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NEW LEGAL LANDSCAPES: (RE)CONSTRUCTING THE BOUNDARIES OF MENTAL CAPACITY LAW

KEYWORDS: disability; legal subject; mental capacity; relationality; responses; UNCRPD

ABSTRACT

This paper explores the development of law and policy relating to mental capacity law, situating this within the context of the binaries that have driven this development. Whilst the story of this historical development is well-worn, considering it through this lens allows some of the previously hidden problematic consequences of these binaries to come to the fore in our debates. The paper will expose these issues through considering the binary between capacity and incapacity, and the interlinked binaries of empowerment/protection and autonomy/paternalism underpinning policies and debate in this area. It will be shown that the struggles around the boundaries of this framework are becoming more pressing given the UN Convention on the Rights of Persons with Disabilities, which presents a more fluid and potentially transformative framework for thinking about the legal subject in this context. There is here a danger, however, that we may end up falling too easily into seeing these issues through our current framework and in turn missing the opportunity to realise the potential of the UNCRPD. The paper will disrupt and denaturalise the 'given-ness' of these conceptual boundaries, drawing on theoretical insights that seek to foreground relationality and the dynamic nature and processes of law. This opens the space in which to reimagine alternative trajectories for legal and ethical responses to take, and to provoke new conceptual pathways.

There is growing dissent around the parameters of mental capacity law at both practical and conceptual levels[1]. The advent of the UN Convention on the Rights of Persons with Disabilities (CRPD) and the invitation to challenge our approaches to justice through this has facilitated renewed criticism of some of the foundational concepts that currently frame our legal and ethical approaches. This paper seeks to embrace this opportunity to interrogate and reimagine

[1] Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12 Equal Recogntiioon before the Law* (OHCHR, 2014); C. Kong, *Mental Capacity in Relationship: Decision-Making, Dialogue and Autonomy* (Cambridge University Press: Cambridge 2017); M. Donnelly, 'Best Interests in the Mental Capacity Act: Time to Say Goodbye?' (2016) *Medical Law Review* 24(3) 318-332; J. Herring, and J. Wall, 'Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act' (2015) *Legal Studies*, 35(4) 698–719; L. Series, 'Relationships, autonomy and legal capacity: mental capacity and support paradigms' (2015) *International Journal of Law and Psychiatry* 40, 80–91.

our legal and ethical approaches to disability[2], through a critical reading of the legal boundaries of mental capacity law. It will explore the development of law and policy relating to mental capacity, situating this within the context of the binaries that have driven this development; capacity/incapacity, vulnerability/invulnerability, autonomy/paternalism, empowerment/protection. Whilst the story of this historical development is well-worn, considering it through this lens allows some of the previously hidden problematic consequences of these binaries to come to the fore. In doing so, it will be seen that in stepping back and analysing the development of the legal and policy frameworks, we can trace the foundational assumptions about the legal subject and the role of the state and institutions. The parameters drawn by this development are central to framing how we respond legally and ethically to individuals in the context of health care and adult social care. The paper will disrupt and denaturalise the 'given-ness' of these conceptual boundaries, drawing on theoretical insights that seek to foreground relationality and the dynamic nature and processes of law. This opens the space in which to reimagine alternative trajectories for legal and ethical responses to take, and to provoke new conceptual pathways.

At a more concrete level, the paper will engage with the transformative potential that resides in the UN Convention on the Rights of Persons with Disabilities 2006. The CRPD has been seen as heralding alternative approaches to justice, with Quinn suggesting that it ought not to be seen necessarily as solely about disability, but instead as being part of an ongoing conversation about a theory of justice[3]. As will be discussed, however, there is a danger that the potential of the CRPD to affect these alternative approaches will be lost if central concepts,

[2] A broad understanding of disability is employed here, underpinned by Article 1 of the CRPD which states that "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

[3] G. Quinn 'Rethinking Personhood: New Questions in Legal Capacity Law and Policy' (2011 Vancouver University of British Columbia) p.52.

which are proving problematic in practice, are understood and reproduced through the current binaries and boundaries. This paper will engage with the concern that Article 12, which states that state parties must recognise that persons with disabilities hold legal capacity on an equal basis with others, may be seen as in tension with Article 16 (freedom from violence, exploitation and abuse) and will be understood and mobilised through ideas of capacity/incapacity, disability/ability, autonomy/paternalism and empowerment/protection. Instead, we need to trouble the contours of debates and avoid stagnant, static understandings of the legal subject and the role of the state in order to enable new legal landscapes. Moreover, exploring the development of these boundaries, and destabilising them, provides an important critical vantage point for us to re-evaluate law and approaches to justice more broadly, outside of these constraining binaries that shape current thinking.

The first part of the paper will elucidate the challenge contained in the CRPD for some of the foundational concepts of mental capacity law. A spatial and relational turn in other disciplines -and to a growing extent, in law-will be offered as a fruitful critical lens for interrogating these. Such approaches present novel ways of re-conceptualising the legal subject and the role of the state and institutions, providing a different perspective from which to explore the future challenges for mental capacity law. The paper then moves on to outline the historical development of the Mental Capacity Act 2005 (MCA) to trace the development of the binary frameworks which have formed and sedimented the boundaries of law and debate in this area. It will then turn to consider the ways in which this patchwork of binaries[4] is deployed through case law in the Court of Protection, and the various ways the understanding of the concepts becomes naturalised and cemented. The framework which sets up these interwoven and mutually reinforcing binaries- autonomy/paternalism, capacity/incapacity, ability/disability, vulnerability/invulnerability, empowerment/protection- will be challenged for what it

[4] M. Davies, *Law Unlimited* (Routledge: Oxon, 2017) p138.

invisibilises and obscures, as well as for what it creates. The core distinction between capacity and incapacity surfaces as central to this framework, with these other binaries being entangled with and recursively reinforcing it.[5] As will be explained, "a frame is not just a framework, some neutral way of making sense of things, but is a meaning and value-laden organizational structure".[6] Challenging the inevitability of the boundaries of the legal and conceptual framework, the paper then moves on to rethink understandings of the legal subject, how we view and respond to disability, and how we can more carefully expose the role of the state and its institutions as part of the complex intra-actions taking place within shifting contexts and relations. In doing this, the paper engages with the CRPD and debates about implementation, cautioning that if we simply reproduce these problematic binaries through legal reform efforts, then the anticipated transformative potential in the CRPD will not be realised.

THE CRPD: A CHALLENGE TO CONCEPTS IN MENTAL CAPACITY LAW

The CRPD is often seen as a visionary human rights instrument with the potential to affect a 'paradigm shift' in disability rights. One of the key elements in the process of a paradigm shift, according to Kuhn, is the increased questioning of central concepts of the current paradigm in order to produce ruptures in accepted 'knowledge'[7]. These crisis points and ruptures are necessary for new paradigms to emerge. The CRPD provides us with this important catalyst for contestation of these core concepts, with the potential for ruptures and transformative understandings of approaches to justice. Yet, it is important to stress the potential latent in the CRPD to affect a paradigm shift. As will be seen, this has not been actualised and the necessary stage of rupture has not yet occurred.

[5] Further challenge to these mutually dependent binaries will be considered in more depth in B. Clough, *The Spaces of Mental Capacity Law* (Routledge, forthcoming 2019).
[6] E. Gilson, *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice* (Routledge: New York, 2014) p44.
[7] T. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press: Chicago, 2nd Ed, 1996).

At present, much of the literature on the CRPD, particularly in the mental capacity and medical law field, has focused on Art 12- the right to legal capacity on an equal basis with others (universal legal capacity). The aim of this paper is not to give an in-depth analysis of Art 12 and the academic and practical debates surrounding it. Indeed, to do so would contribute to the belief that the transformative thrust of the CRPD lies in Art 12 alone, which is a position that this paper resists. However, suffice it to say here that it has provoked a number of commentators to suggest that the MCA is incompatible with the Convention, given that it draws a distinction between those with and without disabilities, and that it enables best interests decision making on the basis of this. Article 12 here poses a challenge to our understanding of autonomy and mental capacity, seeing legal capacity as akin to agency and as something which is universal, supported and delinked from a measure of mental capacity.[8] The UN Committee on the CRPD, in their General Comment, took a decidedly 'hard line' approach to this issue, stating that there be no substitute decision making practices, and that,

> "The Committee reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12. All practices that in purpose or effect violate article 12 must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others".[9]

There has been a great deal of debate about the legitimacy and correctness of the Committee's approach here as well as what it means for domestic legislation. Supported decision making,

[8] See G. Richardson, 'Mental Capacity in the Shadow of Suicide: What can the law do?' (2013) 9(1) *International Journal of Law in Context* 87-105; E. Flynn, and A. Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) *International Journal of Law in Context* 10(1); P. Gooding, 'Navigating the 'Flashing Amber Lights' of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns' (2015) *Human Rights Law Review* 15(1) 45-71.

