-Bloom & Rafii, *supra* note 16, at 453 ("Converging evidence from longitudinal studies of clinically normal elderly and familial AD cohorts strongly suggests that the AD pathophysiological process begins decades before the manifestation of clinical dementia.").

72. See *id.* at 458.

73. See generally Melanie D. Sweeney, Axel Montagne, Abhay P. Sagare, Daniel A. Nation, Lon S. Schneider, Helena C. Chui, Michael G. Harrington, Judy Pa, Meng Law, Danny J.J. Wang, Russell E. Jacobs, Fergus N. Doubal, Joel Ramirez, Sandra E. Black, Maiken Nedergaard, Helene Benveniste, Martin Dichgans, Constantino Iadecola, Seth Love, Philip M. Bath, Hugh S. Markus, Rustam A. Salman, Stuart M. Alan, Terence J. Quinn, Rajesh N. Kalra, David J. Werring, Roxana O. Carare, Rhian M. Touyz, Stever C.R. Williams, Michael A. Moskowitz, Zyoniimir S. Katusic, Sarah E. Lutz, Orly Lazarov, Richard D. Minshall, Jalees Rehman, Thomas P. Davis, Cheryl L. Wellington, Hector M. Gonzalez, Chun Yuan, Samuel N. Lockhart, Timothy M. Hughes, Christopher L.H. Chen, Perminder Sachdev, John T. O'Brien, Ingmar Skoog, Leondro Pantoni, Deborah R. Gustafson, Geert Jan Biessels, Anders Wallin, Eric E. Smith, Vincent Mok, Adrian Wong, Peter Passmore, Frederick Barkof, Majon Muller, Monique M.B. Breteler, Gustavo C. Roman, Edith Hamel, Sudha Seshadri, Rebecca F. Gottesman, Mark A. van Buchem, Zoe Arvanitakis, Julie A. Schneider, Lester R. Drewes, Vladimir Hachinski, Caleb E. Finch, Arthur W. Toga, Joanna M. Wardlaw & Berislav V. Zlokovic, *Vascular Dysfunction—The Disregarded Partner of Alzheimer's Disease*, 15 ALZHEIMER'S & DEMENTIA 158 (2019) (summarizing what is known about vascular dementia, an understudied but prevalent cause of dementia).

74. See generally Gregory R. Samanez-Larkin & Brian Knutson, *Decision Making in the Ageing Brain: Changes in Affective and Motivational Circuits*, 16 NATURE REV. NEUROSCIENCE 278 (2015) (summarizing patterns of cognitive and decision-making change in healthy aging).

75. See Karen Ritchie & Sylvaine Artero, *Mild Cognitive Impairment (MCI): A Historical Perspective*, in DEMENTIA, *supra* note 8, at 419, 421 ("[M]any clinical observations of the long-term outcome of cognitive complaints . . . led to the general conclusion by many neurologists that subclinical cognitive disorder in the elderly is in fact principally, if not exclusively, early-stage dementia.").

76. *Id.* at 422–23.

by society.<sup>77</sup> Anecdotally, many people report being treated differently by family and friends after a diagnosis of Alzheimer's, including being treated like a child and being excluded from plans and conversations.<sup>78</sup> And sociologists have widely confirmed that "receiving a dementia diagnosis allocates [an] older person to a new lower status social group," to some extent regardless of their functional impairment at the time of the diagnosis.<sup>79</sup> This bias appears to bleed into legal practice where, the language of the test notwithstanding, "[i]n some cases, disability itself—as opposed to functional ability—appears to be used as the justification for guardianship."<sup>80</sup>

## 2. Normative Challenges of the Cognitive Doctrine

Scholars have ascribed part of the challenge of the doctrine to its normative under-theorization. First, the doctrine's vague language does not offer a fully-realized theory of *how much* cognitive functioning is required in order to make particular decisions.<sup>81</sup> Indeed, "where we strike this balance reflects our social values, moral judgments, and legal principles."<sup>82</sup> And neither courts nor scholars have articulated a complete theory of *the levels of* "understanding" required for access to the protections of law, nor what "understanding" *is* and how we measure it.<sup>83</sup> After all, we permit cognitively healthy individuals to make decisions, the consequences of which they do not fully understand (and could not realistically understand) all the time.<sup>84</sup>

77. See, e.g., TOM KITWOOD, *DEMENTIA RECONSIDERED: THE PERSON COMES FIRST* 7 (1997) ("Alzheimer victims, demented, elderly mentally infirm—these and similar descriptions devalue the person, and make a unique and sensitive human being into an instance of some category devised for convenience or control."); Daniel R. George, *Overcoming the Social Death of Dementia Through Language*, 376 *LANCET* 586, 586 (2010) ("The everyday language we use to describe dementia shapes our perceptions of brain ageing and even contributes to what has been called the 'social death' of those most severely affected.").

78. See, e.g., *How Are You Treated Differently Since Diagnosis*, ALZHEIMERSDISEASE.NET (Apr. 2, 2020), <https://alzheimersdisease.net/living/different-treatment> [<https://perma.cc/Q4SB-F3Q4>] ("Roughly 58 percent of participants said they are treated differently by a spouse or partner, while 47 percent said they are treated differently by a co-worker, colleague, or supervisor. About 46 percent said they are treated differently by their friends, while 45 percent said they experienced a change in treatment from their children. Similarly, 45 percent said they are treated differently by their acquaintances and 40 percent said their parents treat them differently.").

79. Alison Milne, *The 'D' Word: Reflections on the Relationship Between Stigma, Discrimination and Dementia*, 19 *J. MENTAL HEALTH* 227, 228 (2010); see also Jane M. Scholl & Steven R. Sabat, *Stereotypes, Stereotype Threat and Ageing: Implications for the Understanding and Treatment of People with Alzheimer's Disease*, 28 *AGEING & SOC'Y* 103, 103 (2008).

80. KOHN, *supra* note 14, at 185.

81. See, e.g., Grey, *supra* note 15, at 738.

82. *Id.*

83. See Toomey, *How To End Our Stories*, *supra* note 29, at 3.

84. For instance, in the securities laws, we require disclosure of certain information to the public, but we do not ask whether any individual member of the public trading in securities has read and understood, or even *could* understand, the content of those disclosures. See, e.g., 15 U.S.C. § 77g(c)(1) (authorizing the SEC to issue regulations regarding disclosures for asset-backed securities).

Moreover, the cognitive doctrine necessarily suffers a theoretically unexplained inconsistency in the way it treats people of differing lifelong cognitive functioning. Among the adult population, there is a range of baseline cognitive functionality.<sup>85</sup> Alzheimer's disease affects those with high lifelong functioning differently from those with low functioning—those with higher lifelong functioning tend to experience less decline longer into its course but eventually decline more rapidly than others.<sup>86</sup> But the law applies a universal threshold, demanding the same absolute level of cognitive functioning from every decision maker, regardless of their lifelong functioning. This necessarily means that those with higher functioning will change *more* from themselves before the law intervenes, while lower-functioning individuals will see the law intervene in their decision-making much more quickly.<sup>87</sup> This disparity is harmful to both groups in different ways—higher-functioning people are permitted to do more damage to their stories and relationships in their decline, and lower-functioning people are denied autonomy more quickly.

### 3. Failure To Adjudicate Between Prima Facie Plausible Stories of Apparent Normative Significance

Reading capacity opinions closely reveals that, where courts focus on the doctrine and the contemporaneous cognitive functioning of the individual decision maker,<sup>88</sup> they miss the point. Since these cases involve human stories—about people, families, and relationships—the courts ought to adjudicate between the two prima facie plausible stories the parties present. Instead, they look only to the individual's cognitive functioning at the time of the decision.

Take, for instance, the 2019 case *In re Guardianship of Thrash*.<sup>89</sup> Charles Inness Thrash was “a millionaire and owner of a successful automotive repair

85. See generally Christopher F. Chabris, *Cognitive and Neurobiological Mechanisms of the Law of General Intelligence*, in INTEGRATING THE MIND: DOMAIN GENERAL VS. DOMAIN SPECIFIC PROCESSES IN HIGHER COGNITION 449 (Maxwell J. Roberts ed., 2007) (discussing cognitive mechanisms underlying the range in general intelligence among the population).

86. See Corey-Bloom & Rafii, *supra* note 16, at 458 (“The cognitive reserve hypothesis suggests that higher education delays the onset of accelerated decline but that, once it begins, it is more rapid in persons with higher education.”).

87. An example of this in practice may be the case *Woodville v. Woodville*, 60 S.E. 140 (W. Va. 1908), where the court highlighted the high functioning of a grantor of property, instead of his apparent memory loss. See *id.* at 141, 143. There, the grantor of property was noted as a man of “more than ordinary intelligence” who suffered from “the loss of memory at times” and, as the result of dementia, was only “at times” the “same remarkably intelligent and strong-minded man” he had been the rest of his life. *Id.* But the court looked at his contemporaneous writing, found the use of “intelligent and sensible diction,” and held that he had sufficient capacity. *Id.*

88. See, e.g., *Wiesman v. Wiesman*, No. 2017AP466, 2018 WL 4943805, at \*3 (Wis. Ct. App. Oct. 18, 2018) (unpublished table decision) (focusing on cognitive functioning rather than considering whether a decision to change a will to be more beneficial to a child who had become more active in their care was the decision an individual with dementia really wanted).

89. No. 04-19-00104-CV, 2019 WL 6499225 (Tex. Ct. App. Dec. 4, 2019).

shop.”<sup>90</sup> For most of his adult life, Thrash lived in a small apartment above his shop, where he had only one employee, and acted with the kind of fiscal conservatism that allowed him to amass a small fortune.<sup>91</sup> In 2009, when he was seventy-one years old, Thrash began dating a woman named Laura Martinez.<sup>92</sup> Both Thrash and Laura had been married before, with adult children (in Thrash’s case, stepchildren) from prior marriages.<sup>93</sup> Throughout their relationship, Thrash paid many of Laura’s expenses, and in 2016, Thrash and Laura moved into a house he purchased for \$750,000 in cash.<sup>94</sup> After that, Thrash’s sister and stepchildren petitioned the court for guardianship, alleging that he was incapacitated.<sup>95</sup>

Based on the facts, there are two *prima facie* plausible stories about these years of Thrash’s life. The first is a story of abuse. It is a story, told by Thrash’s family members, about Laura, a manipulative woman taking advantage of a wealthy and vulnerable old man for her own financial gain.<sup>96</sup> Indeed, Thrash’s stepdaughters “described Laura as a woman he dated who wanted him to help her pay her bills, to marry her, and to change ‘a lot of things in his life,’ including his will.”<sup>97</sup> They testified that “they believed *Thrash* would not take” the actions Laura was pushing him to.<sup>98</sup> And Thrash plainly suffered from some cognitive impairment. A psychiatrist appointed to examine Thrash reported that he had, *inter alia*, some level of Alzheimer’s dementia.<sup>99</sup> This story of abuse is a plausible one. We know these stories happen.<sup>100</sup> If it is true, we know the purchase of the house should be reversed and the guardianship granted—to do otherwise would be a grave harm to Thrash, the story of his life, and those he truly cares about.<sup>101</sup>

The other story is a love story. It’s the story of a man unlucky-in-love until he found a woman in the twilight years of his life with whom he wanted to

90. *Id.* at \*1.

91. *See id.*

92. *See id.*

93. *Id.* at \*6.

94. *See id.* at \*1.

95. *See id.*

96. *See id.* at \*6.

97. *Id.*

98. *Id.* (emphasis added).

99. *Id.*

100. *See, e.g.,* Anna Coluccia, Andrea Pozza, Fabio Ferretti, Fulvio Carabellese, Alessandra Masti & Giacomo Gualtieri, *Online Romance Scams: Relational Dynamics and Psychological Characteristics of the Victims and Scammers. A Scoping Review*, 16 CLINICAL PRAC. & EPIDEMIOLOGY MENTAL HEALTH 24, 25 (2020) (reviewing case studies and other research on romance scams, where an individual pretends to be in love with an individual with the intent to obtain money).

101. *See, e.g.,* RONALD DWORIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 230 (1993) (“[W]hen . . . we consider the patient’s whole life, not just its sad final stages, . . . we consider his future in terms of how it affects the character of the whole.”).

commit in a way he never had before. At first blush, there was at least as much evidence in the record to support this love story as there was to support one of abuse. In fact, nearly everyone—Laura, Thrash, the lawyer with whom Thrash drew up an estate plan, the investigator appointed by the court, and even some of Thrash’s family members—agreed that Thrash appeared happy and in love with Laura.<sup>102</sup> As for the purchase of the house, Laura explained that Thrash had been “saving money to buy a ‘gingerbread house.’”<sup>103</sup> And there was substantial evidence that Thrash was not all that far gone. He was conversational, regularly spoke coherently and independently to his lawyer and others, and was clearly capable of love.<sup>104</sup> This story, too, is entirely plausible.<sup>105</sup> If it is true, the law has no business helping Thrash’s family (concerned with its own inheritance, perhaps) stand in the way. To do so would render a profound harm to the privilege of love and the autonomy of the self.<sup>106</sup>

The question of which story is true—the love story or the abuse story—is more than just a question of Thrash’s momentary cognitive functioning. People who have lost some cognitive functioning, as Charles Thrash had, can fall in love.<sup>107</sup> And indeed, the case is challenging under the cognitive paradigm precisely because, although he had lost some capacity, Thrash remained functional in many ways, could carry on complex conversations, and would discuss his love for Laura and his desire to buy the house.<sup>108</sup> Adjudicating between the stories depends on a variety of facts—including not only Thrash’s cognitive function, but also his feelings; the explanations and causes of his actions; Laura’s motivations and those of the family members; and whether the

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102. See *In re Guardianship of Thrash*, 2019 WL 6499225, at \*8 (“[T]he probate court heard testimony from both Laura and Thrash that Thrash was happy with Laura.”); see also *id.* at \*6 (“[Attorney] Augsburg testified that during his private consultations, Thrash indicated he wanted to take care of Laura.”); *id.* at \*7 (observing that the court-appointed investigator testified that “Laura continued caring for Thrash’s daily needs, and Thrash appeared to be happy and well taken care of by Laura”); *id.* (observing that Thrash’s great-niece “testified Thrash seemed happy in his home and living with Laura”).

103. *Id.* at \*6.

104. See *id.*

105. See Sherry Amatenstein, *First Love Late in Life. Yes, It Happens! Here’s Proof*, NEXTTRIBE (Feb. 12, 2021), <https://nexttribe.com/finding-love-later-in-life/> [<https://perma.cc/4H8E-KX5R>] (discussing “touching, relatable, and highly romantic” stories of “couples who had experienced their first love later in life”).

106. Cf. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

107. See Eva Feder Kittay, *At the Margins of Personhood*, 116 ETHICS 100, 116 (2005) (discussing the author’s loving relationship with her daughter with severe mental illness); see also DANIEL KEYES, *FLOWERS FOR ALGERNON* 270 (1959) (“I told her I didnt like her any more. I told her I didnt want to be smart any more either. Thats not true but. I still love her and I still want to be smart but I had to say that so she woud go away.”). See generally, e.g., JESSICA BRYAN, *LOVE IS AGELESS: STORIES ABOUT ALZHEIMER’S DISEASE* (2002) (summarizing personal narratives of love stories involving people with Alzheimer’s dementia).

108. *In re Guardianship of Thrash*, 2019 WL 6499225, at \*6.

purchase of the house was the culmination of savings for this specific purpose or something Thrash, if it was really him, would never have done.

Applying the doctrine of capacity, however, the court did not decide which of these stories was true. Instead, it relied primarily on medical testimony about Thrash's cognitive abilities. It held sufficient to establish the guardianship "two medical reports, both concluding that Thrash lacked capacity . . . because he could not comprehend complex matters."<sup>109</sup> Further, the court noted that "Laura did not produce any medical evidence controverting the medical reports concluding Thrash lacked capacity."<sup>110</sup> It granted a guardianship over Thrash's estate.<sup>111</sup>

Thus, because the court did not adjudicate between the two stories before it, we have no way of knowing whether it reached the right outcome in this case, even assuming that its assessment of Thrash's cognitive functioning was medically defensible. Instead, we are left with the material and troubling possibility that the court did a bad thing—denying Charles Thrash the freedom to make his own decisions in life and love and facilitating Thrash's stepdaughters securement of their inheritance against his wishes. Maybe that is not what happened, but based on the court's analysis and the doctrine it applied, it could be.