[9] GC No. 1 (n1) Para 9.

under Art 12(3), is seen as the alternative framework which ought to form the basis of law and policy, however some scholars and professionals are concerned that supported decision making is not always possible. The purpose of the discussion here however is not to get mired in these debates, but to propose that we are not confined by current conceptual boundaries when thinking about the challenges raised. As Weller says, "a danger for those who wish to promote a radical interpretation of the CRPD is that the entrenched position of capacity in modern legal systems may encourage an impoverished interpretation of Article 12".[10]

The debates as to Art 12 have been accompanied by a more relational turn in medico-legal and mental capacity scholarship[11]. This has been used to challenge the perceived legal subject inhabiting legal frameworks. Feminist theorists have long highlighted that liberal legal frameworks have been built around and shaped an ideal of an individualistic, rationalistic and masculine legal subject; one who is seen to be ubiquitous in law yet reflective of no one. Enlightenment ideas of rationality, self-determination and human progress have been steadily challenged through feminist legal critique. Relational autonomy, as a particular instantiation of this, resonates with and has stemmed from much of the ethics of care literature and instead calls for a focus on interdependence and relationality in decision-making and agency, rather than fetishized ideals of independence and self-determination which were seen as dogging ethical discourses of autonomy[12]. Similarly, there has been increasing interest in vulnerability theory, particularly building on the work of Fineman, which emphasises shared, universal vulnerability[13]. This transformative understanding of vulnerability as a universal ontological

[10] P. Weller, 'Reconsidering legal capacity: radical critiques, governmentality and dividing practice', (2015) *Griffith Law Review*, p512.
[11] B. Clough, 'Vulnerability and Disability: Challenging the Capacity/Incapacity Binary in Mental Capacity Law' (2017) *Social Policy and Society* 16(3) 469-481; Also see sources in n1.
[12] See R. Harding, 'Care and Relationality: Supported decision-making under the UN CRPD' ,114-130 in R. Harding, R. Fletcher, and C. Beasley (eds) *ReValuing Care: Cycles and connections in theory, law and policy* (Abingdon, Routledge, 2017) for a discussion of these relational approaches.
[13] M. Fineman, 'The Vulnerable Subject and the Responsive State', (2010) Emory Law Journal 30; M. Fineman, 'Equality and Difference- The Restrained State' (2015) Alabama Law Review, 66(3), 609-626.

condition of all human beings shifts the focus onto the structural and institutional conditions that exacerbate the experience of disempowerment[14].

What stems from these approaches is a challenge to the decontextualized and unreflective legal subject upon which much of our law and policy is built. Recognition of the way in which we are all vulnerable, inhabiting our situated and embodied context, and embedded in particular structures and institutions which shape and create this context, opens up interesting ways to rethink our ontology and the relational dynamics at play in medical and social care contexts. To date, however, this critical reimagining has not fully taken place in the mental capacity literature. Whilst commentators are increasingly engaging with relationality as a concept, particularly in terms of critiquing the hegemonic power of autonomy, this is still often deployed within the parameters of the framework which has been constructed around autonomy/paternalism, capacity/incapacity, empower/protect, as though these are the natural or pre-given boundaries of the problem. For example, in a discussion of relational autonomy and vulnerability, Series stresses that "if mental capacity assessments did take into account the deleterious effects of particular relationships this could permit more paternalistic interventions, evoking similar controversies to externalist constitutive approaches to autonomy … which permit coercive interventions on the basis of the properties of oppressive relationships".[15]

What is currently missing from these accounts is an interrogation of these boundaries which frame our understandings of the legal subject and the role of the state and institutions. A number of scholars in other disciplines are taking up this challenge in providing insights that take us a step further than seeing the legal subject as vulnerable, focusing also on the processes through

[14] *Ibid.* Also see Clough (n10).

[15] L. Series, 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms' (2015) *International Journal of Law and Psychiatry* 40, p88.

which particular renderings of the legal subject, institutional and interpersonal boundaries, and frames of response are created, in order to reconfigure them.

One of the common threads linking these approaches is the challenge to binary thinking and dualisms. In drawing attention to the historicity of these binary frames, it allows us to see that they are not 'natural' or presumed in advance. Barad, for example, posits that what is important in recognising the dynamic processes involved in creating matter and meaning is "an unsettling of nature's presumed fixity and hence an opening up of the possibilities of change".[16] As will be seen below, this has important repercussions in a field such as mental capacity law which is rigidly framed by a number of interlinked binaries. Binaries often play a central role in drawing the boundaries of a particular framework- in mental capacity law, for example, distributing the individual into a particular legal framework. Such frames are important, and as Sherwood-Johnson suggests, "the kind of problem we consider these things to represent, the kind of things we place inside or outside the boundaries of this problem category and the kinds of things we do about it are contingent".[17] It is necessary to reiterate here that this is not to take (or return to) a view of individuals as passive and inert- as simply inscribed upon by broader material structures.[18] Instead, as will be seen, the legal subject is central to these processes of boundary drawing, and a shift in our understanding of the legal subject and agency will impact on these broader structures.

The need to think about spatial imaginaries in law alongside and through rethinking the legal subject is increasingly being recognised, with Feldman suggesting that it is "not simply about the social construction of subjects but rather is about the discursively regulated practices that

[16] K. Barad, *Meeting the "Universe Halfway* (Duke University Press: Durham, NC, 2007) p64.
[17] F. Sherwood-Johnson, 'Discovery or Construction? Theorising the Roots of Adult Protection Policy and Practice', (2016) *Social Work Education* 35(2) p121.
[18] J. Conaghan, 'Feminism, Law and Materialism: Reclaiming the 'Tainted Realm' 31-50 in M. Davies and V. Munro (eds), *Ashgate Research Companion on Feminist Legal Theory* (Ashgate 2013).

inscribe boundaries between subjects and reify them in that very process".[19] Issues of legal subjectivity- who is the subject of law, who gets lost, who or what gets represented or left out of these boundaries, who becomes the 'other'- are interwoven with these processes of boundary production. For example, exposing the spaces (conceptual and material) which are often seen as being 'private' and unencumbered, and the way in which these very spaces are often created or shaped by structural or institutional processes, poses a challenge to the public/private divide presupposed in much liberal legal thought. As will be discussed in turn below, this opens up alternative ways of thinking about responses and interventions, and the processes of change.

A core aspect of this critical lens is to focus on the processes by which these spaces are created and reproduced through interactions and boundary drawing- around categories of legal subject, around the role of the state, and around the private realm. The CRPD, as noted above, provides an important moment to challenge the current paradigm through which these issues are framed and deployed in practice. A central part of doing this is to look to the development of the MCA, to show the roots of the binary framework which has served to reproduce a particular view of the legal subject and the role of the state.

THE DEVELOPMENT OF THE BOUNDARIES OF MENTAL CAPACITY LAW

The MCA was enacted after a long and tumultuous period of consultation, drafting and debate. It is worth reflecting here on the various forces feeding into the process of legislating in this area, and the corollary logics and drivers of these. A number of factors triggered the need for law reform in this area, including cases such as T v T[20] and Re F[21] which exposed the problematic lack of legal authority for medical interventions in the lives of those deemed

[19] G. Feldman, 'Development in Theory: Essential Crises: A Performative Approach to Migrants, Minorities and the European Nation State' (2005) *Anthropological Quarterly* 78, p222. Also see D. Delaney, *The Spatial, the Legal and the Pragmatics of World-Making* (Routledge, 2010) and M. Davies (n4).
[20] *T v T* [1988] Farn 52.
[21] *Re F* (*Mental Patient: Sterilisation)* [1990] 2 AC.

unable to consent by reason of incapacity[22]. Additionally, the Law Commission pointed to the way in which the law governing decision making for adults deemed to be incompetent was "unsystematic and full of glaring gaps"[23] and had "failed to keep up with developments in our understanding of the rights and needs of those with mental disability". Furthermore, there was perceived to be a lack of an effective framework for resolving disputes about the care of people without capacity or for legitimating or regulating the substitute decision making that regularly took place in practice[24]. The Law Commission also pointed to deinstitutionalisation, the ageing population, medical advances and a rights-focused law and policy agenda as being key social and political drivers for change in this area[25].

The resulting MCA sets up a clear, and perhaps deceptively simple, framework for decision making, with a central distinction drawn between capacity and incapacity. The binary divide is crucial in guiding the legal trajectory and available responses. Those seemed to have capacity are legally constructed as autonomous, as seen in the Code of Practice which states that "the Act's starting point is to confirm in legislation that it should be assumed that an adult has full legal capacity to make decisions for themselves (the right to autonomy) unless it can be shown that they lack capacity to make a decision for themselves at the time the decision needs to be made".[26] Moreover, Arden LJ stated that, "capacity is an important issue because it determines whether an individual will in law have autonomy over decision making".[27] In many ways, the legislation consolidated and codified the existing law which had developed through a number of cases[28]. Whilst it appears that the test for capacity in the MCA, stemming as it did from Re

[22] See J. Munby, 'Protecting the Rights of Vulnerable and Incapacitous Adults- The Role of the Courts: An Example of Judicial Law Making' (2014) *Child and Family Law Quarterly,* 26 64-77.
[23] Law Commission, *Mental Incapacity* (London, HMSO, 1995 Para 1.1.
[24] *Ibid.* Para 1.5.
[25] Para 2.31.
[26] Para 1.2
[27] *Bailey v Warren* [2006] EWCA Civ 51 para 105.
[28] M. Brazier and E. Cave, *Medicine, Patients and the Law* (Penguin: London, 5th Ed, 2011) p144.

C[29], is a legal construct, its origins belie a more than subtle medical influence. As I have discussed previously[30], the medical expert in the case, Dr Nigel Eastman, was invited by Thorpe J to provide his view on how capacity should be assessed. His approach drew on three factors which he saw as relevant to assessing capacity in relation to health care decisions, namely retaining information; believing information; and weighing up that information.[31] Keywood highlights how Thorpe J then "borrowed" these criteria to form the legal threshold of mental capacity, which "is highly problematic for it conceals the fact that clinical determinations of patients' decision-making abilities are given a normative force that they were never intended to have".[32] This in turn stifles meaningful examination of non-clinical issues by the courts[33] as a clinical perspective is foregrounded in the purportedly objective criteria for assessing capacity[34].

Indeed, there is a heavy emphasis on clinical diagnosis in the MCA. Whilst we see from Re C and the legislation that a mental disorder alone is not sufficient for a finding of incapacity, it is a necessary element. The applicability of the legislation intrinsically depends on there being a disorder or disturbance in the functioning of the mind or brain which causes the inability to use, weigh, retain or communicate the information relevant to the decision[35]. This played out in the recent and much publicised case of Kings College NHS Foundation Trust v C[36] involving a woman wanting to refuse lifesaving renal dialysis following an attempted suicide. A great

[29] *Re C (Adult: Refusal of Medical Treatment) [1994] 1 All ER 819.*
[30] B. Clough, 'Anorexia, Capacity and Best Interests: Developments in the Court of Protection since the Mental Capacity Act 2005' (2016) *Medical Law Review* 24(3) 434-445.
[31] K. Keywood, 'Rethinking the anorexic body: How English law and psychiatry 'think'' (2003) 26 *International Journal of Law and Psychiatry* 599-616.
[32] *Ibid.,* p605.
[33] *Ibid.*
[34] For more on this see S. Stefan, 'Silencing the Different Voice: Competence, Feminist Theory, and Law' (1993) 47 University of Miami Law Review 763-815: "The assumptions that incompetence inheres in the individual, that it is identifiable by objective, empirical observations by neutral experts…fly in the face of feminist challenges to traditional claims of objectivity, neutrality and universality" p765.
[35] *PC and NC v City of York Council* [2013] EWCA Civ 478.
[36] [2015] EWCOP 59

deal of the judgment in this case is given over to an in-depth discussion of her ability to understand, use and weigh the information relevant to this decision. However, there is an interesting discussion following this about the causal link between this ability and an impairment of, or disturbance in the functioning of the mind or brain,

> "It is right to record that, as I observed at the conclusion of the hearing, had I been satisfied that C was unable to use and weigh information in the manner contended for by the Trust, I believe I would have had difficulty in deciding that this inability was, on the balance of probabilities, because of an impairment of, or a disturbance in the functioning of, the mind or brain. Whilst it is accepted by all parties that C has an impairment of, or a disturbance in the functioning of, the mind or brain, the evidence as to the precise nature of that impairment or disturbance was far from conclusive. Further, and more importantly, with regard to the question of causation, and in particular whether what was being seen might be the operation of a personality disorder or simply the thought processes of a strong willed, stubborn individual with unpalatable and highly egocentric views the evidence was likewise somewhat equivocal. However, as I say, I need say no more about this in light of my conclusions as set out above".[37]

This diagnostic or status element to the legislation was not uncontroversial in the consultation and debates leading to the Act. In their consultation paper 'A New Jurisdiction', the Law Commission stated that

> "From the responses received to our consultation paper it appears that more distress is caused by over-extensive use of protective powers than by any stigma found to attach to the term 'mental disorder'. It also seems that the requirement [inclusion

[37] Para 93, per Macdonald J

> of a diagnostic element] goes at least some way towards providing a safeguard against improper interference in the lives of those whose perceived failure to manage is attributable merely to a lack of inclination or eccentricity"[38]

In their 1995 report Mental Incapacity, the Law Commission signalled that the balance fell in favour of including a diagnostic element so as to ensure that "the test is stringent enough not to catch large numbers of people who make unusual or unwise decisions".[39] We see here the clear distinction developing between those with a cognitive impairment, and those without. Recognition was given to the criticisms propounded at the time by Carson, who argued that both a test for capacity and a diagnostic element to this were misconceived[40], yet it was felt overall by the Commission that inclusion of these elements would provide clarity and prevent 'net widening'. This creation of a necessary connection between recognising incapacity and a 'paternalistic intervention' leads to a perceived need to keep the category of incapacity small, to reduce intervention. What this does not explain is why purportedly 'paternalistic interventions' are the only responses conceivable here. It is starkly evident that this binary understanding is constraining, and is recursively constrained by, the conceptualisation of potential responses.

It is also pertinent to reflect on the broader context in which the consultation and legislative process was taking place. The ascendency of medical law and ethics and bioethics as disciplines helped to bring debates about patient autonomy, paternalism and rights to the fore[41]. Traces of this are evident through much of the Law Commission's work on mental capacity. Their early consultation documents, for example, emphasise the importance of balancing 'choice' and

[38]Law Commission, *Mental Incapacity*. (HMSO: London, 1995) para 3.13.
[39] *Ibid.*
[40] D. Carson, 'Disabling Progress: The Law Commission's Proposals on Mentally Incapacitated Adults' Decision Making' (1993) *Journal of Social Welfare and Family Law* 15(5) 304-320
[41] See J. Harrington, *Towards a Rhetoric of Medical Law* (Routledge: Abingdon, 2016) for in depth discussion of this

'protection'[42], and the 1995 report similarly emphasises this need to balance 'autonomy' and 'protection'. In all instances, these terms are presented as in need of being balanced, implying their separateness and tension. The MCA Code of Practice states that "… the Act also aims to balance an individual's right to make decisions for themselves with their right to be protected from harm if they lack capacity to make decisions to protect themselves."[43] At the same time, however, what is meant by these terms is not explained- they are simply deployed as though their meaning is unproblematic. This attention to the importance of autonomy and nervousness about perceived paternalism and interference in the lives of individuals is also prominent in the above discussion about the diagnostic threshold. The importance of constraining any powers to interfere in decisions to those who have a particular mental disorder, and not encroaching on merely eccentric or unwise decisions, is paramount in the debates surrounding the legislation.

Looking further at the developments in adult social care law and policy alongside this, we see that legal and professional responses were being shaped by the conceptual framework in the MCA. The initial Law Commission project envisaged focus and reform of 'public law' issues around jurisdiction and obligations in relation to those who were termed 'vulnerable adults'.[44] This was seen as important given the diffuse and unclear nature of local authority duties and obligations in this context, as well as the "outdated" nature of any existing powers, such as under the National Assistance Acts 1947 and 1951, given more modern approaches to rights and autonomy. The Law Commission here envisaged setting up a jurisdiction alongside the mental capacity legislation, which encompassed a group of adults who were deemed vulnerable and at risk[45]. The core focus of the consultation on the public law issues, and the resulting 1995

[42] Law Commission, 'Mentally Incapacitated Adults and Decision Making: Medical Treatment and Research' Consultation Paper 129 (HMSO, London, 1993) and Law Commission, 'Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection' Consultation Paper 130 (HMSO, London, 1993).
[43] Mental Capacity Act Code of Practice Para 1.4. Also see 2.4- "It is important to balance people's right to make a decision with their right to safety and protection when they can't make decisions to protect themselves".
[44] Consultation paper 130, n25.
[45] *Ibid.* Chapter 9.

report, was on issues of abuse and safeguarding, with the framing of the problem being posed as being about a balance between individual rights v protection.[46]

Despite the extensive consultation, however, the Government stated that law reform here was unnecessary and instead favoured developing clearer processes and powers in relation to social care through policy mechanisms[47]. Whilst wholesale reform was abandoned, the social care legislation and policy trajectories intersect in fundamental ways with the workings and interpretation of the MCA. No Secrets, which was (prior to the Care Act 2014) the key policy framework underpinning adult safeguarding, drew on the Law Commission's work to shape the realm of the 'vulnerable adult' and core values in this area. In particular, the way in which the term 'vulnerable adult' had been framed in the consultation paper and 1995 Law Commission report[48] was used to underpin the policy. This created a necessary link between vulnerability and disability, age or illness[49], as well as reproducing the centrality of capacity as guiding responses in this area[50]. This interaction between the adult social care policy and the mental capacity legislation helped to structure the foundations for conceptual development going forward. It set the categories, obligations and scope of responses and built them upon a framework of capacity/incapacity and vulnerability/invulnerability; a framework that was also heavily suffused with notions of disability and protection. In many ways, these realms of incapacity and vulnerability became seen as exceptions to the norm of capacitous and autonomous choice; different, other, and warranting special responses.

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[46] *Mental Incapacity* (n21) para 9.1

[47] Lord Chancellor's Department, *Who decides: making decisions on behalf of mentally incapacitated adults; a consultation paper* (TSO: London, 1997)

[48] (n21) Para 9.5

[49] 'A person aged 18 or over who is or who may be in need of community care services by reason of a mental or other disability, age or illness; and who is or who may be unable to protect himself or herself against significant harm or exploitation.'

[50] Department of Health, *No Secrets: Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults from Abuse*, (TSO: London, 2000) Para 6.21 "The vulnerable adult's capacity is the key to action since if someone has 'capacity' and declines assistance this limits the help that he or she may be given

These concepts can be traced through the developments following No Secrets which further shaped the contours of the adult social policy agenda. Whilst No Secrets was concerned with safeguarding and protection of the vulnerable, issues of access to services and the values underpinning these developed through a different agenda. The White Paper Valuing People,[51] for example, aimed to set the policy agenda for services for people with learning disabilities. Choice featured as a central focus of this document, alongside control and independence. Such concepts became the central drivers and focus for initiatives following Valuing People, being echoed in Independence, Wellbeing and Choice[52], Our Health, Our Care. Our Say[53] and Valuing People Now[54].These ideas of choice and independence resonate with the focus on patient autonomy and self-determination which was increasingly framing debates in medical law and ethics, and which featured so heavily as a framing device in the legislative process leading to the MCA. The trajectories of access to services and safeguarding thus developed in parallel, with very little engagement with one another[55]. Incapacity and/or vulnerability are distinguished at both a conceptual and policy level from capacity, invulnerability and independence. This is then entangled with questions about how and whether the state should intervene, whether this is paternalistic, and whether interventions should be aimed at empowerment or protection. Just as the balance to be struck between autonomy and paternalism

[51] Department of Health, '*Valuing People - A New Strategy for Learning Disability for the 21st Century'* (TSO: London, 2001).