Similarly, consider another challenging case, *In re Estate of Marsh*,<sup>112</sup> where the court found sufficient capacity notwithstanding facially similar levels of cognitive functioning as in *Thrash*. Clara Marsh lived near her daughter in Xenia, in southwestern Ohio; her son lived a three-and-a-half hour drive away in Cleveland.<sup>113</sup> Her longstanding estate plan divided her assets equally between son and daughter.<sup>114</sup> But after she moved into the Alzheimer's ward at a local nursing home, tensions between the family members arose.<sup>115</sup> The daughter—who saw Clara every day—believed that Clara was incapacitated and filed for guardianship.<sup>116</sup> The son disagreed.<sup>117</sup> In the midst of the guardianship proceedings, Clara handwrote a note that said, in its entirety, "Because of all the legal problems [my daughter] Elaine and [her husband] are causing, I am afraid my final wishes will be ignored. To prevent this from happening, this is

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109. *Id.* at \*7.

110. *Id.* at \*8.

111. *Id.* at \*3.

112. No. 2010 CA 78, 2011 WL 5137235 (Ohio Ct. App. Oct. 28, 2011).

113. *Id.* at \*1.

114. *Id.*

115. *Id.* at \*2.

116. *Id.* at \*1.

117. *Id.*

my new will: I leave *everything* to my son Richard and his wife Sam. I love you all very much.”<sup>118</sup> Then she died.<sup>119</sup>

Once again, at least two plausible stories are apparent. In the first one, Clara needs help as her dementia advances and she becomes increasingly paranoid. Instead of recognizing the extent to which the daughter with whom she is closer is trying to help her, she sees salvation in the distant son who cannot see how far she is gone. In the other story, however, Clara really made the decision to disinherit her daughter—she saw that the daughter had come to feel entitled to control her life and her money because she was physically closer. And again, the normative stakes are clear—if the first story is true, the court should find the handwritten will invalid, but if the second is true, it should be enforced. Similarly straightforward are the facts needed to adjudicate between the stories—facts about Clara’s relationships with her children, their behavior, and her evolving understanding of herself and family.

But the court in *Marsh* did not tell us which of these stories is true. It simply looked to the evidence regarding Marsh’s cognitive capacities at the time of the execution of the handwritten will and acknowledged that while “[t]here appears to be acceptance of the facts that the decedent was diagnosed with Alzheimer’s by Dr. Byers and was found to struggle with ‘significant cognitive impairments’ by Dr. Kraus,” “neither [doctor] addressed the criteria for testamentary capacity and thus did not preclude the possibility.”<sup>120</sup> And the daughter, the court held, simply had not put forth sufficient evidence of Clara’s cognitive state at the time she wrote the will to overcome the presumption of capacity.<sup>121</sup> The court granted summary judgment to the son.<sup>122</sup> Was that the right thing to do? Who knows. Maybe the court properly safeguarded the rights and autonomy of Ms. Marsh; maybe it ratified an inexplicable decision that Marsh herself never really wanted to make.

Although the doctrine gives no formal role to facts about the story of a particular decision—indeed, formally, any facts before and after the decision are irrelevant on their own—some contemporary courts feel the clear normative importance of deciding between the competing stories the parties offer.<sup>123</sup> Indeed, many capacity opinions bolster their doctrinal, cognitive conclusions by explaining them in terms of the story of the individual.

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118. *Id.* at \*2.

119. *Id.*

120. *Id.* at \*3.

121. *Id.* at \*5.

122. *Id.* at \*6.

123. See, e.g., *Greasheimer v. Bridgewater*, KNL CV186036815S, 2020 WL 1496584, at \*6–7 (Conn. Super. Ct. Mar. 2, 2020).

For example, *In re Estate of Farr*,<sup>124</sup> the Kansas Supreme Court confronted a challenge to testamentary capacity where decedent Farr disinherited his two granddaughters—the children of his deceased son, Everett—in favor of two surviving sons.<sup>125</sup> The court, applying the doctrine of capacity, noted that “[t]he time when the will is made is the time of primary importance,” and grounded its decision in the observation that “[t]hose present at the execution of the will, medical professionals and a long-time acquaintance, believed Farr to have been aware of what was going on when the will was executed.”<sup>126</sup>

The court went on to note, however, that “[t]here was evidence that would support that Farr intended to disinherit” the granddaughters.<sup>127</sup> Indeed, as the court took the time to tell us, testimony indicated that sometime after Everett had passed away, Everett’s wife sold the family farm and moved elsewhere against Farr’s wishes.<sup>128</sup> For a man as “stubborn, hard-headed, and sometimes difficult”<sup>129</sup> as Farr, this is certainly a plausible, if not particularly admirable, story of disinheritance. It is, after all, vaguely reminiscent of *King Lear*.<sup>130</sup>

In short, some contemporary courts appear to recognize that cognitive ability conclusions on their own are not entirely satisfactory in this context. But that is all that the current doctrine tells courts to look to, and as compelling as a discussion about an individual’s life story may be, it is, legally speaking, superfluous.

### C. *The Medicalization of the Capacity Doctrine and the Decline of Narrative Analysis*

The formulation of the doctrine of capacity as a measure of contemporaneous cognitive functioning has remained consistent for at least the past two centuries.<sup>131</sup> But before the development of modern medicine and neuroscience, a reader of capacity cases at the turn of the twentieth century would find courts relying on narrative facts much more frequently than they do today. And while this earlier capacity litigation was not perfect, courts’ reliance

124. 49 P.3d 415 (Kan. 2002).

125. *Id.* at 420.

126. *Id.* at 427, 429.

127. *Id.* at 429.

128. *Id.*

129. *Id.* at 420.

130. See generally WILLIAM SHAKESPEARE, *KING LEAR* (telling the story of a man who disinherited one of his three daughters for failing to properly express her love for him).

131. See, e.g., *In re Koll’s Estate*, 206 N.W. 40, 42 (Iowa 1925) (“To constitute senile dementia in such legal sense as to deprive one of testamentary capacity, there must be such failure of the mind as to deprive [an individual] of intelligent action.”). See generally SUSANNA L. BLUMENTHAL, *LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE* (2016) [hereinafter BLUMENTHAL, *LAW AND THE MODERN MIND*] (charting the development of the doctrine of capacity over the nineteenth century).

on narrative facts, rather than cognitive evidence, resulted in a more consistent, coherent, and defensible body of cases than today's.

For example, in the 1915 case *Wisner v. Chandler*,<sup>132</sup> the Kansas Supreme Court addressed the question of whether a man, who “by the time of his death had totally lost his mind,”<sup>133</sup> possessed sufficient mental capacity to execute a will unfavorable to his son Charles.<sup>134</sup> The court reversed a lower court finding, holding that “the facts . . . establish to a moral and legal certainty capacity.”<sup>135</sup> In so doing, it did not rely on medical testimony or facts about the decedent's cognitive function.<sup>136</sup> Instead, the court looked to the story and character of the decedent—a story about a man whose sons, the product of a second marriage, did not get along with his third wife (“Mrs. Wisner”)—and found the decision to exclude Charles to follow from this story:

Charles and his stepmother sometimes quarreled. While their relations were not severed, and remained cordial and ordinarily affectionate, he sometimes used to her and of her language profane, unkind, and in a few instances, cruel. . . . Charles denied the defamation, but lack of proper respect for Mrs. Wisner, extending to cruelty, on the part of Charles, was expressly found by the court. . . . However much it may be regretted that the testator could not forgive, as Mrs. Wisner probably did, his resentment was human and natural.<sup>137</sup>

Capacity cases analyzing the relationship of a decision to the individual's life story were quite common,<sup>138</sup> and some courts in the late-nineteenth century viewed their task in these cases as requiring an understanding of the individual's life story.<sup>139</sup> Moreover, courts through the first half of the twentieth century betrayed a frank recognition of the challenging normative questions of the capacity doctrine that medicine was ill-equipped to answer on its own.<sup>140</sup> Indeed, in *Wisner*, the court noted that science “has done but little more than give a name to the retrograde metamorphosis of the brain which causes . . .

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132. 147 P. 849 (Kan.).

133. *Id.* at 851.

134. *Id.*

135. *Id.* at 850.

136. *Id.* at 851.

137. *Id.* at 854.

138. See, e.g., *In re Koll's Estate*, 206 N.W. 40, 42 (Iowa 1925); *In re Kimberly*, 36 A. 847, 847–48 (Conn. 1896); *Woodville v. Woodville*, 60 S.E. 140, 142 (W. Va. 1908).

139. See *In re Forman's Will*, 54 Barb. 274, 294 (N.Y. Sup. Ct. 1869) (“Mr. Forman appears to have been at the time of his marriage, and to have continued to be, a common-place, cool, complacent, calculating, circumspect man, without vices.”); see also 1 FRANCIS WHARTON, MORETON STILLÉ, ROBERT AMORY & EDWARD STICKNEY, WHARTON AND STILLÉ'S MEDICAL JURISPRUDENCE 329 (4th ed. 1882) (“To penetrate the mask of Hamlet's madness . . . it is necessary to understand Hamlet's history.”).

140. See, e.g., *Waggoner v. Atkins*, 162 S.W.2d 55, 58 (Ark. 1942) (“Perhaps no branch of jurisprudence is more tenuous or spectral than that dealing with one's mental capacity to contract.”).

senility.<sup>141</sup> Similarly, in the 1944 case *In re Provolt's Estate*,<sup>142</sup> the Oregon Supreme Court observed that

[i]t is extremely difficult to determine just at what stage in the progress of senile dementia the mind is incapable of functioning intelligently. The line of demarcation between sanity and insanity is often as indistinct and uncertain as that between twilight and darkness. It is a question upon which medical experts have often disagreed.<sup>143</sup>

This earlier narrative reasoning was not the result of a materially different doctrinal formulation—the doctrine has always purported to be based in contemporaneous cognitive functioning.<sup>144</sup> But the quacks of the age aside,<sup>145</sup> courts simply did not have the tools to meaningfully measure cognitive mechanics in the way we do today. Over the course of the twentieth and early twenty-first centuries, as we've developed brain scans, biomarkers, and batteries for cognitive functioning, this has changed. Indeed, today, courts rarely resolve capacity challenges with reference to facts *other than* medical testimony.<sup>146</sup> In many ways, then, the capacity doctrine of the last century did not suffer from some of the shortcomings of the current one. We can read these cases with relative confidence in their outcomes because we see the courts wrestle with the stories presented by the parties and watch them adjudicate between them.

But this earlier doctrine was not perfectly applied. As Professor Susannah Blumenthal has documented, courts in the late-nineteenth and early-twentieth centuries struggled profoundly with capacity, how to measure it, and what it meant to have the threshold level of cognition required for democratic citizenship.<sup>147</sup> Judges had a doctrine of capacity that aspired to measure cognition but a medical profession that was not meaningfully able to do so.

141. *Wisner*, 147 P. at 852.

142. 151 P.2d 736 (Or.).

143. *Id.* at 737.

144. *See In re Koll's Estate*, 206 N.W. 40, 42 (Iowa 1925).

145. *See, e.g.*, BLUMENTHAL, *LAW AND THE MODERN MIND*, *supra* note 131, at 2 (“[I]t was not unusual for each party to enter the courtroom flanked by medical experts and an army of lay witnesses who offered diametrically opposed portraits of the alleged incompetent.”).

146. *See, e.g.*, *In re Estate of Washburn*, 690 A.2d 1024, 1027 (N.H. 1997); *In re Cirnigliaro*, 2017 WL 6763159, at \*4 (N.Y. Sur. Ct. Dec. 28, 2017) (unpublished table disposition); *Wiesman v. Wiesman*, No. 2017AP466, 2018 WL 4943805, at \*5 (Wis. Ct. App. Oct. 10, 2018) (unpublished table decision); *In re Guardianship of Thrash*, No. 04-19-00104-CV, 2019 WL 6499225, at \*8 (Tex. Ct. App. Dec. 4, 2019).

147. *See* Susannah L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 1034 (2006) [hereinafter Blumenthal, *The Deviance of the Will*] (observing that judges in the Gilded Age “remained committed to the onerous and time-consuming task of ferreting out the truly meritorious claims”); BLUMENTHAL, *LAW AND THE MODERN MIND*, *supra* note 131, at 14 (“These lawsuits provided occasions for airing doubts about the capacity of citizens to be self-governing and they display the difficulties that participants encountered in attempting to set the threshold of legal competence.”).

Moreover, the capacity case law at this time struggled to cast off its doctrinal roots in substantive moral judgment on private decision-making. In its origins in Roman law, the capacity doctrine originally made ethical judgments about the appropriate disposition of property, invalidating “unnatural” dispositions.<sup>148</sup> This made the doctrine fundamentally illiberal.<sup>149</sup> And while judges of the early-twentieth century heartily embraced liberalism, “the ‘reasonableness’ of the testator’s disposition remained an important consideration in borderline cases.”<sup>150</sup> For example, in the 1904 case *Hamon v. Hamon*,<sup>151</sup> the Missouri Supreme Court noted that “if a man over 80 years of age should express a desire to marry . . . and have a wife to take care of him in his old days, it was no symptom of senile dementia,” because “[c]ommon sense is not indebted to science for knowledge of that fact.”<sup>152</sup> We can speculate that the court may not have been so indulgent if the genders were reversed.

From this perspective, the medicalization of the capacity doctrine over the course of the twentieth century accomplished some valuable things. It brought capacity litigation closer in line with its normative foundations and helped make the cases more agnostic to the content of the decision. But by purging narrative facts from consideration, this development—an instance more of science catching up to the aspirations of law than of change in the law—has resulted in case law today that is in many ways more incoherent and inconsistent than it was a century ago.

The problem with the older capacity cases was not their inability to measure what they wanted, it was their desire to measure the wrong thing. In order to make sense of the way in which courts clearly *felt they should* resolve these cases, judges would have had to notice the philosophical confusion underneath the doctrine. And to develop a doctrine that resolved that confusion in a way morally agnostic to the content of decisions, they would have needed a rigorous theory of personal identity. Early twentieth-century judges lacked the philosophical tools, not just the scientific ones, to make these interventions.<sup>153</sup> Instead, as medical developments that fit cleanly into the

148. See DUKEMINIER, SITKOFF & LINDGREN, *supra* note 36, at 167–68. The civil law continues to take substantive ethical positions, barring disinheritance of children except for specified reasons. See, e.g., Adam F. Streisand & Lena G. Streisand, *Conflicts of International Inheritance Laws in the Age of Multinational Lives*, 52 CORNELL INT’L L.J. 675, 701–05 (2020).

149. See, e.g., James Toomey, *Constitutionalizing Nature’s Law: Dignity and the Regulation of Biotechnology in Switzerland*, 7 J.L. & BIOSCIENCES 1, 2 (2020) (“[W]hat distinguishes a liberal state from others is that it is agnostic to its citizens’ theories of the good life.”). See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (describing political liberalism from a philosophical lens).

150. Blumenthal, *The Deviance of the Will*, *supra* note 147, at 1034.

151. 79 S.W. 422 (Mo.).

152. *Id.* at 426.

153. The narrative theory of personal identity was not fully articulated until Marya Schechtman’s 1996 book *The Constitution of Selves*. See generally SCHECHTMAN, *supra* note 22 (articulating a narrative

doctrine became available, courts eagerly relied on them and lost reference to the kinds of facts that they had incidentally sought as a proxy—the narrative facts that really always mattered. In the next part, I hope to offer the philosophical basis for a doctrine of capacity grounded in these narrative facts—a doctrine based in a narrative theory of personal identity.

## II. THE PHILOSOPHY OF CAPACITY

Capacity litigation offers the court two *prima facie* plausible stories. The normative consequences of each story are straightforward—in one, a story of what we might think of as “ordinary” change, the court should respect the decision, and in the other, about the fading or disruption of an individual, it should not. This part dives into that distinction, analyzing what is different between the two stories. In philosophical terms, the difference is that in one the individual’s *personal identity*—that which makes us the same person across time—has been disrupted by a breach of narrative continuity, whereas in the other it has not. This way of thinking about the problem is distinct from the law’s, which is rooted in the philosophical construct of *personhood*—that which makes us a person *at all*—understood as a measure of cognitive function.

After laying out the philosophical stakes of the capacity doctrine, I argue that its reliance on cognitive personhood rather than narrative personal identity is misplaced. Indeed, what matters to private-law decision-making is personal identity, not personhood. Moreover, there is substantial evidence in philosophy, anthropology, psychology, and literary theory that personal identity is constituted of narrative coherence.