[52] Department of Health, '*Independence, well-being and choice: our vision for the future of social care for adults in England'* (TSO: London, 2005) Interestingly, this document also signified increasing usage of the terms 'responsibility' and 'consumer' in relation to service users.

[53] Department of Health, '*Our health, our care, our say: a new direction for community services'* (TSO: London, 2006)

[54] Department of Health, *'Valuing People Now: a new three-year strategy for people with learning disabilities'* (TSO: London, 2009).

[55] See K. Mackay, 'Choosing to Live with Harm? A Presentation of two Case Studies to Explore the Perspective of those who Experienced Adult Safeguarding Interventions' (2017) *Ethics and Social Welfare*, 11 (1), pp. 33-46; F. Sherwood-Johnson, 'Discovery or Construction? Theorising the Roots of Adult Protection Policy and Practice', (2016) *Social Work Education* 35 (2), pp. 119-130; F. Sherwood-Johnson, 'Constructions of vulnerability in comparative perspective: Scottish protection policies and the trouble with "adults at risk"', (2013) *Disability and Society,* 28 (7), pp. 908-921; R. Fyson, and D. Kitson, 'Independence or protection: does it have to be a choice? Reflections on the abuse of people with learning disabilities in Cornwall' (2007) *Critical Social Policy* 27(3) 426–36.

has framed much of medical law and the development of the MCA, the balance between empowerment and protection, or independence or protection has framed much of the debate and policy agenda in relation to adult social care[56].

What is evident then is the way in which a number of different factors fed into the legislative process and its justification, yet these seem to have been reduced to an overarching 'tension' between autonomy and paternalism, underpinned and intertwined with a number of other oppositional concepts. The next section will expose the ways in which these binaries work in practice to frame the conceptual boundaries of mental capacity law through an exploration of their deployment in case law.

CAPACITY/INCAPACITY

The oppositional framework set up by the MCA has not gone without criticism, and there is a growing body of dissatisfaction with the dividing line drawn by the statute[57]. Disquiet around the capacity/incapacity divide is also increasingly driven by social model and disability critiques of the legal framework, as well as feminist legal perspectives engaged with ideas of relationality and vulnerability. Similar approaches have also helped to strengthen debates in the social policy literature in which the foundational concepts of adult social care and safeguarding, such as independence, choice and control versus protection, have been subjected to critical scrutiny[58]. This section will explore the impact of this framing in case law in the Court of Protection, and the way in which these norms are reproduced, cementing these boundaries. Echoing Gilson[59] these reflections will bring to the fore what is invisibilised in these representations of autonomy, capacity, and empowerment. As Davies suggests, "borders

[56] M. Dunn, I. Clare, and A. Holland, 'To empower or protect? Constructing the vulnerable adult in English law and public policy', (2008) *Legal Studies*, 28, 2, 234–53.
[57] (n1) Also see Clough, (n10).
[58] See (n54)
[59] See (n5)

and domains are actively produced"[60] and the lines drawn are not fixed, but shape norms and perceptions at a given moment. What is evident through this analysis is that the binary concepts that frame the boundaries of debate are not natural or neutral- they can be deployed in ways which preclude certain responses and obscure other relevant factors[61].

The House of Lords Select Committee, in their post-legislative scrutiny of the MCA, pointed to the malleability of capacity, stating that

> "The presumption of capacity, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm. In some cases this is because professionals struggle to understand how to apply the principle in practice. In other cases, the evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult".[62]

However, underpinning the Select Committee's analysis and recommendations is a tacit endorsement of the values and concepts underpinning the legislative framework, with recommendations focused on improving their application in practice. Training and increased awareness were seen as important, yet the validity of the underpinning framework seemingly remained incontrovertible. Much deeper criticism of this binary or oppositional framework can be gleaned from academic literature spurred by the CRPD and, in particular, Art 12 and debates about universal legal capacity. Ruck-Keene, for example, argues that the concept of mental capacity is inescapably "in the eye of the beholder", and that greater attention ought to be given

[60] (n4) p83

[61] A. Ludvig, "Differences Between Women? Intersecting Voices in a Female Narrative" (2006) *European Journal of Women's Studies* 13(3) 245. "The interesting point here is that [law's] dichotomies are not "neutral"; they have been the means of fixing meaning in ways that secure power relations and inequalities in and of themselves" at p 249.

[62] House of Lords Select Committee on the Mental Capacity Act 2005, *Report of Session 2013-14: Mental Capacity Act 2005 Post Legislative Scrutiny* (TSO: London, 2014) Para 3, also see para 105

as a result of this to processes of assessment and potential biases and subject positions of those undertaking the assessing[63]. This is a persuasive analysis, yet it ascribes to an idea of the inevitability of having mental capacity assessments- the legitimacy of the background framework is left unscathed. More fundamental criticism of the legitimacy of this background framework has been levelled by the Committee on the CRPD, who have stated in their general comment on Art 12 that,

> "The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity".[64]

This echoes the work of Stefan, who suggests that a finding of incompetence is part of a dynamic process between the individual and a professional- a process that is "a matter of both interpersonal dynamics and social and political structuring of roles and communciation".[65] Such insights resonate with the growing interest in non-representational approaches, such as that of Haraway and Barad, who emphasise the processes involved in assigning and producing matter and meaning, and the way in which situated knowledge is part of this process, rather than being about an objective 'discovery' of a pre-existing 'thing'.[66] This is part of a challenge to the way in which "representationalism would have us focus on what seems to be evidentially given, hiding the very practices that produce the illusion of givenness"[67], and that

[63] A. Ruck Keene, 'Is mental capacity in the eye of the beholder?' (2017) *Advances in Mental Health and Intellectual Disabilities,* 11(2) 30-39
[64] General Comment No. 1, (n1) Para 14
[65] Stefan (n33) p778
[66] D. Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) *Feminist Studies* 14(3) 575-599; K. Barad, *Meeting the "Universe Halfway* (Duke University Press: Durham, NC, 2007) in particular ch 4; Also see F. Sherwood-Johnson, 'Discovery or Construction?' (n54)
[67] Barad, *Ibid.* p359.

representations always "select and exclude, while often masking or naturalising the choices involved".[68] Challenging the 'giveness' of particular categories enables us to see the different processes which feed into these and the various power relations at stake in creating them.[69]

Commentators engaging with concepts such as relational autonomy and vulnerability have similarly made critical inroads into the concept of mental capacity/incapacity. Recognition of our shared dependence on those around us for creating and shaping our identities and decisions has been central to much of this critique and has worked to de-stabilise a particular view of the legal subject as unencumbered, self-determining and separate. Attentiveness to relational dynamics opens up the space for critical interrogation of Court of Protection case law and the way in which mental capacity has been framed and operationalised, and in turn how this constrains legal and professional responses. In a recursive and iterative process, the conceptualisation of these norms becomes naturalised and further entrenched. To exceed them, or allow other concerns in, becomes impossible, lest the whole structure falls down[70].

One of the often-lauded requirements of the legislation is that capacity must be assessed in a decision-specific manner. This is seen to prevent 'global' declarations of incapacity in order to respect decision making in realms where the individual is capacitous. Yet, this is not unproblematic, as it invites us to try to abstract a decision in a way which is not possible. One area which demonstrates this starkly is in relation to capacity to consent to sexual relations[71]. A number of cases demonstrate the struggles that the judiciary had in outlining the relevant test

[68] Davies (n4) p92.

[69] This is not to say these differences do not exist and are wholly constructed. Instead, it draws attention to the processes through which these differences become interpreted and come to matter, highlighting alternative trajectories and elements that are marginalised or overlooked. See Haraway, (n65).

[70] As Davies has argued, "The division of knowledge into fields and terrains is political- it allows administration and governance- for instance to ensure that it takes a particular form, is under specialised control, and contains pathways and conduits for dissemination of itself and for transmission of approved messages" (n4) p82. The maintenance of the structure and demarcation is thus paramount.

[71] For more sustained discussion of this case law see B. Clough, 'Vulnerability and Capacity to Consent to Sex: Asking the Right Questions?' (2014) *Child and Family Law Quarterly* 26(4) 371-397.

for such capacity[72] with debates ranging around whether this test should be act-specific or person-specific. Linked to these was a concern not to encroach on sexual autonomy, given that a declaration that somebody lacked capacity to consent to sex would inevitably mean that they would have to be prevented from having sex[73]. As a result, in an authoritative Court of Appeal judgment, Sir Leveson outlined that the test must be act-specific, "a general evaluation which is not tied down to a particular partner, time and place"[74]. This, however, sits uneasily with the necessarily relational character of sexual decision making- at an obvious level, sexual acts are inter-personal and so are always tightly interconnected with others. The inter-personal dynamics involved, as well as broader structural factors such as education, spaces in which to engage in sexual activity, and moral judgements about such activities will mean that capacity to consent is always contingent. A later case, Derbyshire CC v AC[75], demonstrates the continuing dissatisfaction with the approach taken in IM v LM. Here, Cobb J discussed the statement of a Dr Milne, who reported that the woman in the case, AC, "said that even if she did not want sex she would have to go along with it as she wants to be 'lovey dovey'"[76]. Cobb J expressed his unease with this and the way that the test for capacity to consent to sex as currently framed in IM v LM does not include this within its scope[77]. It is evident in these cases that the all-or-nothing framework here, with everything hinging upon capacity/incapacity, constrains the ability to recognise or speak to broader issues.

[72] *X City Council v MB, NB and MAB* [2006] 2 FLR 968*; MM v Local Authority X* [2007] EWHC 2003 Fam; *D County Council v LS* [2010] EWHC 1544; *A Local Authority v H* [2012] EWHC 49; *A Local Authority v TZ* [2013] EWHC 2322 (COP); *IM v LM* [2014] EWCA Civ 37.

[73] Because a best interests decision cannot be made in relation to such issues. See s27 MCA-
1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person-
(a) consenting to marriage or a civil partnership,
(b) consenting to have sexual relations…

[74] *IM v LM and Others* [2014] EWCA Civ 37, para 76.

[75] [2014] EWCOP 38.

[76] *Ibid.* Para 33.

[77] *Ibid.* Para 36.

Yet it is not only in these overtly relational decisions that this is problematic. Decisions generally are very difficult to distil into abstract 'chunks of time'. Decisions about whether to apply for or accept a job, to have a particular medical treatment, to go the pub with a particular group of friends, whether to spend the day in bed reading magazines, are all contingent, relational and depend on a range of factors. They tend to be ongoing, interwoven with other decisions and the decisions of others. These important temporal elements of decision making are overlooked through the deployment of this capacity/incapacity binary. The backgrounded elements of decision making, and questions about why we are questioning capacity, why now and the historicity of this process and others within it are lost.

It is important, however, to bear in mind the pragmatic questions facing the judiciary. Given the framing of the legislation, it is perhaps then understandable that given this all-or-nothing approach, the judges are somewhat constrained by pragmatic concerns[78] and a low-threshold may be seen as the optimal way to protect sexual rights. Indeed, this is clear in Baker J's assertions in A Local Authority v TZ that a low threshold for capacity here is "more consistent with respect for autonomy in matters of private life"[79]. However, this serves to highlight the struggle central to the binary here, and the way in which it constrains and is constrained by itself. It is limited by a sense of inevitability that recognising these additional factors necessarily means that the response needs to be, or will be, paternalistic and that autonomy is buttressed by non-interference. This then leaves these additional aspects unsaid, neutralised, depoliticised and outside of the scope of concern- although this does not extinguish their very tangible, ongoing impacts.

This can lead in practice to a malleability in ways of framing or describing the decision specificity that enable those seeking to assess capacity to do so in a way that leads to a particular

[78] s27, for example.
[79] *A Local Authority v TZ* [2013] EWHC 2322 (COP), para 23.

outcome. This is then justified and naturalised by a cloak of objectivity in the terms of the Act, such as 'capacity' and 'best interests'. We see this starkly in the line of TZ cases which involved assessments of capacity to consent to sex[80]- after declaring that TZ had capacity to consent to sexual relations, there was a concern that TZ, in exercising this in particular instances (at some unspecified point in the future), may lack capacity. To avoid the pragmatic pitfall that a best interests decision cannot be made with regard to sexual consent, the question in TZ (2) was posed as,

> "whether TZ has the capacity to make a decision whether or not an individual with whom he may wish to have sexual relations is safe"[81]

According to Baker J, this focused in on the 'specific factual context'[82]; however it is contended that this is no less abstract or artificial than a general declaration of either capacity or incapacity in relation to sex. It ignores the contingency of this upon a number of different other contextual connections. Moreover, the future-orientation presumes a static legal subject, and ignores the various shifts in interpersonal and institutional relations which will impact on this. Interestingly, it was also raised that if TZ lacked capacity in relation to this first point, then it also had to be asked whether he has the capacity to 'make a decision as to the support that he requires when having contact with an individual with whom he may wish to have sexual relations'[83]. Again, the boundaries of the capacity concept are shaped in order to shoehorn in and neutralise what are otherwise broader, ongoing processes involving a multiplicity of other actors and agents. Whilst this could be seen as merely judicial pragmatism, this is problematic when this reinforces and ingrains problematic notions autonomy and lends an objectivity to the assessment of mental capacity.

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[80] *A Local Authority v TZ* [2013] EWHC 2322 (COP); *A Local Authority v TZ (No.2)* [2014] EWHC 973 (COP).
[81] *Ibid* (No.2), para 18.
[82] *Ibid.* para 17.
[83] *Ibid.* para 18.

The complex nature of these entangled interactions also suggests a challenge to the idea of causality that underpins the mental capacity legislation. It was reiterated in the case of PC & Anor v City of York Council[84] that the 'causal nexus' between the cognitive impairment and the inability to satisfy the capacity assessment must be shown, i.e. it must be shown that the inability to use, weigh or communicate is because of the cognitive impairment[85]. This is a particularly linear way of understanding causality, and is problematised when we recognise the ongoing and shifting relations and contexts which impact upon and shape decision making abilities. Indeed, here again we see the tendency to view capacity or incapacity in the abstract and to take a cookie-cutter approach which detemporalises and decontextualises the concept of a decision. It suggests an internal approach to incapacity, which sees it as stemming from some interior process divorced from the broader context[86]. Moreover, as will be discussed in further detail below, it is common to think of 'intervention' by the state or other institutions as taking place only when capacity is called into question, but this often ignores or deliberately overlooks the ways in which they play a role before this event. The concept of a decision itself is equally constructed through this lens in a way which avoids the question of why capacity is being assessed at this particular moment. Decisions are often difficult to abstract in this way and tend to be part of ongoing, interwoven decisions over time and across different domains. Section 1(3) of the MCA tends to be viewed by some as a part of the legislation which is CRPD 'compliant' and a site for progressive approaches[87]. This states that a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success, resonating to a certain degree with the emphasis on support to exercise legal

[84] [2013] EWCA Civ 478.
[85] See discussion above on *Kings College* v *C* on this.
[86] There is at least the residue of a Cartesian mind/body split evident here. For a discussion of new materialist theories and the challenge to such dualisms, see D. Coole and S. Frost, *New Materialisms: Ontology, Agency and Politics* (Duke University Press: Durham, NC, 2010) in particular p8.
[87] A. Ward, A. Ruck Keene, A. Hempsey *et al*, *Three Jurisdictions Report: Towards Compliance with CRPD Art 12 in Capacity/Incapacity Legislation in the UK,* (Essex Autonomy Project, 2017)

capacity in Article 12. Yet this detemporalises the decision, retaining a narrow focus on that particular decision rather the processes leading to this 'event' of questioning capacity. This abstraction could potentially be reduced to simply providing information, rather than facilitating ongoing agency.

What becomes apparent through these examples is the way in which the binary concepts both constrain and are constrained by a range of other factors, yet these are obscured and individualised through the way in which these norms are deployed. In this sense, both sides of this binary have driven and reinforced each other.

DENATURALISING THE BOUNDARIES

The preceding discussion has demonstrated the way in which the binary and oppositional concepts have drawn the boundaries of debate in the context of mental capacity law. The paper now seeks to critically explore what is left outside of this particular framing, and to think about how shifting the perspective necessitates unravelling the interwoven patchwork of binaries that rely upon each other for their maintenance. First, it will look at how recognition of our relationality and interdependence impacts on the framing of the legal subject. It will then move on to reflect upon the consequences of this for the conceptualisation of legal responses.

A. Disability and the Legal Subject

In many respects, the concept of mental capacity in the legislation can be seen to overstate differences and overlook similarities between people. When we remove or challenge the liberal legal subject as our starting point we can begin to recognise that we do not progress through life in rational, self-regarding and disconnected ways. We are connected to and reliant upon others to support us, to provide information, to help us to process and create our own sense of self. This poses a challenge to the understanding of autonomy and self which haunts the mental capacity legislation, with its focus on rationalising information and processing it as an internal

action. Moreover, it could be argued that this view of autonomy and self-determination is suffused with a classic Cartesian mind/body dualism which sees autonomy and the self as separate to matter (including the body). This process of knowledge and understanding, and self-creation, becomes a disconnected and abstract concept, separated from material forces. The MCA, with its rationalist foundations and focus on understanding and comprehending, places an overt focus on internal abilities of the mind- evidenced further by the focus on cognitive impairments. As Shildrick suggests, "the knowing subject is disembodied, detached from raw material"[88].

A number of theorists have utilised an understanding of assemblages[89] or entanglements[90] to draw attention to these various interconnections (or intra-connections[91]). These ongoing, dynamic processes, impacted by different intra-actions which then shift and shape experience, destabilise static, ordered understandings of the (legal) subject, and dividing lines between public/private, self/other, nature/culture, mind/body. What is central to these is a focus on the processes and dynamics by which we come to draw distinctions and boundaries, and the ways in which these are entangled with broader processes which are often hidden in philosophical and political theory. Our physicality within the world[92], interdependence and material interconnectedness become the starting point for theoretical approaches. Unlike the disembodied subject that Shildrick alludes to above, we instead see the mind as embodied, embedded, enacted and extended[93].

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[88] M. Shildrick, *Leaky Bodies and Boundaries: Feminism, Post-modernism and (Bio)ethics* (Routledge: London, 1997) p14

[89] G. Deleuze and F. Guatarri, *A Thousand Plateaus* (University of Minnesota Press: Minneapolis, 1993).

[90] Barad (n15); J. Conaghan, 'Feminism, Law and Materialism: Reclaiming the Tainted Realm' in M. Davies and V. Munro, *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate: 2013); Colle and Frost (n67)

[91] Barad speaks of intra-action, rather than interaction, to highlight the openness of material engagements- the way in which things are not pre-existing units but are co-created and shifting through different intra-actions.

[92] Davies (n4) p66

[93] Davies (n4) p88, quoting Malafouris (2013) p77 "thinking is not something that happens 'inside' our brains, bodies or things: rather it emerges from contextualised processes that take place 'between' brains, bodies, and things".