### A. *Situating Capacity Litigation in Philosophy*

This section analyzes capacity litigation through the lens of philosophy. First, it abstracts from the *prima facie* plausible stories presented to the court in a capacity case and finds that the essential distinction between the two stories is that in one the individual’s personal identity, understood as the continuity of their story, has been disrupted, and in the other it has not. I then explain the

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theory of personal identity). This work built on an explosion of interest in narrative, particularly in psychology, in the 1980s. *See generally, e.g.*, JEROME S. BRUNER, *IN SEARCH OF MIND: ESSAYS IN AUTOBIOGRAPHY* (1984) (outlining a psychological theory of mind grounded in narrativization); DAN P. MCADAMS, *POWER, INTIMACY, AND THE LIFE STORY: PERSONOLOGICAL INQUIRIES INTO IDENTITY* (1985) (emphasizing the identity-constituting function of life story); RICOEUR, *supra* note 22 (outlining a philosophical theory of narrative); MACINTYRE, *supra* note 22 (focusing on the philosophical theory of narrative’s application to ethics). Schechtman’s work engaged with the modern analytical debates on the nature of metaphysical identity from the mid-century. *See* SCHECHTMAN, *supra* note 22, at 2 (situating the narrative theory of personal identity in debates about the nature of personal identity in analytical philosophy); NOONAN, *supra* note 21 (reproducing seminal articles in the debate on the nature of personal identity from analytical philosophers such as Barnard Williams, Derek Parfit, and Sydney Shoemaker).

philosophical theory that accounts for this distinction—a *narrative theory of personal identity*. Finally, I contrast this theory with the philosophical basis of the current doctrine—a *cognitive theory of personhood*.

### 1. Capacity Litigation in the Abstract

In capacity cases—like those of Charles Thrash, Clara Marsh, and many more—the opposing parties each offer the court an alternative story, the narrative structures of which are essentially consistent. Indeed, at a certain level of abstraction, the facts of these competing stories are the same. Let us suppose the following skeleton of stipulated sequential facts: ( $T_1$ ) Jane Doe has maintained for some time a particular view with respect to Decision  $X$  (whether, for example, she would ever sell the family home or to whom she intends to leave the estate); ( $T_2$ ) Jane’s cognitive abilities undergo some changes; ( $T_3$ ) after those changes, Jane changes her view on Decision  $X$ .

From these agreed-upon facts, the adversarial parties tell two different stories. The first one, call it  $S_1$ , explains  $T_3$  as a result of  $T_2$ —that is, it explains the change in decision as the *causal* product of cognitive changes.  $S_1$  is a story about the awesome and frightening power of mental decay. In contrast, the other story,  $S_2$ , tells us that Jane reached  $T_3$  by some means other than the causal power of cognitive change at  $T_2$ . This process can take myriad forms, but we recognize those forms as a coherent narrative of *Jane*, and we understand that there is something privileged about their form.  $S_2$  is a story of love or hate, alienation or reconciliation, hope or fear, loneliness or yearning, or all of these. Let us agree that in  $S_1$  the law may decline to recognize decisions at  $T_3$ .<sup>154</sup> But in  $S_2$  the law has no such discretion. The obligation of private law there—with Jane Doe as with the rest of us—is to recognize and enforce her wishes.

To illustrate the essential difference between  $S_1$  and  $S_2$ , we must make some further assumptions. First, let’s assume the same levels of mechanical cognitive function. In other words, whether we are in  $S_1$  or  $S_2$ , Jane Doe receives the same scores on cognitive tests at each stage. This assumption is necessary to tease out whether what really distinguishes the two stories is the *extent* of cognitive decline; that is, whether our normative intuitions in the story of ordinary change ( $S_2$ ) versus the story of incoherent decline ( $S_1$ ) are driven by the fact that we assume a greater level of cognitive decay at  $T_2$  in  $S_1$ . But the normative distinction between the stories survives this assumption of equal

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154. Some scholars have challenged that, in the healthcare context, the law has the right to override the present, experientially-rooted wishes of individuals with dementia. See generally Rebecca Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 ARIZ. L. REV. 373 (1986) (challenging the doctrine of enforcing advance healthcare directives over the present objections of an individual with dementia). As discussed *infra* note 193, however, this objection may turn on disagreement about the identity-dependent nature of healthcare rights. In contrast, the private-law rights of property and contract are strongly identity-dependent. See *infra* Section II.B.

cognitive functioning. We feel as solicitous of a genuine love story involving an individual with cognitive impairments as we do in general.<sup>155</sup> People at a wide range of cognitive functioning—both among the healthy population and among the population suffering from various levels of deviation from their lifelong baseline—fall in love, change their minds, encounter new arguments and experiences, and make changes in their values, relationships, and goals.<sup>156</sup> In its refrain that there is no particular diagnosis that vitiates capacity,<sup>157</sup> the doctrine already, to a limited extent, seems to recognize that it is not only particular diseases that matter in whether the law should intervene.

Next, we must cut third parties from the equation and assume good faith. Of course, in many real-life circumstances,  $S_1$  is not merely a story about the power of cognitive decline but is also a story of manipulation or abuse, of a bad actor taking advantage of a vulnerable individual. Assuming away third parties addresses the possibility that our real concern in the difference between  $S_1$  and  $S_2$  is a response to the bad behavior of a third party that we may suspect is present in  $S_1$  but not  $S_2$ , where the story is one of decay, not ordinary change. But the distinction between the stories survives this assumption as well. The law should not recognize decisions in  $S_1$ —decisions that are *caused by* a mental disease—regardless of whether they were brought about by the manipulation of a third party. Indeed, the doctrine already recognizes that third-party influence is not dispositive of capacity. Private law treats “capacity,” which is the threshold prerequisite to legal decision-making, and “undue influence,” which invalidates certain decisions brought about by the manipulation of third parties, as distinct legal forms.<sup>158</sup> Decisions made without capacity are not recognized whether or not they were the result of manipulation by a third party.<sup>159</sup> In other words, if undue influence were all that mattered in this context, the capacity doctrine would not exist.

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155. See, e.g., Ellen McCarthy, *When Bill Met Shelley: No Disability Could Keep Them Apart*, WASH. POST (Feb. 7, 2013), <http://www.washingtonpost.com/blogs/liveblog/wp/2013/02/07/when-bill-met-shelley-no-disability-could-keep-them-apart/> [<https://perma.cc/9NQ7-CGXD> (dark archive)] (describing the love story of a couple both of whom have intellectual disabilities, including Down syndrome).

156. See, e.g., Deirdre Fetherstonhaugh, Laura Tarzia, Michael Bauer, Rhonda Nay & Elizabeth Beattie, “*The Red Dress or the Blue?*” *How Do Staff Perceive That They Support Decision Making for People with Dementia Living in Residential Aged Care Facilities?*, 35 J. APPLIED GERONTOLOGY 209, 210 (2016) (“From this literature, it is clear that people with dementia can and do make decisions, and wish to remain involved in decision making for as long as possible.”); Jaworska, *supra* note 18, at 107 (relating an anecdote involving a man with moderate dementia who is able to care for himself and purchases the car he has always wanted).

157. See, e.g., *In re Estate of Schlueter*, 994 P.2d 937, 940 (Wyo. 2000) (holding a diagnosis of senile dementia is not incompatible with a finding of testamentary capacity).

158. See *supra* note 36.

159. *Id.*

By making these two assumptions, we know that the distinction between  $S_1$  and  $S_2$  is not contingent on Jane-in- $S_1$  being subject to greater cognitive decline than Jane-in- $S_2$ , nor is it that Jane-in- $S_1$  is a victim of another's malfeasance. But in  $S_1$  the court has a role and in  $S_2$  it does not. What, then, *is* the distinction? The best candidate remaining is a claim about Jane, not her biology, but her identity, her Jane-ness. The distinction is what we mean by the colloquialism that it was not the *real* Jane who made the decision in  $S_1$ , or that Jane didn't *really* make the decision. What matters in the difference between  $S_1$  and  $S_2$  is whether Jane at  $T_3$  is *the same Jane* we know and love.

Moreover, the distinction between  $S_1$  and  $S_2$  turns on something about *Jane's story*—it turns on whether that story is, in fact, nonsense or a coherent, continuous story of Jane, a story of love and the ordinary things. Indeed, the way in which we distinguish  $S_1$  from  $S_2$  is to establish certain facts that tell us more about the story (that is, certain narratively significant facts) about what happened between  $T_1$  and  $T_2$  and  $T_3$ . It is about whether Jane grew to hate her house now that it was empty—a story about herself that she could tell us—or whether the story of her has been interrupted—a fact that makes *her* a story impossible to follow. In short, this abstraction tells us that what matters in distinguishing  $S_1$  from  $S_2$  is whether Jane Doe at  $T_3$  is the same Jane Doe as she was at  $T_1$ , a question we answer by looking to facts about her story.

## 2. The Philosophy of Narrative Personal Identity

Philosophers have long sought to answer the question of what makes someone at  $T_2$  (or  $T_3$ , in our case) the same person that they were at  $T_1$ .<sup>160</sup> In the philosophical literature, this is referred to as the question of *personal identity*.<sup>161</sup> This literature seeks to understand the necessary and sufficient conditions of what makes someone the same person that they had been previously.<sup>162</sup> Thus, in the language of philosophy, the distinction between  $S_1$  and  $S_2$  is one of personal identity.

The modern philosophical interrogation of the nature of personal identity began with John Locke, who posited that personal identity is constituted of the continuity of “consciousness,” which has been widely understood to mean the continuity of memory.<sup>163</sup> The field today is largely divided between partisans of

160. See, e.g., JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 5 (2002) (“[W]e must determine what is necessarily involved in our continuing to exist over time . . . . This is what is known as the problem of *personal identity*.”).

161. See *id.*; see also Daniel Kolak, *Room for a View: On the Metaphysical Subject of Personal Identity*, 162 *SYNTHESE* 341, 370 (2008).

162. See, e.g., SCHECHTMAN, *supra* note 22, at 2; David W. Shoemaker, *Personal Identity and Practical Concerns*, 116 *MIND* 462, 462 (2007).

163. See Sydney Shoemaker, *Persons, Animals, and Identity*, 162 *SYNTHESE* 313, 314 (2008) (“[T]he history of the topic of personal identity has been a series of footnotes to Locke.”). See generally Jessica

“Neo-Lockean” views, who argue that the necessary conditions of personal identity have something to do with psychological continuity, and a robust group of dissenters who argue that the only necessary and sufficient condition of personal identity is the biological continuity of a human body (regardless of psychological continuity).<sup>164</sup> To illustrate the difference between these theories, consider the case of an individual who has undergone total amnesia since committing a crime. Neo-Lockeans would hold that they are now a different person and cannot be punished; bodily continuity theorists say that they are the same person and should be.

Neither of these theories obviously accounts for the difference between  $S_1$  and  $S_2$ . In determining whether we are living in  $S_1$  or  $S_2$ , we do not ask *how much* memory was lost at  $T_2$  (necessarily, in the extent to which the distinction survives the assumption of identical cognitive functioning), nor whether Jane has (obviously) remained constituted of the same body. Instead, we make our determination about identity by looking to narrative facts—facts about causation, the relationships of characters, and human agency—about Jane between  $T_1$  and  $T_3$ .

In recent decades, a growing group of philosophers has outlined and argued for a narrative theory of personal identity.<sup>165</sup> These theorists posit that “a person creates his identity by forming an autobiographical narrative—a story of his life”;<sup>166</sup> “[o]n this view, a person’s *identity* . . . is constituted by the content of her self-narrative, and the traits, actions, and experiences included in it are, by virtue of that inclusion, hers.”<sup>167</sup> Many philosophers have endorsed this view. For example, Charles Taylor argued that “grasp[ing] our lives in a *narrative*” is a “basic condition of making sense of ourselves”;<sup>168</sup> Alasdair MacIntyre that “personal identity is just that identity presupposed by the unity of the character which the unity of a narrative requires”;<sup>169</sup> and Daniel Dennett that the “story [of] our autobiography” acts as the “center of gravity” of the self.<sup>170</sup>

In defense of this narrative theory, philosopher Marya Schechtman has argued that the prevailing non-narrative theories of personal identity are

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Gordon-Roth, *Locke on Personal Identity*, STAN. ENCYC. PHIL. (Feb. 11, 2019), <https://plato.stanford.edu/entries/locke-personal-identity/> [<https://perma.cc/VH53-C6MY>] (explaining that Locke’s discussion of personal identity “ignited a heated debate over” the topic).

164. See SCHECHTMAN, *supra* note 22, at 13 (summarizing the psychological and bodily continuity theories).

165. See *supra* note 22 and accompanying text.

166. SCHECHTMAN, *supra* note 22, at 93.

167. *Id.* at 94.

168. CHARLES TAYLOR, *SOURCES OF THE SELF: MAKING OF THE MODERN IDENTITY* 47 (1989).

169. MACINTYRE, *supra* note 22, at 218.

170. Daniel C. Dennett, *The Self as the Center of Narrative Gravity*, in *SELF AND CONSCIOUSNESS: MULTIPLE PERSPECTIVES* 103, 114 (Frank S. Kessel, Pamela M. Cole & Dale Johnson eds., 1991).

preoccupied with answering the wrong question.<sup>171</sup> She argues that when we talk about personal identity, there are at least two distinct things we may be referring to: (1) the “logical relation of identity,” of “what makes a person at time  $t_2$  the same person as a person at time  $t_1$ ” (the “reidentification question”), and (2) the “practical importance of personal identity,” or “which beliefs, values, desires, and other psychological features make someone the person she is” (the “characterization question”).<sup>172</sup> The former is a metaphysical question<sup>173</sup> but struggles to explain its significance to the ethical questions for which we look to a theory of personal identity for answers. Instead, it primarily resolves thought experiments involving teleportation, duplication, and brain-splitting (or, as above, rare cases of total amnesia), all of which are of little practical importance.<sup>174</sup> Indeed, some prominent philosophers, after painstakingly laying out a metaphysical theory of personal identity, have found themselves forced to proclaim that personal identity is not of ethical significance at all.<sup>175</sup>

In contrast, Schechtman directly tackles the characterization question, which is one of primary *ethical* significance having to do with the concerns from which private law’s interest in personal identity arises—the survival of the self, the allocation of moral responsibility, and compensation for previously made decisions.<sup>176</sup> In her effort to directly answer these questions, Schechtman arrives at the theory that “an autobiographical narrative,” a “story of [a] life,” constitutes personal identity in the ethically relevant sense.<sup>177</sup> From this perspective, an individual’s personal identity remains continuous so long as it continues to build a story of themselves; it is disrupted where their choices cease to make a story.<sup>178</sup> Schechtman’s theory includes both objective and subjective

171. See SCHECHTMAN, *supra* note 22, at 1 (“Most modern personal identity theorists, I charge, conflate two significantly different questions.”).

172. *Id.* at 1–2.

173. See *id.* at 7 (“The general problem [of identity] is the metaphysical question of how a single entity persists through change.”).

174. See *id.* at 1 (“[D]ebates about personal identity have become so far removed from the concerns that originally impelled them that it seems as if something more must be amiss in this case.”).

175. See DEREK PARFIT, REASONS AND PERSONS 217 (1984) (“Personal identity is not what matters.”); see also SCHECHTMAN, *supra* note 22, at 1 (“[I]t has been notoriously difficult for any of the views of identity currently in vogue to explain why personal identity matters to us at all.”). Whatever the merits of the view that personal identity is not of essential ethical concern, it is not compatible with private law’s assumption that personal identity is significant. See *infra* Section II.B.

176. See SCHECHTMAN, *supra* note 22, at 2 (“There is a strong pre-philosophical sense that facts about identity underlie facts about four basic features of personal existence: survival, moral responsibility, self-interested concern, and compensation.”).

177. *Id.* at 93.

178. *Id.* at 148 (“The important element in [late-stage Alzheimer’s] cases, however, is the loss of narrative capacity, and even though such an individual may have memories of long ago, he cannot integrate these with anything else, or have any kind of coherent sense of himself as an extended subject.”).

criteria; it requires both the subjective *experience* of narrative sense and the objective coherence of that story.<sup>179</sup>

This theory explains what matters in the distinction between  $S_1$  and  $S_2$ . It explains why the difference between these two stories is whether Jane Doe at  $T_3$  is the same Jane Doe we have always known (or, another way of thinking about the same point, that the decision at  $T_3$  is not *really* made by Jane Doe), and why we feel this question can be answered with reference to narrative facts and conclusions about the story. In other words, the distinction between  $S_1$  and  $S_2$  is rooted in a narrative theory of personal identity—when Jane Doe’s narrative identity has been disrupted by disease, we are in  $S_1$  and the law ought to intervene, and when it has not been, we are in  $S_2$  and the law ought to stay out.

### 3. The Philosophy of Cognitive Personhood

The capacity doctrine is not grounded in narrative personal identity—it does not adjudicate between  $S_1$  and  $S_2$ . Indeed, it is not based on personal identity at all. Rather than ask whether Jane is still Jane when she made the decision, the court asks whether, as an *absolute* matter, Jane has the cognitive functioning required to exercise the relevant private-law right at  $T_3$ . This analytical posture can also be understood in the language of philosophy—the doctrine of capacity is grounded in a *cognitive theory of personhood*.

In ethical philosophy, a *person* is an entity entitled to the full suite of rights recognized in ethics and law.<sup>180</sup> Contemporary analytical philosophers generally do not think of personhood as a freestanding ontological category, but rather as a metaphysical *conclusion* about an entity based on the presence or absence of certain capacities at a particular time—that is, *anything*—a space alien, an AI, an exceptional orangutan—can be or not be a person at  $T_3$ , so long as it possesses the capacities that are the necessary conditions of personhood.<sup>181</sup> A theory of personhood tells us what those necessary conditions are.