The focus on assemblages, entanglements and complex intra-actions between agents, and the embodied effects of these, challenges the mind/body dualism and attempts to dispose of the Englightenment baggage that frames ideas of capacity and autonomy here. When it is recognised that we are all similarly shaped by, and actively shaping, our context and relations and that these can be differentially experienced as embodied beings inhabit and move between different contexts, then the role of experience and embeddedness within particular assemblages of the material and discursive becomes central to creating agency. Agency does not spring internally or in spite of our material, cultural, relational, emotional, structural, corporeal, institutional, technological, economic entanglements but through and because of them. As noted above, the capacity legislation overstates difference by drawing a stark division between those who have a cognitive impairment and those who do not- i.e. those who are seemingly 'in control' of their thoughts and rational, and those who are not. This ignores the way in which we are all embedded in relations and networks and our sense of self, our agency, does not stem from a vacuum but is constituted and limited by our embodied experience. It overlooks these similarities, then, in an attempt to make clear categories for legal responses. As Carson maintained at the time the mental capacity legislation was being drafted,

> "Life is not so simple as mental disorder or no mental disorder, capacity or incapacity, though it is regularly portrayed by the law as being such. The Law Commission's interim proposals, if implemented, would continue this dichotomous legal view of the world and avoid meeting the challenge or incorporating and rationalising legal developments such …into a more general law about when decisions made by anyone are validly made"[94].

[94] Carson (n39) p314.

When problematising these binaries- between disability/non-disability and capacity/incapacity- questions inevitably arise around disability neutrality as a potential way forward. Often, discussion of this attracts concerns that this would enable 'paternalistic interventions' in people's lives, and widening the 'net' of these. This was unambiguously evident in the Law Commission's justification for limiting the legislation to those with cognitive impairments.

These ideas are reflected in a more general concern that an increased focus on 'vulnerability' in the context of welfare can invite policies that reinforce notions of acceptable behaviour[95] or of those deemed vulnerable as being passive recipients of care or services[96]. This is echoed in the context of disability, with commentators such as Hollomotz expressing concern that framing disabled people as vulnerable can reinforce the powers of professionals and allow people to be subjected to paternalistic or protective actions[97]. It is crucial to recognise that this has been the case in the past, and that casting people with disabilities as vulnerable has enabled disempowerment, disavowal and differential responses through law and policy. Similarly, Dunn, Clare and Holland argue that in the context of mental capacity, 'substitute decision making' based on the idea of vulnerability as situational (perhaps due to an abusive partner being deemed to be dominating a person's decision-making ability) may allow courts to step in with actions that are 'potentially infinite in scope and application'[98] and effect a course of action that is protective. The inevitability of 'protection' as a response to recognising certain forms of vulnerability was echoed more recently in a case involving a man who was assessed

[95] B. Fawcett, 'Vulnerability: questioning the certainties in social work and health', (2009) *International Journal of Social Work*, 52, 473–84; K. Brown, 'Questioning the vulnerability zeitgeist: care and control practices with "vulnerable" young people', (2014) *Social Policy and Society*, 34(3) 371–87.
[96] B. Daniel, 'Concepts of adversity, risk, vulnerability and resilience: a discussion in the context of the "Child protection system"', (2010) *Social Policy and Society*, 9(2) 231–41.
[97] A. Hollomotz, *Learning Difficulties and Sexual Vulnerability: A Social Approach* (Jessica Kingsley: London, 2011). A. Hollomotz, 'Beyond "vulnerability": An ecological model approach to conceptualizing risk of sexual violence against people with learning difficulties', (2009) *British Journal of Social Work*, 39, 99–112.
[98] (n55) p241.

as lacking capacity to consent to sex, whose partner was then told not to have sexual relations with him as she would then be potentially subject to criminal sanction[99]. Here, whilst damages were awarded for breach of CH's Art 8 rights for a part of the period during which this was ongoing, Hedley J provided some interesting reflections, stating that,

> "Many would think that no couple should have had to undergo this highly intrusive move upon their personal privacy yet such move was in its essentials entirely lawful and properly motivated. As I have said, perhaps it is part of the inevitable price that must be paid to have a regime of effective safeguarding".[100]

There is an inevitability about this- as though these sorts of individualised responses are all that law can (ever) offer. These concerns resonate with those who argue that being attentive to vulnerability in social policy can be dangerous, and may lead to interventions which reinforce power positions, which prevent the ability to develop resilience or personal preventive strategies, and which work to normalise 'acceptable' behaviours. Yet these concerns tend to reflect the way in which vulnerability (as opposed to invulnerability) has been deployed in law and policy to effect particular ends[101], rather than reflecting what productive potential rethinking the legal subject can have in challenging the viability of the distinction between vulnerable/invulnerable, and, in turn, disabled/non-disabled. What is missed in these critiques is the opportunity to reframe the discourse through seeing our ontology differently. There is a tendency then to reinforce the binary through disavowing vulnerability and dependency, in turn leaving the broader framework that structures these debates intact.

[99] *CH v A Metropolitan Council* [2017] EWCOP 12.
[100] *Ibid.* para 25.
[101] Gilson, (n5).

Instead of reinforcing these problematic boundaries then, it is important to challenge and rethink them[102]. It has been recognised for some time now by some critical disability scholars that rethinking our ontology through vulnerability, new materialisms and post-humanism can disrupt subjectivity which is based on autonomy, rationality, individualism and self-determination[103]. Hall and Wilton, writing from a critical geography perspective, have drawn on the new materialist theorists such as Barad and Braidotti, and the notion of assemblage, to advance an understanding of "complex and emergent geographies of disability, but also to unsettle broader assumptions about the nature of the 'able-body'"[104]. Unseating the norm of the autonomous, rational, individual legal subject and rethinking subjectivity through and with impairment, interdependence, difference and relationality enables us to then see the "sheer diversity of embodied experiences that overwhelm any binary opposition between a normative 'able-body' and its disabled other"[105]. The productive, vibrant nature of new materialist approaches enables a more positive, creative and transformative social model approach. There is a sense in which an approach which focuses on removing a particular barrier that disables an impaired subject still individualises the problem, and leaves the broader structural issues including the conceptual framework intact. The locus of action is a linear connection between the individual who is impaired and the barrier which prevents them from meeting a particular norm. Exclusionary practices or frames may still be left to function, so long as the impaired individual is able to function within this. In drawing on ideas of processes and moving away

[102] "When even those who espouse radical discourses seem unable to reconceptualise an alternative world without being locked into the political constructions of what constitutes appropriate humanness, then it becomes apparent that the disability movement has a task that goes above and beyond merely extending the boundaries of the discourses that celebrate humanism and instead needs to focus its energy on re-theorising itself" N. Erevelles, 'Disability and the Dialectics of Difference' (1996) *Disability & Society* 11(4) 519-538, p522.
[103] K. Ecclestone and D. Goodley, 'Political and educational springboard or straitjacket? Theorising post/human subjects in and age of vulnerability' (2016) *Discourse: Studies in the Cultural Politics of Education* 37(2) 175-188; F. Kumari Campbell, *Contours of Ableism* (Palgrave: Hampshire, 2009).
[104] E. Hall and R. Wilton, 'Towards a relational geography of disability' (2016) *Progress in Human Geography*, 1-18.
[105] *Ibid.* p14

from a uni-directional, linear way of framing disability, it becomes evident that thinking in terms of a relational, interdependent legal subject is productive within these assemblages and can impact on the broader structures and institutions. It sees us not as simply inscribed by practices and processes, but as active (or intra-active) participants. Allowing this legal subject to replace the individualistic, atomistic autonomous subject thus has productive potential. As Schwiek outlined in her discussion of the so-called 'ugly laws' which made it illegal in some US states for people with 'unsightly' disabilities to appear in public, those seeking to challenge these did so by challenging norms in order to reconfigure them. Terming such activists 'spatial dissidents', she suggests that they,

> "insisted not only on exposing themselves to public view but also on occupying and radically reconfiguring public space".[106]

It is argued that so to can changing our ontological starting point change and reshape the material and conceptual framework of analysis, potentially changing approaches to law and social justice in radical ways rather than leaving them intact or seeing them as natural. This echoes Davy's argument for 'philosophical inclusive design'[107] which takes universal relationality and interdependence as the central starting point for political philosophy, rather than (as often happens) trying to shoehorn disability into existing political and philosophical approaches almost as an afterthought, thus reinforcing the 'otherness' and exceptionality of disability.[108] It is important not just to consider the shift in ontology or subjectivity, but to think about how this then impacts and reconfigures the broader theoretical and material terrain- what

[106] S. Schwiek, *The Ugly Laws: Disability in Public* (New York University Press, 2009) p6.
[107] L. Davy,) 'Philosophical Inclusive Design: Intellectual Disability and the Limits of Individual Autonomy in Moral and Political Theory' (2015) *Hypatia*, 30(1) 132-148.
[108] See S. Clifford Simplician, 'Disavowals of disability in Rawls's Theory of Justice and his critics', 99-122 in B. Arneil and N. Hirschmann, *Disability and Political Theory* (Cambridge University Press, 2016) for a good discussion of the tendency to do this in relation to Rawls.

are the consequences for the rest of the structure- when these 'unspeakable subjects'[109] become central. Thinking in terms of shifting these frames,

> "... a change in scale involves (by definition) a change in frame of reference, and also in the modes of authority, the definition of a legal subject, the sources of normativity, the affective ties between norms and subjects and so forth. Certain elements are made visible, while others recede. Everything, in other words, is up for re-analysis and the scholarly imagination must be attentive to new types of objects not seen, or perhaps sometimes seen and marginalised, at the level of state law".[110]

At present, the desire to do this is constrained by the sense in which recognising relationality and interdependence would necessarily entail responding in 'paternalistic' ways.