179. *Id.* at 95.

180. *See, e.g.*, TAYLOR, HUMAN AGENCY AND LANGUAGE, *supra* note 19, at 97 (“A person is a being with a certain moral status, or a bearer of rights.”); *see also* TOMASZ PIETRZYKOWSKI, PERSONHOOD BEYOND HUMANISM: ANIMALS, CHIMERAS, AUTONOMOUS AGENTS AND THE LAW 7 (2018) (“[A] person in law is an entity that can be ascribed certain rights and duties.”).

181. *See, e.g.*, TAYLOR, HUMAN AGENCY AND LANGUAGE, *supra* note 19, at 97 (“[U]nderlying the moral status [of personhood], as its condition, are certain capacities.”). This is the prevailing position in philosophy, although, to be sure, some philosophers defend “speciesist” accounts that limit personhood to homo sapiens. ROBERT SPAEMANN, PERSONS: THE DIFFERENCE BETWEEN ‘SOMEONE’ AND ‘SOMETHING’ 247 (Oliver O’Donovan trans., 2006) (“There can, and must, be one criterion for personality, and one only; that is biological membership of the human race.”).

There are many theories about the necessary conditions of personhood, which is among the most contested issues in philosophy.<sup>182</sup> But setting aside the details and speaking generally, the capacities thought to underlie personhood are “usually cognitive.”<sup>183</sup> Under these prevailing *cognitive theories of personhood*, personhood is a metaphysical conclusion about an entity based on the presence or absence of a certain suite of cognitive abilities at a certain level of functionality.<sup>184</sup>

A cognitive theory of personhood explains the capacity doctrine’s analytical posture—both the variables it measures and the practical consequences it adjudicates. Of course, the law does not, in so many words, describe a challenge to legal capacity as a challenge to personhood (and, moreover, a capacity ruling with respect to a decision or a class of decisions does not deprive an individual of legal personhood generally; guardianship, though, is a different story). But a legal conclusion of capacity is based on the same variables as a metaphysical conclusion of personhood under cognitive theories—namely, absolute, momentary cognitive functioning. And these conclusions have similar ethical stakes—access to or deprivation of the protections of law at a particular point in time.

Although grounded in the same variables, however, the legal doctrine demands *greater* levels of cognitive functioning than theories of personhood would generally require on their own. As discussed above,<sup>185</sup> the legal tests demand an individual be able to understand the nature and consequences of the particular decision and in some circumstances the “natural objects of their bounty.”<sup>186</sup> This is a much more demanding test of cognitive functioning than prevailing theories of personhood, which make weaker claims about the levels of cognitive functioning that entitle an individual to the highest levels of moral concern. For example, Immanuel Kant’s theory requires only the ability to reason<sup>187</sup> and John Stuart Mill’s theory, the ability to reason and feel.<sup>188</sup> In other words, the cognitive threshold of *legal* capacity is higher than the threshold of

182. See Edmund L. Erde, *Personhood: The Vain and Pointless Quest for a Definition*, in PERSONHOOD AND HEALTHCARE, *supra* note 19, at 71 (asserting that defining “personhood” has been “the guiding question in philosophy since Socrates”).

183. Beauchamp, *supra* note 20, at 59–60.

184. See, e.g., IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 35–40 (James W. Ellington trans., 3d ed. 1993) (defining rationality as the capacity required for personhood); Samuel Dale, *Personhood, Critical Interests, and the Moral Imperative of Advance Directives in Alzheimer’s Cases*, VOICES BIOETHICS, Jan. 2021, at 1, 4 (suggesting Mill required both rational and affective capacities to “maximize[] their holistic goods, not only the sum of their experience of pleasure and pain”); John Harris, *The Concept of the Person and the Value of Life*, 9 KENNEDY INST. ETHICS J. 293, 307 (1999) (arguing that the relevant capacity is the capacity to “valu[e] its own existence”).

185. See *supra* Section I.A.

186. JORGENSEN, *supra* note 48, at 49.

187. See KANT, *supra* note 184, at 28–29.

188. See Dale, *supra* note 184, at 4.

philosophical personhood under most theories. The doctrine of capacity is not, then, *coterminous* with personhood. But by determining access to decision-making rights based on the results of cognitive testing, the doctrine of capacity is *grounded* in a cognitive theory of personhood.<sup>189</sup>

The constructs of personhood and personal identity are conceptually related. This is because to be the *same person* one was, one must *be a person*; personhood is ontologically prior to personal identity, and personal identity assumes personhood.<sup>190</sup> Because personhood is necessary but not sufficient to establish personal identity, cognitive testing will have a role in a doctrine grounded in personal identity, discussed at greater length below.<sup>191</sup>

Moreover, although they are related, the philosophy of personhood is distinct from the philosophy of personal identity—it is a *different inquiry* to ask whether an entity is *currently* entitled to a certain level of moral concern than it is to ask whether that entity is qualitatively the same as it was at another time.<sup>192</sup> It is not the case, then, that the doctrine’s apathy towards narrative facts is simply the result of disagreement about the *content* of the metaphysical category of personhood.<sup>193</sup> Instead, it is a disjuncture about the appropriate category to be analyzing: we ought to look to personal identity; the doctrine tells us to look to personhood. This misalignment is the fundamental error of the capacity doctrine.

#### B. *Personal Identity and the Private Law*

The fundamental philosophical error of the capacity doctrine is that it is grounded in a cognitive theory of personhood where it should be grounded in a narrative theory of personal identity. This claim has two steps. The first is that personal identity, not personhood, is the appropriate philosophical category

189. Consider, perhaps, an analogy to the way in which legal philosopher Adolf Reinach argues that positive private law is *grounded in* various ontological categories but not *coterminous* with them. See ADOLF REINACH, *THE APRIORI FOUNDATIONS OF THE CIVIL LAW* 131 (John F. Crosby trans., 2021).

190. See, e.g., MCMAHAN, *supra* note 160, at 5.

191. See *infra* Section III.C.

192. See, e.g., MCMAHAN, *supra* note 160, at 5 (stressing that the inquiry of “what is necessarily involved in our being or remaining persons” may be different than that of “our continuing to exist”); see also Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL’Y 93, 128 (2011) (observing that “Professor Radin’s example of the home as property for personhood equates personhood with personal identity”).

193. Some philosophers and scholars have argued, in effect, that one of the capacities underlying personhood is the capacity for continuity or personal identity. See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 963 (1982) (“Another classical view of the person makes its essential attributes self-consciousness and memory.”). But while this view may make conclusions about personhood and personal identity *coterminous* as a practical matter, personhood and personal identity are analytically and metaphysically distinct concepts. See *supra* text accompanying note 192.

through which to adjudicate access to private law. The second is that the content of personal identity is narrative.

This section evaluates the first claim. It argues that personal identity is what matters for two reasons. First, as a matter of substantive doctrine, the private-law fields in which capacity is implicated are concerned with personal identity. Second, the core normative commitment of private law is to promote human flourishing through private ordering; a basic commitment to facilitating private aspirations, desires, intuitions, and impulses. And my recent empirical research suggests that seniors, the population that most frequently interacts with the capacity doctrine, think personal identity is what matters in this context.

### 1. Substantive Private Law and Personal Identity

There are two essential bodies of private law that we have been analyzing in this Article—contracts and property.<sup>194</sup> After all, marriage law is a kind of contract law<sup>195</sup> that implicates property law.<sup>196</sup> Estate law, similarly, is a subsidiary of property law.<sup>197</sup> Finally, trusts occupy an ambiguous position between the doctrines of property and contract.<sup>198</sup>

194. The doctrine of capacity does not play a similar thresholding role in tort law. *See, e.g.*, Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 *LAW & PSYCH. REV.* 1, 1 (1995) (“A mentally disabled tort defendant is held to that requisite standard of care without regard to the disability’s effect on his ability to comply.”).

195. *See, e.g.*, Kaiponanea T. Matsumura, *Breaking Down Status*, 89 *WASH. U. L. REV.* 671, 683–84 (2021); Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 *UNBOUND* 1, 18 (2010) (observing that marriage is “permeated by contract”); *see also* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 *VA. L. REV.* 1225, 1233–34 (1998) (collecting scholarship on marriage law as contract law).

196. *See, e.g.*, Charlotte K. Goldberg, *Opting In, Opting Out: Autonomy in the Community Property States*, 72 *LA. L. REV.* 1, 1 (2011). It is possible that not all rights are as identity-dependent in the relevant respect as those of contract and property. In particular, it is possible that the right to choose whether to live or die is not identity-dependent and turns only on whether the entity deciding is a person. This could justify a standard of capacity based in personhood for some kinds of decisions, such as healthcare decisions. This Article is concerned with capacity in private law, where it interfaces directly with identity-dependent substantive doctrines.

197. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (“Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional.”); Emily Hoenig, *Why Can’t We All Just Cher?: Drag Celebrity Impersonators Versus an Ever-Expanding Right of Publicity*, 38 *CARDOZO ARTS & ENT. L.J.* 537, 543 n.28 (2020) (“[T]he right of testamentary disposition is essential to the idea of private property.”).

198. *See, e.g.*, Allison Anna Tait, *Keeping Promises and Meeting Needs: Public Charities at a Crossroads*, 102 *MINN. L. REV.* 1789, 1792 (2018) (“[T]rust law has roots in both contract and property.”); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 *CORNELL L. REV.* 621, 628 (2004) (“Trust law is most frequently classified as a species of property law.”); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 627 (1995) (“Trusts are contracts.”).

Contract law is, at its core, preoccupied with personal identity.<sup>199</sup> It is fundamentally committed to holding persons in the future to promises that they make now (or holding persons now to promises they made in the past).<sup>200</sup> After all, the only person bound by a contract is the one who made it.<sup>201</sup> When we ask whether a contract can be enforced against a particular person, our primary concern is whether that person is the one who entered into the contract, not whether they are a person at all.<sup>202</sup> Indeed, it is *never* enough in contract law to simply ask whether the individual entering into or enforcing a contract is a person. We must also ask whether they are the *same* person as they were at some other time. Imagine, for instance, that I enter into a contract to deliver 8,000 widgets next year. In the meantime, suppose I'm killed and replaced by an imposter. The imposter would not be bound to deliver 8,000 widgets. He is a different person than me, he never agreed to do it, and he was never a party to the contract. His personhood is immaterial. Although the right to contract is a right of personhood, rights regarding *particular* contracts (which is what contract law is about) are necessarily about personal identity.

Other scholars have noted the essential identity-dependence of contract law in different ways. For example, Professor Kaiponanea Matsumura analyzed the use of the contractual defense that the party against whom enforcement is sought is no longer the same person as they were when they entered into the contract.<sup>203</sup> He noted that a core commitment of contract law is the principle that “the contracting self” may bind “his future self”<sup>204</sup> and that contract law “generally assumes the existence of a continuous personal identity.”<sup>205</sup> Professors Elizabeth Scott and Robert Scott,<sup>206</sup> Marjorie Maguire Shultz,<sup>207</sup>

199. See generally Matsumura, *Binding Future Selves*, *supra* note 22 (providing background on the nature of contract law).

200. See, e.g., FRIED, *supra* note 26, at 17 (“[S]ince a contract is first of all a promise, the contract must be kept because the promise must be kept.”).

201. See, e.g., *Mendez v. Hampton Ct. Nursing Ctr., LLC*, 203 So. 3d 146, 149 (Fla. 2016) (“The third-party beneficiary doctrine does not permit two parties to bind a third—without the third party’s agreement . . .”).

202. See, e.g., *Sanchez v. Mondy*, 936 So. 2d 35, 38–39 (Fla. Dist. Ct. App. 2006) (finding erroneous admission of evidence purporting to show that the defendant was the same person as the one who had entered into the contract was not harmless); cf. *Shay v. Aldrich*, 790 N.W.2d 629, 659 (Mich. 2010) (noting that individuals who are not the same person that agreed to the contract may only sue to enforce it where they “stand[] in the shoes of the original promisee”).

203. Matsumura, *Binding Future Selves*, *supra* note 22, at 102–20.

204. *Id.* at 75.

205. *Id.* at 81.

206. Scott & Scott, *supra* note 195, at 1247 (describing as “the very essence of contract” the proposition that courts will enforce a contract against the same person that entered into it notwithstanding their present regret).

207. Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 214 (1982) (arguing that the *sine qua non* of contractual private ordering is that “yesterday’s legally binding private choice overrides today’s contrary private choice” by the same person).

Gregory Klass,<sup>208</sup> Richard Posner,<sup>209</sup> and Allan Farnsworth<sup>210</sup> have also observed the way in which contractual enforcement relies on an implicit claim of personal identity.

Property, too, is an identity-dependent right.<sup>211</sup> As I've recently explained at greater length elsewhere,<sup>212</sup> this is because when we consider whether an individual may *exercise* a particular property right—say, to dispose of property by will—we must ask not only whether the decision maker *is* a person but whether they are *the* person that owns the particular piece of property.<sup>213</sup> And whether an individual owns a particular piece of property is primarily a question of personal identity—whether the claimed owner is the same person that purchased or was given the property at some prior time.<sup>214</sup> That is, if I own a home and am murdered in it, my murderer has no claim to my home, despite being a person, and being inside it. He is not me, and it is not his. This identity-dependence can be further seen in the law of adverse possession, under which a *given individual's* possession of property must be *continuous* for the statutory period of time in order for an ownership interest to perfect.<sup>215</sup> If the identity of the individual possessing property against the true owner is interrupted during that time, the adverse possession clock resets (absent privity, which in many ways is an artificial legal identity).<sup>216</sup> In other words, as with contract law, while

208. Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1727 (2008) (describing contract law as “an act of *self*-legislation in which the parties create new legal obligations for themselves” (emphasis added)).

209. Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 LEGAL THEORY 23 (1997).

210. E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 26 (1998) (observing that the argument that a “person may evolve into a ‘later self’” and thereby avoid contractual enforcement “has had no significant impact on courts”).

211. See James Toomey, “*As Long as I’m Me*”: *From Personhood to Personal Identity in Dementia and Decision-Making*, 4 CANADIAN J. BIOETHICS 57, 62–64 (2021).

212. See *id.*

213. See, e.g., Patricia A. McCoy & Susan M. Wachter, *Why the Ability-To-Repay Rule Is Vital to Financial Stability*, 108 GEO. L.J. 649, 659 (2020) (“[I]nvestors cannot sell homes that they do not own.”); Miriam A. Cherry, *A Tyrannosaurus-Rex Aptly Named “Sue”: Using a Disputed Dinosaur To Teach Contract Defenses*, 81 N.D. L. REV. 295, 306 (2005) (describing as a “fundamental property and contract law principle” that “in general, you cannot sell what you do not own”); see also *Moore & Co. v. Robinson*, 62 Ala. 537, 543 (1878) (“Mr. Benjamin, in his excellent book on sales of personal property, says: ‘In general, no man can sell goods, and convey a valid title to them, unless he be the owner, or lawfully represent the owner. *Nemo dat, quod non habet.*’” (quoting J.P. BENJAMIN, *BENJAMIN’S TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY* § 6 (1868))).

214. See, e.g., *Kerby v. Ogletree*, 313 S.W.2d 325, 327 (Tex. Ct. App. 1958) (describing the dispositive question for establishing present ownership by chain of title as whether “S.H. Wills and S.H. Wells were one and the same person”).

215. See, e.g., 3 AM. JUR. 2D ADVERSE POSSESSION § 9 (2021).

216. See *id.* § 80 (“An interruption of the continuity of possession of the adverse claimant will cease the running of the prescribed period for a claim of adverse possession.”); *id.* § 72 (“[S]uccessive possessions cannot be tacked for the purpose of showing a continuous adverse possession in the absence of privity of estate or a connection between the successive occupants.”).

the right to own property in general may be incident to personhood, the question of whether a particular individual *may exercise* a property right with respect to a particular piece of property is always a question of personal identity.

Further, in a seminal article,<sup>217</sup> Professor Margaret Jane Radin illustrated the essential identity-dependence of property law in the extent to which property *itself* can facilitate the construction of personal identity: “Most people possess certain objects they feel are almost part of themselves. These objects are . . . part of the way we constitute ourselves as continuing personal entities in the world.”<sup>218</sup>

Thus, because the substantive doctrines of private law are concerned with the exercise of identity-dependent rights, the threshold doctrine of capacity should be grounded in the philosophical construct of personal identity.