B. Empowerment/Protection and Intervention: Rethinking Responses

As has been discussed, the mental capacity legislation creates a framework in which if somebody is deemed to lack mental capacity, a decision then must be made in their best interests, taking into account a range of factors as outlined in section 4 MCA. On the other hand, if somebody is deemed to have mental capacity then they are seen as free to make their decision without state interference. What is presupposed within this framework is an idea of freedom or liberty as non-interference, which enables autonomy and self-determination to flourish unimpeded. This is evident in many Court of Protection judgments, including this statement by Eldergill J,

> "Society is made up of individuals, and each individual wills certain ends for themselves and their loved ones, and not others, and has distinctive feelings,

[109] N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart: Oxford, 1998)
[110] Davies (n4) p106.

> personal goals, traits, habits and experiences. Because this is so, most individuals wish to determine and develop their own interests and course in life, and their happiness often depends on this. The existence of a private sphere of action, free from public coercion or restraint, is indispensable to that independence which everyone needs to develop their individuality, even where their individuality is diminished, but not extinguished, by illness. It is for this reason that people place such weight on their liberty and right to choose".[111]

Even if somebody is deemed to lack mental capacity, the best interests framework reinforces this importance through section 4(6) MCA, which states that the decision maker must consider the person's past and present wishes and feelings, beliefs and values.

This is a much lauded aspect of the best interests assessment, which many see as preventing unwarranted or paternalistic interferences. Cases such as Wye Valley v B evidence the importance of s4(6). The case involved a man with a chronic foot ulcer, and the treating clinicians applied to the Court of Protection for declarations that it would be in Mr B's best interests to have the foot amputated. Jackson J agreed that Mr B lacked capacity in relation to treatment decisions, and the case concerned the weight to be placed on his wishes, feelings, beliefs and values. The judgment emphasised the importance of Mr B's wishes, despite the gravity of the decision, and it was held that it was not in his best interests to undergo the amputation. These statements as to the importance of autonomy, and respecting individual wishes, feelings and values are positive developments in cases such as this, however there is a sense in which they can serve to mask broader processes and contingencies that form the background of these cases, yet remain unsaid and invisibilised in the judgments. The responses open to judges and other decision makers in these cases again centre on the individual, and

[111] *Westminster City Council v Manuela Sykes* [2014] EWHC B9 (COP).

presume and reinforce the idea of a 'zone of non-interference' as key to what is to be protected. What is missing here however is the way in which these individual wishes and values are often intertwined with those of others, including institutional constraints. If the facts of the case can be aligned with these norms, such as autonomy and non-interference (as opposed to paternalistic interference) then they can be stated with confidence in a way which reinforces and cements them. Yet, often hidden underneath the strong assertions of respecting autonomy or self-determination are a number of contingencies- a range of professional intra-actions and actors shaping the context which allows the case to framed in such a way.[112] In contrast to Wye Valley v B, we have other cases which do not align neatly with these norms, and in which responses cannot be framed in a way that is supportive of autonomy. There is a line of case law in which it is evident that the possibility of respecting wishes and feelings through best interests decisions is foreclosed by the institutional decision-making processes earlier on, such as where doctors or social care professionals are not willing to provide certain treatments or services[113]. In such cases, dividing lines are drawn by judges between public law and private law, and their lack of jurisdiction is deployed to prevent what are said to be public law questions from muddying the waters of mental capacity law. This overlooks the centrality of the interaction of the 'public' and 'private' spheres in enabling the autonomy and empowerment said to be central to the legislative framework. It ignores, or deliberately obscures, the ongoing historicity, power relations and processes which contribute to decision-making and wishes over time.

This distinction drawn between the public sphere of interference, and the private sphere of non-interference has been challenged by many feminist legal theorists and is undoubtedly problematic when particular practices become normalised or viewed as an aspect of 'nature' or individual responsibility when relegated to this private realm. By shifting the focus to

[112] See discussion of anorexia case law in Clough (n29).

[113] *N v ACCG* [2017] UKSC 22; *North Yorkshire County Council v MAG* [2016] EWCOP 5; *NYCC v MAG* [2015] EWCOP 64; *Re MN* [2015] EWCA Civ 411; *ACCG v MN* [2013] EWHC 3859 (COP).

entanglements and connections in assemblages, and drawing attention to the temporal aspects of decisions as ongoing, produced through a number of connections and intra-actions over time, this private realm of individual self-determination becomes difficult to sustain. This zone of non-interference ignores the ongoing, embedded webs of relations between individuals with each other, with the state, with institutions and with cultural, economic, technological and discursive forces- relations which shift and change over time as new connections are made. What is important here is that even those spaces which the state and its institutions claim to be absent from are actively produced by norms which shape this absence. This can be seen, for example, in the emergence of consumer and responsibilisation agendas in more recent adult social care policy, where active decisions have been taken to roll back certain provisions or responsibilities and to shift this to the individual rather than the state[114]. This 'absence' here is, paradoxically, creative and productive of new norms and spaces of regulation in itself. Processes of regulation, deregulation and reregulation are active forces which can, in themselves, be creative of vulnerability.[115] What begins to emerge is the sense in which the state is always, already there in particular forms and is already responding in particular ways. Thinking in terms of ongoing intra-actions and connections, and the processes of entanglement over time challenges ideas of causality, responsibility and intervention, which has important repercussions for the concepts underpinning mental capacity law.

In the same way that we have seen the concept of autonomy in medical law and mental capacity law being subject to criticism in relation to its almost parochial individual and narrow deployment, the concepts that resonate with it in the social policy literature- choice, control,

[114] This is not to say that the state is no longer there. It is still part of the regulatory space, and has actively created the space for the market, and is often paradoxically *more* involved. Often, however, the role of the state is invisiblised in this process of shifting responsibility.

[115] See, for example, discussion of pathogenic vulnerability in C Mackenzie, W Rogers and S Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) p7.

independence and empowerment- are facing similar charges. These are set up against (negative) ideas of intervention and protection, echoing concerns of paternalism. However, many commentators point to the empty rhetoric that surrounds these terms in policy, and the way in which they tend to ignore or overlook the context which adult social care policies occupy. As Rushing discusses,

> "empowerment is easily reduced to aesthetic self-expression and individual choice, in a way that not only neglects but fully invisibilises the relational and structural conditions of 'choice' and 'freedom'"[116]

There is also a concern here that, particularly in light of policy developments which actively promote service users as 'consumers' and aim at responsibilising engagement with services, ideas of empowerment and choice may work in practice to individualise responsibility for needs and to overlook the ways in which these needs can be structurally produced. As with the idea of autonomy and capacity above, this may translate into seeing liberty and freedom as respected in the absence of outside interference, overlooking or actively obscuring the ways in which the agency required for meaningful autonomy (or empowerment) is produced through relations. This can have the effect of depoliticising inequalities and disadvantage and paradoxically subverting the professed aims of empowerment, choice, control or independence[117].

Instead, when recognition is given to the way in which the state and structures/institutions have been involved in shaping contexts and norms over time, these binaries start to dissolve. The

[116] S. Rushing, 'What's left of empowerment after Neoliberalism?' (2016) *Theory & Event* 19(1) (online).

[117] See K. Keywood, 'The Vulnerable Adult Experiment: Situating vulnerability in adult safeguarding law and policy' (2017) *International Journal of Law and Psychiatry* 53, 88-96, footnote 5- "The Department of Health policy on personalisation (2006), presents a good illustration of this process, since autonomy and well-being are represented as being secured through the service user exercising choices form a range of health and social care services offered; irrespective of the individual's needs for support in accessing these, or in seeking alterative supports that are not currently offered. Empowerment (in contrast to vulnerability) is represented in that policy as flowing from the exercise of choice and control over the services an individual receives".

structural embeddedness that instead becomes central illuminates the impact of particular modes of governance and law and policy over time which have shaped and defined current problems. Brown and Halley, for example, cautioned that "legalism has ways of hiding its presence, or providing background rules so backgrounded that we can forget they are there"[118]. This echoes the insights from some of the vulnerability theorists who similarly point out the way in which certain structural supports which enable people to function in line with particular norms- such as being autonomous and self-determining- are invisibilised in some liberal discourses. This brings into focus the social, economic, political and structural vulnerability faced by all citizens in a society or community who are dependent on a network of background supports and structures. Leach Scully suggests that, "permitted dependencies are naturalised and normalised. They are met and supported without question".[119] The current invisibilty (or, perhaps, deliberate obfuscation) of this has harmful consequences when those whose needs for support are then categorised as different, or other. Recognition of the shared embeddedness within networks enables us to change the perspective; the question becomes not 'should we respond or intervene?', as it often is in current debates in mental capacity and adult social care, but 'what is the current response or intervention doing'?

This is important for challenging binaries drawn between disabled/non-disabled, capacitous/incapacitous, and vulnerable/invulnerable. As discussed in the previous section, the idea of the legal subject is open to challenge, and alongside this our way of viewing responses must also be questioned. We need to be vigilant not to reinforce this binary thinking by seeing particular options as only viable for those with disabilities, or who are deemed to be vulnerable or incapacitous. Questions of empowerment, protection, and paternalism become issues for all

[118] W. Brown and J. Halley, *Left Legalism/Left Critique* (Duke University Press: Durham, 2002) p12.
[119] J. Leach Scully, 'Disability and vulnerability: on bodies, dependence and power', in C. Mackenzie, W. Rogers and S. Dodds (eds.), Vulnerability: New Essays in Ethics and Feminist Philosophy, (Oxford University Press: Oxford, 2014) p217.

when it is recognised that we are all dependent upon and embedded within particular material, discursive, technological, institutional, economic, environmental and cultural configurations. Empowerment and protection become similarly embedded concepts, rather than abstract ideals which stem from one-off interjections into individual lives. They are ongoing, mutually interwoven consequences of an array of entangled forces and processes[120]. Barnes has made similar arguments regarding the place of care in debates in adult social care, with care constructed "as something that is exceptional and only to be invoked in situations where people are unable to articulate their needs and wants…Rather than recognising care as a practice deeply embedded in everyday life, and a political idea necessary to the creation of circumstances in which we can live well together".[121] Like care, protection is similarly embedded in everyday life, yet often invisibilised due to the normalisation and naturalisation of what Leach Scully terms 'permitted dependencies'[122]. Exposing this rich scaffolding that we are all entangled in sits uneasily with the Law Commission's justification highlighted at the outset for having a 'diagnostic threshold' in the mental capacity legislation. There was a fear central to this that they did not want to enable paternalistic interventions into the lives of those who were 'merely eccentric'- yet this occludes the interventions and responses that all in society are already embedded in. What this also ignored is the sheer scope for creativity that faced the Law Commission in terms of what responses or interventions could have been created by the legislation.