## 2. Human Flourishing, Private Ordering, and Personal Identity

Moreover, an understanding of capacity as rooted in personal identity is consistent with the underlying normative aspirations of private law. Private law, and in particular the law of contracts and property, exists to facilitate human flourishing through private ordering, and is based on the normative presumption that it is generally best to permit people to make decisions for themselves.<sup>219</sup> From this perspective, presumptions of law ought to reflect widespread intuitions.<sup>220</sup>

The law’s understanding of decision-making capacity as rooted in cognitive theories of personhood does not reflect widespread intuitions. Instead, my recent empirical work suggests that most seniors—perhaps something approaching a consensus of seniors—think of the question of when the law should intervene in their decision-making in terms of personal identity.<sup>221</sup> Indeed, many seniors “describe[] the point at which they would no

217. Jones, *supra* note 192, at 94 (listing major citations of Professor Radin’s article).

218. Radin, *supra* note 193, at 959. Radin refers to this claim as one about personhood rather than personal identity, but in focusing on the *continuity* of selves rather than the cognitive preconditions of being an entity entitled to the highest moral concern, her argument supports the notion that property is concerned with personal identity, not personhood, as I have defined those terms in this Article. Professor Jeffrey Douglas Jones has noticed the confusing terminology in this context. See Jones, *supra* note 192, at 128 (“I believe Professor Radin’s example of the home as property for personhood equates personhood with personal identity.”). Radin’s reference to personhood appears to arise from her reliance on Hegel’s philosophically idiosyncratic use of “personhood.” See Radin, *supra* note 193, at 971–73.

219. See *supra* text accompanying notes 26–27; see also HAROLD C. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 31 (1961) (“Command is slavery; contract is freedom.”); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 367 (1921) (“[I]t was a corollary of the philosophy of freedom and individualism that the law ought to extend the sphere and enforce the obligation of contract.”).

220. See *supra* text accompanying note 28.

221. See Toomey, *Perspectives of Seniors*, *supra* note 29, at 106.

longer want to be permitted to make their own decisions as the point at which they were no longer ‘themselves’ or ‘the same person,’” including saying that they would not want to be permitted to make decisions when they were “becoming someone who is not me anymore,” or when they lost the things that “matter[] in terms of who you are.”<sup>222</sup> Ninety-six percent of a study population of seniors, drawn nationwide from the online database Amazon Mechanical Turk (n = 235), expressed that they would not want to be permitted to change their will after losing characteristics that had to do with their sense of life story, and close analysis of qualitative responses revealed that a near-consensus of the study population expressed the significance of their personal identity in some way.<sup>223</sup> Therefore, to the extent that private law’s understanding of decision-making capacity is motivated by a normative commitment to facilitating decision-making in patterns of ordinary preferences, it should be based in personal identity rather than personhood.

Of course, the fact that most people have certain normative intuitions does not make those intuitions right, nor compel their codification in law.<sup>224</sup> But this limitation on the normative salience of majoritarian moral understandings is less significant in our design of private law, based on the fundamental premise of facilitating human flourishing through private ordering, than in other areas of law. In contrast to, for instance, the criminal law, where exogenous normative commitments about individual rights and the role of government necessarily play a role in legal design,<sup>225</sup> there is a much broader consensus that the whole point of private law is to legalize the aspirations of ordinary people.<sup>226</sup> If ordinary people think of the point at which their personal identity is disrupted as the threshold past which they no longer want their decisions to be recognized by law, then the doctrine should account for this.

### C. *Personal Identity as Narrative Continuity*

The final piece of the philosophical puzzle of the doctrine of capacity is that, in distinguishing between the two *prima facie* plausible stories before it, the court would tell us something about the story of the individual decision

222. *See id.*

223. *See* Toomey, *How To End Our Stories*, *supra* note 29, at 40, 43–51.

224. *See, e.g.*, Roseanna Sommers, *Commonsense Consent*, 129 *YALE L.J.* 2232, 2301 (2020) (“The larger problem with ‘having criminal law adopt liability and punishment rules that track community views’ is that community views can be wrong. As previous research amply demonstrates, moral intuitions can be tribal, short-sighted, and cruel.” (quoting Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 *NW. U. L. REV.* 1565, 1580 (2017))).

225. *See id.* (rejecting the argument that criminal law doctrines should necessarily conform to majoritarian normative intuitions).

226. *See* RAWLS, *supra* note 149, at 268 (arguing that the doctrines of private law are “framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints”).

maker, something about whether the decision follows from their story or disrupts it. This is a claim about the *content* of personal identity—what it *means* to maintain a continuous personal identity—specifically, it is the claim that personal identity is constituted by narrative continuity.

The theories of personal identity that situate identity in self-narrative can be understood as making two claims—an empirical claim and a normative one.<sup>227</sup> The empirical claim is that it is an inherent characteristic of persons<sup>228</sup> to structure ourselves in narrative ways. The normative claim is that this narrative structure is ethically significant and justifies looking to self-narratives to answer ethical (and legal) questions, such as whether a decision is entitled to respect in law. Recent research in a broad range of fields suggests both claims are right.

### 1. Human Psychology and Life Stories

As for the empirical claim, some have objected to the narrative theory of personal identity on the ground that narrative is not a universal mechanism for the organization of thought and, in the case of at least one philosopher, by claiming not to personally experience his life as a story at all.<sup>229</sup> However, psychology tells us that, in fact, people *do* generally think of their lives as stories, and anthropology tells us this phenomenon is universal.

Over the past thirty years, psychological research has shown that “[p]eople think about their own lives, and the lives of others, in narrative terms, as stories unfolding over time.”<sup>230</sup> Indeed, young children begin to relate experiences as simple stories between the ages of two and three, coinciding with and connected to the beginning of development of the concept of the self.<sup>231</sup> Throughout

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227. Galen Strawson, *Against Narrativity*, 17 *RATIO* 428, 428 (2004) (“There is widespread agreement that human beings typically see or live or experience their lives as a narrative or story of some sort, or at least as a collection of stories. I’ll call this the *psychological Narrativity thesis* . . . . The psychological Narrativity thesis is often coupled with a normative thesis, which I’ll call the *ethical Narrativity thesis*.”).

228. As an *empirical* claim, this is made about the adult human persons that are most uncontroversially persons. See, e.g., Kittay, *supra* note 107, at 102 (“We can say that ‘we’ are persons.”). But the ethical claim justifies extending constructs of personhood and personal identity to entities capable of narrative formation, and therefore reinforces our preoccupation with the empirical question of whether humans are inevitably narrative-forming.

229. See Strawson, *supra* note 227, at 433 (“I have absolutely no sense of my life as a narrative with form, or indeed as a narrative without form. Absolutely none.”).

230. Dan P. McAdams, *Narrative Identity: What Is It? What Does It Do? How Do You Measure It?*, 37 *IMAGINATION COGNITION & PERSONALITY* 359, 364 (2018).

231. See Monisha Pasupathi & Emma Mansour, *Adult Age Differences in Autobiographical Reasoning in Narratives*, 42 *DEVELOPMENTAL PSYCH.* 798, 799 (2006) (“The ability to construct simple stories about single episodes emerges between 18 months and 3 years, roughly.”); see also Robyn Fivush & April Schwarzmueller, *Children Remember Childhood: Implications for Childhood Amnesia*, 12 *APPLIED COGNITIVE PSYCH.* 455, 470 (1998) (“[B]etween the ages of 2 and 5 years, there is a gradual development of narrative skills, and as these skills develop so too do children’s ability to form and retain enduring autobiographical memories.”).

childhood and adolescence, storytelling skills develop (coincident with growing memory-retrieval skills and sense of self),<sup>232</sup> and by late adolescence or early adulthood, people come to think of themselves in terms of a life story,<sup>233</sup> through which new events are mediated, understood, and made sense of.<sup>234</sup> These stories—and the sense of narrative identity with which they are associated—continue to develop throughout adult life<sup>235</sup> and into old age.<sup>236</sup>

The empirical phenomenon of human beings thinking in stories and thinking of themselves as stories is not limited to the contemporary West, and, indeed, has been found ubiquitously across cultures. For instance, in his seminal meta-study of human universals, anthropologist Donald Brown found that narrative is present in every culture that has been studied.<sup>237</sup> And many ethnographies have revealed that individuals across time and culture think of themselves as stories,<sup>238</sup> research that has been corroborated by empirical studies

232. See Elaine Reese, Chen Yan, Fiona Jack & Harlene Hayne, *Emerging Identities: Narrative Self from Early Childhood to Early Adolescence*, in NARRATIVE DEVELOPMENT IN ADOLESCENCE: CREATING THE STORIED SELF 23, 36 (Kate C. McLean & Monisha Pasupathi eds., 2010) (reporting storytelling insight and the development of autobiographical narratives in a cohort of early adolescents); Tilmann Habermas & Cybèle de Silveira, *The Development of Global Coherence in Life Narratives Across Adolescence: Temporal, Causal, and Thematic Aspects*, 44 DEVELOPMENTAL PSYCH. 707, 715–17 (2008) (finding a nearly linear progression of the coherence of life stories in cohorts of eight-, twelve-, sixteen-, and twenty-year-olds).

233. See Py Liv Eriksson, Maria Wängqvist, Johanna Carlsson & Ann Frisén, *Identity Development in Early Adulthood*, 56 DEVELOPMENTAL PSYCH. 1968, 1979 (2020) (finding the development of coherent and stable but revisable life stories in young adults); see also Christin Köber, Florian Schmiedek & Tilman Habermas, *Characterizing Lifespan Development of Three Aspects of Coherence in Life Narratives: A Cohort-Sequential Study*, 51 DEVELOPMENTAL PSYCH. 260, 267 (2015) (“This first longitudinal study of the development of the life story supports the theory that global coherence in life narratives emerges in adolescence.”).

234. See DAN P. MCADAMS, *THE STORIES WE LIVE BY: PERSONAL MYTHS AND THE MAKING OF THE SELF* 37 (1993) [hereinafter MCADAMS, *THE STORIES WE LIVE BY*] (“Through our personal myths, we help to create the world we live in, at the same time that it is creating us.”); see also Ewa Odachowski, Jerzy Trebiński & Monika Prusik, *The Impact of Self-Narrative Framing of a Close Person’s Sudden Death on Coping with the Meaning in Life*, 24 J. LOSS & TRAUMA 293, 315 (2019) (finding narratives to be an effective process by which people make sense of trauma).

235. See Pasupathi & Mansour, *supra* note 231, at 802 (discussing growth of autobiographical reasoning and coherence of life stories through middle age).

236. See Kate C. McLean, *Stories of the Young and the Old: Personal Continuity & Narrative Identity*, 44 DEVELOPMENTAL PSYCH. 254, 260–61 (2008) (“Interestingly, older adults are also experiencing a great amount of objective change in terms of physical, cognitive, occupational, and relational transitions, . . . yet their narratives focused on stability.”); Dan P. McAdams, Ed de St. Aubin & Regina L. Logan, *Generativity Among Young, Midlife, and Older Adults*, 8 PSYCH. & AGING 221, 226–27 (1993) (“[O]lder adults show surprisingly high scores on generative commitments and narration . . .”).

237. See DONALD E. BROWN, *HUMAN UNIVERSALS* 132 (1991) (noting how “universal people” use narrative “to explain how things came to be and to tell stories”).

238. See, e.g., Amy Bazuin-Yoder, *Positive and Negative Childhood and Adolescent Identity Memories Stemming from One’s Country and Culture-of-Origin: A Comparative Narrative Analysis*, 40 CHILD YOUTH CARE F. 77, 77, 82–88 (2011) (presenting case studies of the development of narrative identity among Puerto Rican and North Korean immigrants to the western United States and concluding that

finding consistent patterns of the development of narrative identity in cross-cultural populations.<sup>239</sup> Moreover, anthropologist and literary scholar Michelle Scalise Sugiyama has studied the stories told in a variety of cultures and found universal patterns in their structures.<sup>240</sup>

Phenomena found universally among human populations are often thought to have a biological basis,<sup>241</sup> and indeed, neuroscientists have recently found consistent patterns of brain activation when people relate and interpret personal anecdotes, regardless of the language in which the stories are told,<sup>242</sup> and other scientists have located suggestions of the possible origins of narrative identity in higher apes.<sup>243</sup> For these reasons, there is now a broad consensus that narrative, including a self-conception in narrative form, is a biologically-grounded universal feature of the human mind.<sup>244</sup> As philosopher Alasdair

“[n]arrative is a universal method of experiencing and sharing who we are”); FARZANA GOUNDER, *NARRATIVE AND IDENTITY CONSTRUCTION IN THE PACIFIC ISLANDS* 1 (2015) (discussing narrative identity among several different language groups in the Pacific Islands).

239. See Elaine Reese, Ella Myftari, Helena M. McAnally, Yan Chen, Tia Neha, Qi Wang, Fiona Jack & Sarah-Jane Robertson, *Telling the Tale and Living Well: Adolescent Narrative Identity, Personality Traits, and Well-Being Across Cultures*, 88 *CHILD DEV.* 612, 612 (2017) (finding consistent patterns in adolescent life-story development in New Zealand Maori, Chinese, and European cohorts); see also Neşe Hatiboğlu & Tilmann Habermas, *The Normativity of Life Scripts and Its Relation with Life Story Events Across Culture and Subcultures*, 24 *MEMORY* 1369, 1376–80 (2016) (discussing similarities in form and differences in content of life stories across several cultures).

240. See Michelle Scalise Sugiyama, *Reverse-Engineering Narrative: Evidence of Special Design*, in *THE LITERARY ANIMAL* 177, 179–81 (Jonathan Gottschall & David Sloan Wilson eds., 2005) (“In my own reading of the oral narrative of a wide range of foraging peoples, I have yet to encounter a culture whose stories do not exhibit the same structural features as Western narrative.”). See generally PATRICK COLM HOGAN, *THE MIND AND ITS STORIES: NARRATIVE UNIVERSALS AND HUMAN EMOTION* (2003) (discussing “profound, extensive, and surprising universals in literature that are bound up with universals of emotion”).

241. See, e.g., JONATHAN GOTTSCHALL, *THE STORYTELLING ANIMAL: HOW STORIES MAKE US HUMAN* 30 (2012) (“The fact that story is a human universal is strong evidence of a biological purpose.”).

242. See Morteza Dehghani, Reihane Boghrati, Kingson Man, Joe Hoover, Sarah I. Gimbel, Ashish Vaswani, Jason D. Zevin, Mary Helen Immordino-Yang, Andrew S. Gordon, Antonio Damasio & Jonas T. Kaplan, *Decoding the Neural Representation of Story Across Languages*, 38 *HUM. BRAIN MAPPING* 6096, 6096–106 (2017) (finding patterns of brain activation in telling and interpreting personal anecdotes across English, Mandarin, and Farsi speaking populations).

243. See Dorte Berntsen, *Narrative Identity—Uniquely Human?*, 3 *EVOLUTIONARY STUD. IMAGINATIVE CULTURE* 27, 27 (2019).

244. See Dan P. McAdams, *‘First We Invented Stories, Then They Changed Us’: The Evolution of Narrative Identity*, 3 *EVOLUTIONARY STUD. IMAGINATIVE CULTURE* 1, 1 (2019) (“Storytelling would appear to be an ingrained feature of human nature.”); PAUL COBLEY, *NARRATIVE* 1 (2014) (“[A]s the latest research demonstrates, humans have a compulsion to narrate.”); Steven Pinker, *Toward a Consilient Study of Literature*, 31 *PHIL. & LIT.* 162, 162 (2007) (“People tell stories.”); E.O. Wilson, *Forward from the Scientific Side*, in *THE LITERARY ANIMAL*, *supra* note 240, at ix (“The mind is a narrative machine.”); GOTTSCHALL, *supra* note 241, at 15 (“Humans are creatures of story, so story touches nearly every aspect of our lives.”); see also BARBARA HARDY, *TOWARD A POETICS OF FICTION* 5 (1968) (“In order really to live, we make up stories about ourselves and others, about the

MacIntyre observed in 1984,<sup>245</sup> and literary scholar Jonathan Gottschall reiterated more recently, humans are storytelling animals.<sup>246</sup>

## 2. Life's Stories and Meaning

The narrative theory of personal identity requires another step before we may defensibly adopt it in law—the ethical claim that the narratives we form matter and are worth protecting.<sup>247</sup> Indeed, we could imagine a world in which it were true that people naturally formed narratives—in the same way that we naturally form tribes—without there being anything ethically significant about this fact.<sup>248</sup> If that were true, our life stories could not justify the significance the doctrines of private law assume in the construct of personal identity.<sup>249</sup> But narrative is not merely any evolved quirk—bipedalism, bodily hairlessness, or the lack of a baculum. It is, by its *nature*, of ethical significance. As such, it is a worthy foundation for capacity, the gatekeeper of the private law.

Narrative is an essential vector of meaning-making in human life.<sup>250</sup> To tell a story is to forge from the raw material of reality's happenings purpose, intention, coherence, and morals.<sup>251</sup> It is to find themes of universal significance in particularities.<sup>252</sup> Without story, the occurrences of the universe or human

personal as well as the social past and future.”); Fritz Heider & Marianne Simmel, *An Experimental Study of Apparent Behavior*, 57 AM. J. PSYCH. 243, 251 (1944) (demonstrating the inclination of the human mind to organize information into narrative form).

245. MACINTYRE, *supra* note 22, at 216 (“[M]an is in his actions and practice, as well as in his fictions, essentially a story-telling animal.”).

246. GOTTSCHALL, *supra* note 241, at xvii.

247. See Strawson, *supra* note 227, at 428 (“[T]he *ethical Narrative thesis* . . . states that experiencing or conceiving of one’s life as a narrative is a good thing.”).

248. See, e.g., STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 150 (2002) (discussing the “naturalistic fallacy” of reaching normative conclusions on the basis of empirical claims).

249. See *supra* Section II.B.

250. See, e.g., GOTTSCHALL, *supra* note 241, at 138 (“Story—sacred and profane—is perhaps the main cohering force in human life.” (emphasis added)); see also Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2274 (1989) (describing narrative as a “basic cognitive impulse” to “make meaning in experience”); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983) (“The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative.”).

251. See COBLEY, *supra* note 244, at 7 (“[A]s soon as we begin to think a little bit more deeply about the issue, we might easily reach the conclusion that the whole storytelling impulse is illusory: catching the bus, going out with friends, performing mundane tasks at work, watching football—none of these stories come to fruition as stories unless we ‘choose’ to impose some kind of narrative form on them.”); see also Cover, *supra* note 250, at 10 (“Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.”).

252. See GOTTSCHALL, *supra* note 241, at 55 (“No matter how far we travel back into literary history, and no matter how deep we plunge into the jungles and badlands of world folklore, we always find the same astonishing thing: *their stories are just like ours.*” (emphasis added)); see also RICOEUR, *supra* note 22, at 66 (“These [temporal characteristics] allow us to call plot, by means of generalization, a synthesis of the heterogeneous.”).

affairs do not mean *anything*; it is only through the creative, the *human*, act of story that they can come to mean.<sup>253</sup> A factual, sequential description of a certain collection of atoms at a certain time and place is meaningless; the story of the rise and fall of Napoleon Bonaparte is one of ambition, triumph, hubris, folly, love, betrayal.<sup>254</sup> This is what the philosopher Paul Ricœur meant when he wrote that “time becomes human time to the extent that it is organized after the manner of a narrative; narrative, in turn, is meaningful to the extent that it portrays the features of temporal experience,”<sup>255</sup> a principle he found also in the work of Augustine<sup>256</sup> and Aristotle.<sup>257</sup>

If stories make meaning, it follows that life stories make lives meaningful.<sup>258</sup> As with any story, life stories turn the sequential happenings of our experiences into a cohesive whole, a whole with themes, morals, and purpose. And indeed, psychological research shows that people subjectively find meaning in their life stories and in processing experiences through them.<sup>259</sup> To claim that humans make sense of their lives in narrative form, then, is not only a descriptive claim about our biology. It is, not to put too fine a point on it, necessarily a claim about the meaning of life.

With this observation in hand, we can return to the basic purposes of private law. Private law exists to promote human flourishing through private ordering.<sup>260</sup> An essential part of our flourishing is our construction of identities through the stories of our lives. Therefore, the private-law doctrine of capacity ought to take account of those stories.

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253. See COBLEY, *supra* note 244, at 7–8 (“A sequence of any kind might exist in the world, but if that sequence is to consist of meaningful relations it requires human input; it needs to be understood as being made up of signs.”); see also RICOEUR, *supra* note 22, at 65 (“In short, emplotment is the operation that draws a configuration out of a simple succession.”).

254. See generally ANDREW ROBERTS, *NAPOLEON: A LIFE* (2014) (describing the life of Napoleon Bonaparte).

255. RICOEUR, *supra* note 22, at 3.

256. See *id.* at 5–30 (analyzing Augustine’s *Confessions*).

257. *Id.* at 31–51 (analyzing Aristotle’s *Poetics*).

258. See MCADAMS, *THE STORIES WE LIVE BY*, *supra* note 234, at 11 (“[T]hrough our personal myths, each of us discovers what is true and what is meaningful in life.”); GOTTSCHALL, *supra* note 241, at 161 (“A life story is a ‘personal myth’ about who we are deep down—where we come from, how we got this way, and what it all means.”).

259. See Odachowski et al., *supra* note 234, at 314 (“These results can be interpreted as a manifestation of the healing function of self-story framing of a difficult life event.”); see also Dan P. McAdams & Kate C. McLean, *Narrative Identity*, 22 *CURRENT DIRECTIONS PSYCH. SCI.* 233, 233 (2013) (“Research into the relation between life stories and adaption shows that narrators who find redemptive meanings in suffering and adversity, and who construct life stories that feature themes of personal agency and exploration, tend to enjoy higher levels of mental health, well-being, and maturity.”).

260. See *supra* notes 26–27 and accompanying text.

### III. A NARRATIVE THEORY OF CAPACITY IN PRIVATE LAW

The current cognitive doctrine of capacity in private law is out of step with its purposes. As such, it ought to be reformed to incorporate the ethical significance of narrative personal identity by statute or adjudication. This part outlines a new narrative doctrine of capacity. The doctrinal formulation would be: “A decision that does not follow in a narrative structure from the story of an individual’s life will not be recognized in law.” First, this part draws on insights from psychology, literary theory, and philosophy to distill a test of narrative. Next, it details the procedural rules that would govern the application of the narrative test. Finally, it discusses the role cognitive testing would continue to play in the new doctrine, properly situated to determine in extreme cases that an individual cannot be the same person that they were because they may not be a person at all.

#### A. *The Narrative Doctrine*

A life story is a subjective construct.<sup>261</sup> It is a fact about the way we *experience* the world and our lives. We therefore cannot directly litigate whether a particular decision follows from an individual’s subjective story.<sup>262</sup> And because there is ample psychological evidence that people embellish their stories to render themselves the protagonist, there may be good reasons not to *directly* embed *subjective* life stories in law.<sup>263</sup> But life stories are the stuff of personal identity, and as such, they should be the *basis* of the private-law doctrine of capacity.<sup>264</sup>

A life story is objectively *a* story. In other words, regardless of their contents in the minds of their possessors, life stories *objectively* follow the structure of story in general; they have a narrative structure that can be understood and characterized from a third-person perspective. Another way of thinking about this is that implicit in the phenomenological claim of narrative identity is a behavioral claim—we behave in ways that fit into a narrative structure from our subjective life stories, which roughly cohere to the objective stories others would tell about us.<sup>265</sup> This we can litigate. With an objective

261. See SCHECHTMAN, *supra* note 22, at 95.

262. Cf., e.g., State v. Belleville, 88 A.3d 918, 921 (N.H. 2014) (noting that in the criminal law context, “a culpable mental state must . . . be proven by circumstantial evidence”).

263. See, e.g., GOTTSCHALL, *supra* note 241, at 170 (“[W]e misremember the past in a way that allows us to maintain protagonist status in the stories of our own lives.”).

264. This is so in much the same way that the cognitive doctrine of capacity is based in a cognitive theory of personhood but is not identical to it. See *supra* Section II.A.3.

265. Moreover, as the coherence criterion below, *infra* Section III.A.5, and Marya Schechtman’s understanding of narrative self-constitution makes clear, subjective stories that depart *radically* from the objective story a third-party would tell about the individual are not entitled to moral concern and may not even qualify as stories. See SCHECHTMAN, *supra* note 22, at 119–20 (“A narrative that reveals

definition of story, we can determine whether a particular decision follows as a matter of narrative from the plausible stories of the life of the individual.

A story is an organizational mode that condenses temporally distinct events about persons into an intelligible, coherent, and thematic chain of causation. To break this understanding of narrative into its analytical constituents, a decision would be recognized if it is (1) related to the past and future of that individual's life; and related in an (2) intentional; (3) intelligible; and (4) coherent (5) causal chain that builds to a (6) theme.<sup>266</sup> This section discusses each element of narrative in turn.<sup>267</sup>

### 1. Temporality

Narratives take place across *narrative time*; there is no such thing as an instantaneous story.<sup>268</sup> As Ricoeur wrote, narrative “implies memory.”<sup>269</sup> This suggests that, in order for a proposed decision to follow from a life story, it must bear some relationship to prior events in the individual's story and predicted or hoped-for events of the future. For example, in *Thrash*, where the court

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the narrator to be deeply out of touch with reality is thus undermining of personhood and cannot . . . be identity-constituting.”).

266. Although this test will surely be most commonly applied to cases of narrative *change* (after all, few people challenge decisions that aren't some kind of change), it can be equally applicable in cases where *staying the same* is questionably narrative—for example, if something dramatic has happened that would ordinarily cause a change, but hasn't.

267. In the interest of theoretical completeness, in addition to the foregoing six elements, stories are creatures of language, and in order to have the qualifying narrative structure, a decision must be expressible in language. See, e.g., James Paul Gee, *A Linguistic Approach to Narrative*, 1 J. NARRATIVE & LIFE HIST. 15, 15 (1991) (analyzing the linguistic structure of narrative form); COBLEY, *supra* note 244, at 8, 34 (describing that in order to constitute a narrative, a sequence “needs to be understood as being made up of signs,” and that “[w]hat is evident here is a view of the impulse to narrative organization as fundamental to humans, a reflection of the minute processes, pairings, oppositions and similarities, that make a language possible”); RICOEUR, *supra* note 22, at 54 (arguing that “temporality is brought to language to the extent that language configures and refigures temporal experience”). Indeed, it appears that the narrative structure of our minds arose coincident with the development of language in the Pleistocene. See, e.g., Michelle Scalise Sugiyama, *Food, Foragers & Folklore: The Role of Narrative in Human Subsistence*, 22 EVOLUTION & HUM. BEHAV. 221, 223 (2001) [hereinafter Scalise Sugiyama, *Food, Foragers & Folklore*] (“While it is impossible to pinpoint the birth of narrative, a number of lines of evidence indicate that it emerged in the Pleistocene.”). It is, however, difficult to imagine instances in which the theoretical requirement that a story need be expressible in language would be outcome-dispositive in legal cases—after all, anything that could be expressed in a courtroom could be expressed in language. For this reason, I do not include a separate criterion of linguistic “expressibility” in the proposed test.

268. See, e.g., COBLEY, *supra* note 244, at 2 (describing narrative as “necessarily bound up with sequence, space and time.”); see also Chantal M. Boucher & Alan Scoboria, *Reappraising Past and Future Transitional Events: The Effects of Mental Focus on Present Perceptions of Personal Impact and Self-Relevance*, 83 J. PERSONALITY 361, 361 (2015) (“Despite these differences, mental simulations of both past and future events can inform current thoughts, feelings, and behaviors in ways comparable to present situations . . . , and they provide material upon which to construct a personal life narrative that incorporates self-knowledge and personal goals.”).

269. RICOEUR, *supra* note 22, at 10.

considered the capacity of an elderly man who had begun a new romantic relationship, if Thrash proffered a decision that bore no relation to events in his past, nor related to his imagined or anticipated future, the law need not recognize it.

## 2. Causation

Narratives are not simply descriptions of temporally-situated sequences—they are an organizational mode about *causation*.<sup>270</sup> Indeed, it is for this essential reason that the narrative doctrine is concerned with the *causes* of decisions, not their substance. That is, “X happened. Later, Y happened”<sup>271</sup> is a description of sequential events, whereas “Y happened because of X” might be a story. At an abstract level, if there were *no causal explanation* for a change, society need not recognize it.<sup>272</sup>

More concretely, the causation criterion has two practical implications for capacity litigation. First, it is important to remember that, although it must be litigated with reference to external evidence, the ultimate goal of this test is to assess the narrative structure of the individual decision maker’s life story—that is, after all, what is constitutive of their personal identity.<sup>273</sup> In litigating whether the causation criterion is met, then, we must consider whether the decision has a cause *from the perspective of the individual*; whether the decision maker does (or could) see the decision as caused. This requirement can do a great deal of work in distinguishing decisions the law must recognize from those it need not. Everything, of course, is *caused* from some external perspective—a decision entirely the result of dementia as much as a decision made for love, but

270. See COBLEY, *supra* note 244, at 5 (“Plot’ is the chain of causation which dictates that these events are somehow linked and that they are therefore to be depicted in relation to each other.”); RICOEUR, *supra* note 22, at 69 (describing “causal connection” as essential to narrative); MACINTYRE, *supra* note 22, at 208 (describing narrative as a “causal and temporal order”); GOTTSCHALL, *supra* note 241, at 102 (describing “relationships of cause and effect” as a fundamental of narrative).

271. The exceptions that prove the rule here are statements like “Before he came down here, it never snowed. And afterwards it did.” EDWARD SCISSORHANDS (20th Century Fox 1990). Such statements *are* stories but are self-consciously structured as sequential descriptions. They are only stories because their *actual* meaning differs from a context-independent reading of their language. After all, what Kim was saying here in context was that it now snows *because* Edward is still alive and heartbroken.

272. This may seem to vitiate the ubiquitous phrase of the contract law of employment (and elsewhere) purporting to authorize decisions with “any or no reason.” See, e.g., Leibowitz v. Party Experience, Inc., 233 A.D.2d 481, 482 (N.Y. App. Div. 1996) (describing an “at will” employee as one that can be terminated for “any or no reason”). But obviously this was always a legal fiction—if the decision was made by human beings, there is a story as to why it was made. See, e.g., Daniel Schwartz, “For Any Reason or for No Reason”—*The Language of an At-Will Employment Relationship*, CONN. EMP. L. BLOG (May 20, 2010), <https://www.ctemploymentlawblog.com/2010/05/articles/for-any-reason-or-for-no-reason-the-language-of-an-at-will-employment-relationship/> [<https://perma.cc/RJX7-XA9D>] (“[E]very action has a ‘reason.’” (emphasis added)). This is distinct from the extent to which a party must *explain* the reason to the court, as discussed *infra* Section IV.B.1.

273. See *supra* Section III.A.

only in the latter circumstances would the decision maker themselves see the decision as caused, and it is only those decisions that the law must recognize. Thus, if Thrash simply woke up one morning wanting to marry Laura, a decision that he did not see as having a cause, the law would not recognize it. If, however, he saw the decision as arising from his love for her, the law would be obligated to recognize it.

Second, stories are causal *sequences* of events; the events of the story have causal relationships *among themselves*.<sup>274</sup> This aspect of the causation criterion too may do real work in litigation. If the only explanation for Thrash's decision were a sequence of events unconnected by causal relationships among themselves—specifically, a sequential series of exogenously caused, unrelated events—the law should not acknowledge it.

### 3. Agency

There are three further qualifications about the nature of causation that distinguish stories from general causal sequences. The first is that the *kind* of causation found in narratives is *intentional*; stories are about persons who are intentional agents, which we would ordinarily call characters.<sup>275</sup> Some people might describe “the ball rolled down the incline because of gravity” as a story, but it wouldn't be much of one.<sup>276</sup> Stories are not about physical causes like the fundamental forces, they are about the causal power of human intent, about characters doing things. The causal structure of stories is mediated through the agency concomitant with personhood, and stories are not deterministic.<sup>277</sup> “The atoms formed an ionic bond because of electrostatic attraction” is not a story; “I insisted she get on the plane because I loved her” is.<sup>278</sup> This qualification may

274. See *supra* note 270 and accompanying text.

275. See, e.g., DAVID HERMAN, *STORYTELLING AND THE SCIENCES OF THE MIND* 31 (2013) (describing “narrative modes of sense making” as entailing “person-oriented strategies for ‘storying the world’”); see Shaun Gallagher & Daniel D. Hutto, *Understanding Others Through Primary Interaction and Narrative Practice*, in *THE SHARED MIND: PERSPECTIVES ON INTERSUBJECTIVITY* 17, 27–28 (Jordan Zlatev, Timothy P. Racine, Chris Sinha & Esa Ikonen eds., 2007) (“[M]aking explicit a person's narrative is the medium for understanding and evaluating reasons and making sense of actions.”); RICOEUR, *supra* note 22, at 3 (“[T]ime becomes human time to the extent that it is organized after the manner of a narrative . . . .”); see also Dan P. McAdams, *The Psychological Self as Actor, Agent, and Author*, 8 *PERSPS. PSYCH. SCI.* 272, 273 (2013) (“[T]he autobiographical author works to formulate a meaningful narrative for life . . . why the actor does what it does, why the agent wants what it wants, and who the self was, is, and will be.”).

276. Cf. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568 (1995) (acknowledging that “[s]ome people might call” a group of people walking from here to there for no reason “a parade, but it would not be much of one”).

277. See, e.g., Odachowski et al., *supra* note 234, at 296 (“A crucial building block of narrative is a coincidence of intentions and complications, or the so-called story plot.”); HERMAN, *supra* note 275, at 29 (noting that “ascriptions of intentions to persons” are inextricably linked with “storytelling practices”).

278. See *CASABLANCA*, *supra* note 33.

do a lot of practical work in cases involving dementia and mental illness. It tells us that where the cause of a decision is not an intentional, human one, where the cause is a degenerative disease, it is not entitled to respect. Where the story is “our son was there for us when no one else was, and we want to reward him,” the law should enforce the decision; where the dispositive causal apparatus is degeneration caused by amyloid- $\beta$  build-up (or whatever),<sup>279</sup> it should not.

#### 4. Intelligibility

Further, narrative causality must be *intelligible*. This criterion does not require that the decision maker (or anyone else) actually understand the causality. Instead, it is a criterion of intelligibility—the kind of causality must be understandable and the place of the decision in the story comprehensible.<sup>280</sup> This criterion, easily met in the mine-run of human decision-making, may also do important work in litigated capacity cases. For example, many individuals with dementia begin to make decisions that are not intelligible to them, unable to understand why they are making the particular decision and how it relates to their past and future.<sup>281</sup> More importantly, some of these decisions are *utterly* unintelligible—unintelligible to the individual making them and to any observer. It is these decisions that don’t meet the intelligibility criterion and the law would not recognize.

#### 5. Coherence

Moreover, the causal sequence of a story is *coherent*, or a plausible account of actual causation.<sup>282</sup> The plausibility demanded by the coherence criterion is

279. See JASON KARLAWISH, THE PROBLEM OF ALZHEIMER’S: HOW SCIENCE, CULTURE, AND POLITICS TURNED A RARE DISEASE INTO A CRISIS AND WHAT WE CAN DO ABOUT IT 229 (2021) (summarizing the growing recognition of heterogeneous etiologies of Alzheimer’s).

280. See, e.g., Emily Postan, *Defining Ourselves, Personal Bioinformation as a Tool of Narrative Self-Conception*, 13 BIOETHICAL INQUIRY 133, 136 (2016) (“[A]lthough it is not supposed or required that we literally or perpetually relate our own self-stories, they must at least be relatable and intelligible to ourselves and to others.”); Kenneth Baynes, *Self, Narrative, and Self-Constitution, Revisiting Taylor’s Self-Interpreting Animals*, 41 PHIL. F. 441, 449 (2010) (“What [is essential] to the narrativity thesis is . . . locating one’s action in a script that ‘makes sense’ of one’s life (to oneself) at any given time.”); MACINTYRE, *supra* note 22, at 217 (“When someone complains—as do some of those who attempt or commit suicide—that his or her life is meaningless, he or she is often and perhaps characteristically complaining that the narrative of their life has become unintelligible to them.”).

281. See SCHECHTMAN, *supra* note 22, at 147 (“Those who suffer from dementia are robbed of precisely the ability to pull their lives together into a coherent story; they become terrified and confused because they cannot put the pieces together.”).

282. See, e.g., GOTTSCHALL, *supra* note 241, at 102 (noting that our narrative self-conceptions allow us to “experience our lives as coherent, orderly, and meaningful”); Kate C. McLean, Monisha Pasupathi, William L. Dunlop, Robyn Fivush, Matthew E. Graci, Jennifer Lodi-Smith, Moin Syed, Jonathan M. Adler, David Drustrup, Jennifer P. Lilgendahl, Dan P. McAdams & Tara P. McCoy, *The Empirical Structure of Narrative Identity: The Initial Big Three*, 119 J. PERSONALITY & SOC. PSYCH. 920,

human plausibility. That is, in adjudicating whether a proffered cause is coherent, we may rely on our basic understandings of human nature, and how human causation works. King Lear's all-too-human desire for flattery is coherent and enforceable;<sup>283</sup> the opposite claim "I want to give her my fortune because she broke my heart" may not be.

To be clear, this coherence requirement is about *plausibility*, not truth. The decision "I disinherited my daughter because she said a mean thing about me" is enforceable even if, in fact, the decider only heard it that way.<sup>284</sup> Thus, the essential inquiry is whether the decision is a plausible, human response to stimulus; if it would be, in other words, a plausible decision if we read a character in a book making it. This substantive, narrative plausibility, then, is importantly distinct from the facial plausibility ubiquitous in pleading standards.<sup>285</sup> The plausibility required by the coherence criterion is *narrative* plausibility—whether the established facts form a coherent, plausible narrative—not *factual* plausibility—whether the facts alleged in the complaint happened at all.

## 6. Theme

Finally, stories are sequences of human causes with human *themes*.<sup>286</sup> Indeed, Scalise Sugiyama has documented that all stories the world over are about a handful of key themes including "birth/death, and a wide array of topics that may be loosely categorized as 'human social behavior'—for example, sex, marriage, religion, proscriptions, deception, and violence."<sup>287</sup> The stories of decision-making in the cases we are considering are about these things too—

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939 (2019) (describing "chronological coherence" as a fundamental aspect of empirical data regarding life stories); Baynes, *supra* note 280, at 457 ("[W]e defer to an agent's self-descriptions unless the account he or she gives strikes us as implausible.").

283. *See id.*

284. *See* WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 1.

285. *See, e.g.,* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

286. *See, e.g.,* McLean et al., *supra* note 282, at 928 (finding "theme," described as "clarity of the topic in the narrative" in an empirical study of the structure of life stories); Boucher & Scoboria, *supra* note 268, at 363 (describing how narrative reasoning requires "focusing on how the event relates to life themes, traits, and goals"); *see also* Cover, *supra* note 250, at 5 ("[E]very narrative is insistent in its demand for its prescriptive point, its moral.").

287. Scalise Sugiyama, *Food, Foragers & Folklore*, *supra* note 267, at 222; *see also* GOTTSCHALL, *supra* note 241, at 56 ("[S]tories revolve around a handful of master themes. Stories universally focus on the great predicaments of the human condition. Stories are about sex and love. They are about the fear of death and the challenges of life.").

reconciliation or abuse,<sup>288</sup> family or romantic love,<sup>289</sup> assistance or alienation.<sup>290</sup> This criterion may play a determinative role where the decision-making of an individual with dementia or mental illness is so fractured that it fails to cohere into a meaningful theme.

#### B. *Procedural Rules of the Narrative Doctrine*

This section outlines two of the most significant procedural rules that would govern the narrative doctrine of capacity. First, a strong presumption of capacity, borrowed from the current doctrine, would deter frivolous litigation and limit intrusions into privacy. Second, the narrative doctrine would retain a liberal moral agnosticism to private decision-making of the current regime.

##### 1. Presumption of Capacity

The current capacity paradigm relies on a strong presumption that adults have capacity.<sup>291</sup> This presumption would remain in force in a narrative doctrine. Indeed, a presumption of the narrative consistency of a given decision with a life story makes sense. After all, it is an empirical premise of the narrative doctrine that people's lives are structured as stories, and where they aren't, something has gone wrong.<sup>292</sup> This means that if we *were* to litigate every decision in the absence of a presumption, the vast majority of decisions would follow from the individual's life story. A strong presumption of capacity is therefore empirically justified and would relieve the courts of the burden of litigating every decision on the merits under the narrative standard.<sup>293</sup> With this presumption in place, then, there is no reason to expect an explosion of capacity litigation nor reason to fear that findings of incapacity would become more routine.<sup>294</sup>

Moreover, the *prima facie* burden placed on the party challenging narrative coherence would also serve to protect the privacy of the decision maker. There may be value to the decision maker (and those defending

288. See *Wiesman v. Wiesman*, No. 2017AP466, 2018 WL 4943805, at \*3 (Wis. Ct. App. Oct. 10, 2018) (unpublished table decision).

289. See *In re Guardianship of Thrash*, No. 04-19-00104-CV, 2019 WL 6499225, at \*1 (Tex. Ct. App. Dec. 4, 2019).

290. See *In re Estate of Marsh*, No. 2010 CA 78, 2011 WL 5137235, at \*1 (Ohio Ct. App. Oct. 28, 2011).

291. See KOHN, *supra* note 14, at 153.

292. See *supra* Section II.C.1.

293. See, e.g., Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 434 (1993) ("The cornerstone for many rebuttable presumptions is probability.").

294. See, e.g., Alexander H. Cote, *Trial of Error: The Omission of Elements in Jury Instructions Requires Automatic Reversal on Habeas Review*, 73 S. CAL. L. REV. 403, 415 n.66 (2000) (noting that procedural presumptions can discourage frivolous litigation).

narrative coherence) in not explaining the story of the decision in open court.<sup>295</sup> The presumption would ensure that that privacy interest would not be intruded upon unless the contesting party comes forward with a plausible account for why the decision did not make narrative sense.<sup>296</sup> Where the presumption is prima facie overcome, the case may proceed under pseudonyms or seal, or pursuant to protective orders, as necessary to protect the individual's privacy.<sup>297</sup> Of course, there may be situations in which, to obtain legal recognition of a decision, the decision maker may have to explain the story in open court. But the current doctrine of capacity already "reveal[s] to complete strangers some of the most intimate and personal details of a person's life," including facts about their medical status.<sup>298</sup> Therefore, with the presumption of capacity—and other procedural mechanisms at the court's disposal—the narrative doctrine would not be substantially more invasive than the cognitive one.

## 2. Moral Agnosticism to Private Decision-Making

Finally, as discussed above,<sup>299</sup> one of the benefits of the contemporary doctrine of capacity is that it is agnostic to the content of individual decision-making. This principle is important because liberal governments ought to be agnostic to individual ethical choices.<sup>300</sup> It is true that, applying the narrative standard, courts must look to the content of the decision to determine whether it follows from the story of the individual's life. But the narrative standard is *morally* agnostic to the content of the story. Indeed, the only question before the court would be whether the decision follows in a narrative way from the story of the individual's life, not whether the story the decision helps build is a morally inspiring one. Michael Corleone's descent into evil is as much a story as Jaime Lannister's redemption.<sup>301</sup> Thus, the court would have no greater role

295. See, e.g., *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) (noting that privacy rights are implicated in personal decision-making).

296. Cf. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.>").

297. See, e.g., FED. R. CIV. P. 26(c)(1) (permitting federal courts to issue protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); see also George K. Walker, *Family Law Arbitration: Legislation & Trends*, J. AM. ACAD. MATRIM. L. 521, 560 (2008) (noting that "family law counsel may be familiar with cases where there are closed hearings . . . and sealed records").

298. See, e.g., Daniel J. Reiter, *Public Access to Guardianship Cases: A World of Inconsistency*, ADULT GUARDIANSHIP L. BLOG (Dec. 28, 2020), <https://www.adultguardianshiplawblog.com/2020/12/public-access-to-adult-guardianship-cases-a-world-of-inconsistency/> [<https://perma.cc/2JGJ-D8ER>].

299. See *supra* Section I.C.

300. See generally RAWLS, *supra* note 149 (articulating seminal thoughts on political liberalism).

301. Compare THE GODFATHER: PART II (Paramount Pictures 1974), with GEORGE R.R. MARTIN, A FEAST FOR CROWS (2005).

in adjudicating the *wisdom* or *desirability* of decisions than it currently does; its review is limited to *narrative structural coherence*.<sup>302</sup>

For example, in *In re Farr*,<sup>303</sup> where the decedent disinherited his granddaughters because of disagreements with their mother,<sup>304</sup> the court may well feel that it would have been a better story, and perhaps Farr a better man, if he had come to forgive his granddaughters the perceived indiscretions of their birth. But his disinheriting them *was* a story, and the decision had a narrative relationship with his life story. As such, under the narrative doctrine, the court would recognize the decision, regardless of its opinions on whether Farr's story was one to emulate.

Moreover, as described above, it is an essential attribute of stories that they be about human agency as a medium of causation; they must not be deterministic. In *every* case, then, there will have been a *range* of decisions that the individual *could have made*, all of which would have followed from the story of their life. It is not the court's role to determine whether the decision was the best available, nor whether the story would have been better in some aesthetic or moral sense if the individual had chosen otherwise. The court is simply to determine whether the decision fell within the range of narrative plausibility. Thus, like the current doctrine, the narrative doctrine is morally agnostic to the content of decisions.<sup>305</sup>

### C. Cognitive Assessments, Baseline Personhood, and the Narrative Doctrine

Cognitive assessment of contemporaneous mechanical functioning would continue to play an important, if tightly cabined, role under the narrative doctrine of capacity. The narrative doctrine is based on the premise that what matters to decisions recognized by private law is personal identity, not personhood. Although these constructs are distinct, they are not unrelated. Indeed, as mentioned above, to be the *same* person one was, one must, at a minimum, *be a person*.<sup>306</sup> Personhood is a necessary but not sufficient condition of personal identity. Thus, medical testimony indicating an extreme level of cognitive deterioration, such that it is impossible for the individual to be the same person that they had been because they are not a person at all, is *sufficient* to preclude the individual from making a valid decision. Similarly, in extreme cases of lifelong mental illness, a cognitive test based in the philosophy of

302. The possibility of the sub silentio introduction of judges' substantive moral views is discussed *infra* Section IV.B.4.

303. 49 P.3d 415 (Kan. 2002).

304. *Id.* at 420–21.

305. Of course, it is always possible for facially liberal legal standards to be applied in illiberal ways by biased judges or juries. This possibility is discussed *infra* Section IV.B.4.

306. *See supra* note 190 and accompanying text.

personhood could serve as a backstop to access private law.<sup>307</sup> In some cases, then, cognitive evidence could offer the most efficient resolution.

Indeed, the cognitive paradigm has always made the most sense—and always been most clearly justified—at the extremes.<sup>308</sup> Everyone agrees that healthy adults ought to be generally entitled to legal recognition of their decisions.<sup>309</sup> And it is similarly agreed that after a substantial amount of cognitive decline, people should not be permitted to upset their lives and finances.<sup>310</sup> In these cases at the extremes, the cognitive test has always gotten the right answer—permitting healthy adults to make decisions and not recognizing decisions made in extreme cases of cognitive deviation. But it does so for the wrong reasons—tying the conclusion to personhood rather than personal identity. From this perspective, the problem with the cognitive theory is that it is a crude approximation of the personal identity that matters, not that cognitive testing has no role where it *has been* reaching the right answers.

If personhood is logically necessary but not sufficient for personal identity, it may seem that the narrative doctrine could only do work in preventing an additional class of people from making decisions—those who remain philosophical persons but who have lost personal identity—rather than recognizing decisions that the current system does not. If this were right, the doctrinal intervention proposed in this Article might be objectionable for other reasons—disproportionately disadvantaging older people as a class, for instance<sup>311</sup>—and would seem inconsistent with the intuition that, in at least some cases (perhaps like *Thrash*), courts have been too cavalier in *refusing* to recognize decisions rather than the other way around. If the current cognitive threshold of decision-making capacity were a precise and accurate measure of personhood, it would be true that focusing the doctrine on personal identity would necessarily strip decision-making rights from more people.

But, as discussed above, the current cognitive threshold of capacity in private law *is not* a precise and accurate measure of personhood; it is *grounded in* the same variables as personhood.<sup>312</sup> Indeed, it is plausible that the reason the doctrine of capacity sets a higher threshold than the theories of personhood on which it is based is the intuition that a relatively weak requirement of personhood is insufficient to prevent a class of decisions we want to prevent—

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307. See SCHECHTMAN, *supra* note 22, at 118 (“[W]idespread or serious failure to be able to explicate one’s narrative can be seen to compromise the overall degree of personhood.”).

308. Arias, *supra* note 45, at 137.

309. See Williston, *supra* note 219, at 366–68.

310. See generally Toomey, *Perspectives of Seniors*, *supra* note 29 (finding widespread agreement that there is a point during the development of dementia that individuals should be precluded from making some decisions).

311. *But see* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (holding that older persons are not a suspect classification under the Equal Protection Clause).

312. See *supra* Section II.A.3.

those made with person-levels of cognition but which disrupt a life story.<sup>313</sup> But instead of analyzing that intuition and realizing that it arises from the fact that what matters is personal identity, the doctrine may have simply raised the thresholds on the variables pertinent to personhood. This would explain why the doctrine—correct in the extremes—has struggled so much in the close cases. It is a crude instrument that, by virtue of its conceptual disconnect, necessarily fails to properly distinguish *beyond* the minimal threshold of personhood.

In sum, the narrative reformulation of the doctrine would properly situate cognitive personhood where it belongs—establishing in extreme cases that individuals with a certain global lack of cognitive functioning cease to be entitled to the highest moral concern. Under the new doctrine, the narrative theory of personal identity would do the distinguishing work past the minimal threshold of personhood.

#### IV. THE NARRATIVE DOCTRINE APPLIED

With its emphasis on the apparently ephemeral construct of life story, the narrative doctrine may appear costly, complicated, and difficult to litigate. It may also appear that the cognitive doctrine is a close enough approximation of what matters to justify not upsetting the current paradigm. Not so. Indeed, the narrative doctrine corrects two kinds of errors endemic to the cognitive test. Moreover, the narrative standard is determinate, litigable, and mitigates many of the practical difficulties associated with capacity litigation.

##### A. *Resolving the Hard Cases*

As discussed above, the cognitive doctrine of capacity has always been most successful in extreme cases but struggles in the gray area where an individual has lost some cognitive functions but retains others.<sup>314</sup> In contrast, the narrative standard directs courts to hone precisely in on the facts that distinguish decisions that should be respected from those that should not be. In so doing, it solves two kinds of errors that the cognitive doctrine necessarily commits.

##### 1. Decisions Made with Above-Threshold Cognitive Functioning That Do Not Follow from the Decision Maker's Story

The first kind of error made by the cognitive doctrine is in recognizing decisions that do not follow in a narrative way from a life story but are made with cognitive functioning above the threshold. In these situations, courts are complicit with a disease in upsetting the life story of an individual and possibly

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313. See Toomey, *Perspectives of Seniors*, *supra* note 29, at 106 (finding broad support for intervention where decision-making disrupts personal identity).

314. Arias, *supra* note 45, at 137.

facilitating others in taking advantage of the situation.<sup>315</sup> This may well have been what happened in *Marsh*.<sup>316</sup> Applying the cognitive doctrine, the court enforced Clara Marsh's decision to cut her daughter out of her will.<sup>317</sup> The court did not resolve the factual questions necessary for determining whether, in fact, Marsh really wanted to exclude her daughter for a narrative reason, or whether her disposition was the causal result of Alzheimer's paranoia.<sup>318</sup>

Under the narrative doctrine, rather than focusing solely on medical reports of Marsh's dementia as it did, the court would have asked whether Marsh's decision to disinherit her daughter followed in a narrative structure from the story of Clara Marsh. It would have asked whether the decision (1) related to events in her past and future in an (2) intentional, (3) intelligible, and (4) coherent (5) causal structure, with a (6) theme. Here, the temporal relationship, causality, agency, and intelligibility requirements are met ("[b]ecause of all the legal problems"),<sup>319</sup> and the thematic requirement may be met.

Fundamentally at issue in this case, as it often would be under the narrative standard, was whether Clara Marsh's decision was *coherent*. This turns on the narrative facts discussed throughout this Article. To know if it was coherent, the factfinder must determine whether the decision was a plausible account of human causation. This turns on a broad corpus of facts about Marsh and her relationships with her children. If, for example, the court found that Marsh and her daughter had recently had a conversation about the necessity of guardianship, agreed to it; nothing changed; and she hadn't spoken to her son in years, then her decision was incoherent. It simply would not be a plausible, coherent account of causation. On the other hand, if the court found that Marsh had told her daughter for other, narrative reasons that she wanted to leave everything to her son, and the daughter turned around and petitioned for guardianship, Marsh's decision *would be* coherent. Thus, adjudicating the coherence criterion, and, thereby analyzing whether the court reached the right outcome, would require access to a broader body of facts than the court found, such as testimony from friends and family.

## 2. Decisions Made with Under-Threshold Cognitive Functioning That Follow from the Decision Maker's Story

On the other hand, courts routinely commit errors in *refusing* to recognize decisions. As discussed above, the capacity doctrine demands greater cognitive

315. See, e.g., DWORKIN, *supra* note 101, at 230.

316. *In re Estate of Marsh*, No. 2010 CA 78, 2011 WL 5137235, at \*1 (Ohio Ct. App. Oct. 28, 2011).

317. *Id.* at \*1–2.

318. *Id.* at \*1, \*11.

319. *Id.*

functioning than personhood.<sup>320</sup> This necessarily means that courts are denying basic rights to a class of *persons*, who, in many instances, are the same persons they always have been.<sup>321</sup>

This is quite plausibly what happened in *Thrash*—where an elderly mechanic moved in with a new lover. Indeed, it's possible that Thrash's purchase of the home met each requirement of the narrative standard. Surely it related to his past views on living in a big house and to his future hope to live in one. If indeed it was a change of heart brought about by his new love for Laura, it is hard to think of a more intentional, intelligible, and coherent cause. This story is thematic, about a closed-off bachelor finding love. In short, if a new and genuine love for Laura induced the behavioral changes, the court ought not to have found Thrash incapacitated. Given the extent to which it seems all parties agreed that Thrash loved Laura,<sup>322</sup> it is possible that the court did a profoundly wrong thing, denying him the personal right to make decisions recognized by private law.<sup>323</sup>

In sum, the narrative doctrine of capacity resolves respective errors of over- and underinclusion in the gray area above the threshold of personhood where the current doctrine struggles.

### 3. The Problem of Differing Lifelong Cognitive Functioning

Finally, the narrative standard resolves the atheoretical disparity of the current doctrine's differential treatment of those with different lifelong cognitive functioning.<sup>324</sup> As discussed above, because the cognitive doctrine applies the same threshold to those with differing lifelong cognitive abilities, those with higher adult-baseline functioning will need to change *more* before the law intervenes than those with lower baseline functioning.<sup>325</sup> This can be understood as harming both higher- and lower-functioning individuals in different ways. Those with higher lifelong functioning are permitted to disrupt the stories of their lives more before the courts can stop them. On the other hand, those with lower lifelong functioning see the courts stepping into their decision-making sooner, *even if* their choices follow coherently from their life story.

The narrative doctrine of capacity does not suffer this incoherence. Both individuals who are high and low functioning—and everyone in between—have

320. See *supra* Section II.A.3.

321. See, e.g., Boyle, *supra* note 12, at 37 (“[H]aving the legal right to make . . . decisions removed would be a fundamental intrusion on our civil liberties.”).

322. *In re Guardianship of Thrash*, No. 04-19-00104-CV, 2019 WL 6499225, at \*8 (Tex. Ct. App. Dec. 4, 2019).

323. See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person.”).

324. See *supra* Section I.B.2.

325. See *supra* Section I.B.2.

the law intervene in their decision-making at the same point relative to their life story—when they begin making decisions that disrupt it. In this way, the narrative doctrine resolves this long-simmering theoretical challenge of—and bizarre practical inequity within—the doctrine of capacity.

### B. *Practical Considerations*

Adopting the narrative doctrine of capacity by statute or adjudication would be a substantial change. This raises many practical concerns. But as this section argues, the narrative theory of capacity is not only normatively desirable but practically workable. First, psychological expertise could help in refining and adjudicating the narrative test. Second, by expanding the range of evidence courts consider, the narrative test mitigates the evidentiary challenge that in many capacity cases the best source of evidence—the decision maker—is dead. Moreover, this wider range of evidence is more accessible to ordinary litigants. Finally, although judicial bias is always a concern, the narrative test forces potential bias into the open and subjects it to substantial appellate review, where bias under the cognitive test is effectively unreviewable.

#### 1. The Determinacy of the Narrative Test

In adjudicating whether a decision follows from an individual's life story, factfinders need not go at it alone. Indeed, recent research in psychology has successfully studied life stories empirically and laid out a framework of “common language” to analyze and assess their strength.<sup>326</sup> In a recent study, involving a large set of samples, researchers assessed the coherence of life stories with a measure that was found to have an inter-rater reliability (measured by intra-class correlation (“ICC”) a common measure of reliability<sup>327</sup>) of 0.90–0.95 across data sets.<sup>328</sup> In contrast, the two most common cognitive batteries currently used to screen for capacity in dementia patients, the Mini-Mental State Examination and the Montreal Cognitive Assessment, have ICCs of approximately 0.75 and 0.81, respectively.<sup>329</sup> In other words, it is plausible that devising a psychological test for the coherence of a decision with an individual's life story could be *more* empirically reliable than current cognitive testing.

326. See McLean et al., *supra* note 282, at 941.

327. See, e.g., Shraddha Mehta, Rowena F. Bastero-Caballero, Yijun Sun, Ray Zhu, Diane K. Murphy, Bhushan Hardas & Gary Koch, *Performance of Intraclass Correlation Coefficient (ICC) as a Reliability Index Under Various Distributions in Scale Reliability Studies*, 37 *STATS. MED.* 2734, 2734 (2018).

328. McLean et al., *supra* note 282, at 928.

329. See Feeney et al., *supra* note 66, at 1107 (“MoCA (ICC=0.81) was more reliable than MMSE (ICC=0.75), but all tests examined showed substantial within-patient variation.”); see also Moye et al., *supra* note 15, at 165 (“[C]linicians arrive at significantly discrepant judgments of capacity in dementia, focusing on different cognitive and decisional abilities in patients, or holding values different from those of patients.”).

## 2. Mitigating the “Worst Evidence” Problem

It is true that, as with any doctrine commonly raised in trusts and estates litigation, the narrative doctrine would often run into what Professor John Langbein has called the “worst evidence” problem—by the time these questions are litigated, the person best situated to tell us the dispositive information, the person whose life story it is we are trying to discern, is often dead.<sup>330</sup> To some extent the worst evidence problem is an irreducible challenge of American estate law.<sup>331</sup> But by expanding the corpus of relevant evidence and moving the dispositive focus out from a momentary medical question, the narrative theory of capacity mitigates rather than exacerbates the problem. Under the cognitive paradigm, the dispositive question is the individual’s mental state at the time, and generally, evidence is only admissible to the extent it goes to answering that question.<sup>332</sup> Thus, if the decedent was not medically tested for capacity, there is no evidentiary alternative of comparable weight,<sup>333</sup> and if the contemporaneous medical evidence is inconclusive, courts often find themselves ignoring the black-letter law and reaching for narrative facts anyway.<sup>334</sup>

In contrast, the dispositive question under the narrative paradigm is broader, and the corpus of relevant evidence similarly so. More people, presumably, have friends and family that can testify about the story of a decision than have been medically tested for capacity. Such testimony is not perfect, and it is, of course, possible for family and friends to profoundly misinterpret a person’s story. But factfinders would have *more evidence* to draw upon in adjudicating capacity under the narrative doctrine than the cognitive one.

## 3. Accessibility of Narrative Evidence

Although the fact that the narrative doctrine of capacity looks to a broader corpus of evidence than the cognitive doctrine may suggest that litigating cases would be more expensive and time-consuming, that is not necessarily so. Medical capacity evaluations are themselves expensive and many older adults of questionable cognitive abilities do not realistically have access to them.<sup>335</sup> As we saw earlier in *Thrash*, Laura’s failure to put forth medical testimony about Thrash’s cognitive capacity—which could have been a result of her access to testing just as much as her being worried about its likely conclusions—played a

330. See, e.g., Langbein, *Will Contests*, *supra* note 7, at 2044.

331. See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 647 (2014); see also Mark Glover, *Restraining Live Hand Control of Inheritance*, 79 MD. L. REV. 325, 367–68 (2020) (“Because probate occurs after the donor’s death, the best evidence of the donor’s intent is unavailable, as the donor cannot simply appear in court and testify regarding what they intended.”).

332. See *In re Estate of Flowers*, 88 N.E.3d 599, 618 (Ohio Ct. App. 2017).

333. See *In re Estate of Giaquinto*, 164 A.D.3d 1527, 1529 (N.Y. App. Div. 2018).

334. See *In re Estate of Farr*, 49 P.3d 415, 426–29 (Kan. 2002).

335. See Perry et al., *supra* note 68, at 16.

key role in motivating the court to rule against her.<sup>336</sup> In contrast, testimony from family and friends—the essential stuff of litigation under a narrative theory—is cheap and accessible. While it is possible, then, that the narrative doctrine would increase the amount of time spent *in court*, it is not at all clear that it would increase the *overall* expense and time spent by the legal and medical system in assessing decision-making capacity.

#### 4. Judicial Bias and Appellate Review

Finally, there is a legitimate concern that introducing a standard that is apparently less empirical and does not consider a single kind of fact dispositive would introduce opportunities for judicial bias veiled by discretion.<sup>337</sup> It is certainly possible that some judges would, purposefully or implicitly, use the narrative standard to render judgments on their views of the substantive ethics of privately-made decisions.<sup>338</sup> Indeed, in the early-twentieth-century cases, this sometimes happened.<sup>339</sup> And although courts at the time strove to avoid it and were largely successful,<sup>340</sup> it is impossible to expect judges, even those acting in good faith, to entirely purge their substantive ethical views at the bench.

Nevertheless, and in contrast to the older cases, courts applying the narrative doctrine outlined here would have a clear and determinate sense of what they ought to be looking for—a theory of personal identity and a litigable standard derived from it. Indeed, the determinacy of the six-element test outlined above<sup>341</sup> distinguishes the narrative doctrine of capacity from highly criticized multi-factor balancing tests characteristic of family law doctrines, such as the best interests of the child.<sup>342</sup> Though we continue to trust courts with such discretionary equitable standards, scholars have condemned these

336. See *In re Guardianship of Thrash*, No. 04-19-00104-CV, 2019 WL 6499225, at \*8 (Tex. Ct. App. Dec. 4, 2019).

337. See, e.g., Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 161 (2013) (noting that “judicial discretion” in “family court” may raise opportunities for bias); see also Dain C. Donelson & Robert A. Prentice, *Scienter Pleading and Rule 10B-5: Empirical Analysis and Behavioral Implications*, 63 CASE W. RES. L. REV. 441, 509 (2012) (describing “excessive judicial discretion” as “a recipe for bias”).

338. See, e.g., Mark B. Baer, *The Amplification of Bias in Family Law and Its Impact*, 32 J. AM. ACAD. MATRIM. L. 305, 328 (2020) (“The judge’s job involves making factual findings when the facts are in dispute, and interpreting and applying the law, which includes exercising judicial discretion. All of the biases that can impact an expert’s opinion apply equally well to judges.”).

339. See, e.g., *Hamon v. Hamon*, 79 S.W. 422, 426 (Mo. 1904).

340. See Blumenthal, *The Deviance of the Will*, *supra* note 147, at 1028 (“Judges then took a third and perhaps unnecessary step: summoning evidence to show that the will was, in fact, a perfectly reasonable disposition—if not from the view of the jury or bench, then at least in the testator’s own mind.”).

341. See *supra* Section III.A.

342. See, e.g., *Vidrine v. Vidrine*, 245 So. 3d 1266, 1277 (La. Ct. App. 2018) (“In determining the best interest of a child, courts must consider . . . twelve factors set forth in [the statute]. However, these factors are illustrative, not exclusive.”).

doctrines for the extent to which judges rely on personal moral views in applying them.<sup>343</sup>

More importantly, the cognitive capacity doctrine, notwithstanding its apparent empiricism, is similarly open to judicial discretion and concomitant bias. In so many of these cases, the court is offered conflicting medical testimony from doctors of apparent good faith and strong qualifications. Courts simply decide between them. They often say they are picking the doctor with stronger qualifications or whose testimony was more convincing,<sup>344</sup> and a claim like this is particularly shielded from appellate review.<sup>345</sup> There is, indeed, strong evidence that judges' biases have long played a role in finding incapacity under the purportedly empirical cognitive doctrine.<sup>346</sup> At least under the narrative standard, any biases would be brought into plain view of an appellate court—the appellate court would have before it a complete record of the facts of the case, the characters at play, and the story of the individual. With these narrative tools at its disposal, a reviewing court could see bias in the trial court's story-making just as we can see it where it occurred in the older cases.

#### CONCLUSION

Scholars and courts have long recognized that the threshold doctrine of capacity in private law requires reform to meet the needs of our aging society. What they have not clearly seen is the doctrine's fundamental error—a philosophical misalignment between the legal test, based on the construct of personhood, and its purposes, which are concerned with personal identity. This Article has excavated this distinction. And it has articulated and evaluated an alternative.

We think of ourselves as stories and we make meaning of our lives through our stories. That is what is at stake in the doctrine of capacity—whether an individual may continue to write their story by making decisions and choices. Concern for the stories of our lives should be a paramount guiding principle of the capacity doctrine. In short, courts should only intervene in our decision-making where the story we would tell with our choices ceases to be our story at all.

343. See, e.g., Sean Hannon Williams, *Sex in the City*, 43 FORDHAM URB. L.J. 1107, 1114–19 (2016) (summarizing the indeterminacy of the “best interests of the child standard” and scholarly criticism).

344. *Wiesman v. Wiesman*, No. 2017AP466, 2018 WL 4943805, at \*3 (Wis. Ct. App. Oct. 10, 2018) (unpublished table decision).

345. See, e.g., FED. R. CIV. P. 52(a)(6) (providing that appellate courts owe “due regard” to the opportunity of the trial court judge to assess the credibility of witnesses).

346. See, e.g., Annick Persinger, *Still Pioneers: Special Social and Economic Hardships for Elderly Gays and Lesbians*, 21 HASTINGS WOMEN'S L.J. 137, 148–55 (2010) (discussing the history of courts finding a lack of testamentary capacity and ignoring the wishes of gay individuals to leave property to their same-sex partners).