This recognition invites us to change the way in which we conceptualise interventions. Interventions tend to be seen as one-off 'events' with a linear trajectory between the intervener (a social worker, a doctor, for example) and the intervened (such as a person deemed to lack

[120] C. Barnes, 'Abandoning Care? A Critical Perspective on Personalisation from an Ethics of Care' (2011) *Ethics & Social Welfare* 5, 152-167, p160.
[121] *Ibid.*
[122] (n118).

capacity who is given a treatment in their best interests). Yet this tends to detemporalise interventions and ignore their historic roots and potentially diffuse ongoing impacts. Thinking in terms of assemblages and entanglements of actors illustrates the various different levels, scales and locations that interventions can take place at, and the repercussions that this can have in other locations. Interventions and responses are not linear, and the way in which we conceptualise responses in this context needs to be rethought so that they are not- or not only- located at an individual level[123].

If empowerment is a goal then it ought to be recognised that this is not a product or quality of an individual, but a result of processes over time. As Rushing has argued previously, "the problem is not how to empower pre-existing citizen-subjects who experience themselves as powerless in the face of those who exercise power over them. The problem is diagnosing precisely how 'technologies of citizenship' function in microlevels of day to day activities to produce subjects of empowerment".[124] This draws attention the impact of broader rules and practices and professional relations, and how these processes impact on individuals. At present, there is a danger that we locate empowerment in a uni-directional relationship between the professional and the person who is to 'become empowered', which ignores the way in which this power is often created by and (re)produced by professional knowledge practices[125].

Locating empowerment at an individual level, and seeing somebody as 'being empowered' through an individualised intervention emanating from a particular professional is also problematic as it reinforces the idea that the source of the problem, and consequently the location of change, is the particular individual. This can in turn reinforce problematic binaries that see people or categories as 'other' and in need of 'fixing' to reach a particular norm- in

[123] Coole and Frost (n85)
[124] Rushing (n115)
[125] *Ibid.*

this context, an able-bodied, self-determining norm. Similar cautionary tales have been levelled at the focus on resilience in vulnerability theory. As Lotz argues, "it is of vital importance, therefore, that the significance and role of resilience in human wellbeing and flourishing not be interpreted in an individualistic and voluntaristic manner, to be an individual project or 'boot strapping' exercise…The development of resilience in individuals must therefore be acknowledged to be a fundamentally social and collective task and achievement, and not the responsibility solely of individuals themselves, nor a function purely of individual will and determination".[126] This emphasises the importance of the structural bases and processes enabling empowerment. Whilst this is said to be a policy goal or value at present, the ability for this to be realised is constrained by the binaries shaping the legal and policy frameworks.

FUTURE DIRECTIONS: THE CRPD

New and emergent ways of thinking about disability and decision making have been outlined in this paper which can provide the conceptual underpinnings to challenge current paradigmatic concepts which currently frame and constrain our thinking. This section will provide some reflections on the future implementation and engagement with the CRPD in light of the above discussion in order to provoke this challenge and reconfiguration. Central to this is the recognition that the anticipated transformative potential of the CRPD will not be realised if it re-inscribes the boundaries of law, individualising responsibility and invisibilising relational dynamics. There is a danger that "transformative legal norms will be mapped on to an unchallenged institutional status quo".[127]

In relation to supported decision making, which is seen as a revolutionary aspect of the Convention, we need to be cognisant of the difficulties discussed earlier regarding seeing a

[126] M. Lotz, 'Vulnerability and Resilience: A Critical Nexus' (2016) *Theoretical Medicine and Bioethics* 37(1) 45-59, p57.
[127] C. Sheppard, 'Constitutional Equality and Shifting Conceptions of the Role of the State: Obstacles and Possibilities' (2006) *Supreme Court Law Review* 33, 265.

decision as a single moment in time, or a one-off event. We need to ensure that we see it is an ongoing process and a practice which is not solely located in the individual and question, for example, why decision-making ability is being called into question, who is doing this and based on what knowledge, when this is occurring and the various factors that have fed into this process so far. Art 12(3) specifically refers to State parties providing access to "support they may require in exercising their legal capacity" which is a much broader framing that simply supported decision making. It implies an ongoing process or practice of exercising legal capacity, and does not refer to this being based upon assessments of 'capacity' at any point to trigger this. There is undoubtedly a temporal aspect to Art 12(3) which requires further reflection so that we do not fall back into seeing it through the problematic lens of the existing legislation.

There is scope within the CRPD framework to enable engagements with the ongoing, contingent nature of decision making and the complex institutional interactions that enable this. When other Articles of the Convention are looked at alongside each other, and read in particular alongside Art 12, the importance of this structural embeddedness becomes evident. Article 19 for example, points to State obligations to facilitate inclusion and participation in the community, including access to services and choices about where and with whom to live. Similarly, emphasis is placed on rights to health[128], social protection[129], participation in public life [130] and in cultural life[131]. The intertwining of these rights and others in the Convention is bolstered by key points in the Preamble, including

> (c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for

[128] Article 25
[129] Article 28
[130] Article 29
[131] Article 30

> persons with disabilities to be guaranteed their full enjoyment without discrimination.

It is important not to overlook this when searching for ways forward in realising the potential of the CRPD, particularly around Art 12. Central to it is the recognition of the way in which this legal capacity and ability to exercise this is deeply intertwined with the institutional, structural and attitudinal framework.

A further difficulty with framing Art 12 as an issue of 'supported decision making' rather than 'support to exercise legal capacity' is that the focus then becomes on isolated decisions. This can then transpose the difficulties that have been discussed above regarding the way in which this still sees the individual as the locus of concern- somebody who is falling below particular standards at a particular time and who needs to be supported to reach these. This retains an idea that these (externally verifiable) abilities are individually produced in an unencumbered realm, and once these deficiencies are discovered by professionals, then support can be provided. It overlooks the ongoing processes underpinning this and the role of others in these assemblages. The locus of concern, and site of response, is the individual who is seen as 'other' and deficient. Perhaps due to its historical roots in tort law and medical law, the MCA currently perpetuates this given that its core focus is 'informed consent'. Often it is assumed that providing more information, or providing a particular type of information will do enough to redress any power imbalances in this doctor-patient relationship and enable an autonomous decision. As Harrington suggests, this is problematic as such tests "attempt to compress the interactive process which is the therapeutic relationship into an isolated moment altering the legitimate balance of power between doctor and patient"[132] which then diverts criticism away from broader structural issues of power and dominance. There is a similar danger here that in

[132] J. Harrington, 'Privileging the medical norm: Liberalism, self-determination and refusal of treatment' (1996) *Legal Studies*16(3) p355.

focusing on supported decision making, we inadvertently reinforce the idea that an individual, at a particular moment in time, is deficient and that we can support them to reach the required level of understanding to achieve autonomy.[133] The response then similarly becomes individualised, allowing the background processes to endure. Aside from this diverting attention from the broader structural issues, this also leaves them intact- reifying and perpetuating exclusionary norms. Thus there is a need to carefully engage with Art 12 and the CRPD as a whole and rethink ideas of responsibility, response and causality through this. Our preoccupation with drawing boundaries in the current framework is in danger of overlooking the importance of both voluntary access to services and the positive obligations set out across the CRPD[134].

One of the suggestions that has stemmed from debates around Art 12 has been to make the law in this area disability neutral- for example, by removing the diagnostic threshold in the legislation, and/or having new legislation outlining when decisions can be interfered with which applies on a universal basis to everyone in society. Often this is met with concerns that such an approach would be 'net widening', echoing the Law Commission's stance in developing the MCA. This concern has been addressed to some extent above and it is important to reiterate here that removing a diagnostic element would not necessarily then mean that the response or intervention mandated would be substituted or best interests decision making. If we recognise the various different levels, times and locations at which 'interventions' can take place then more creative responses are considered. Importantly, these do not have to be at the

[133] A cynical reading of recent medical law developments stemming from *Montgomery* v *Lanarkshire Health Board [2015] UKSC 11,* for example, could similarly trace this focus on information provision as the support to exercise patient autonomy- overlooking the contextual constraints and power imbalances circulating in the 'decision'. This then results in the responsibilisation of the patient and individualising of responsibility for the outcome- see, in particular, para 81 of the judgment, where autonomous patients are framed as "accepting responsibility for the taking of risks affecting their own lives, and living with the consequences of their choices".

[134] B. McSherry and K. Wilson, 'The concept of capacity in Australian mental health law reform: going in the wrong direction? (2015) *International Journal of Law and Psychiatry* 40, 60-69.

individual level. Yet it is also important to consider here that the state and its institutions are not 'absent' at this point and have already been (intra)acting, responding and shaping in particular ways.

Flynn and Arstein-Kerslake have put forward some proposals for a "narrow disability-neutral legislative framework for state intervention in the lives of all adults" in which they define state intervention as "unwanted state involvement in the lives of adults"[135]. This they envisage would be triggered on the basis of "risk of imminent and serious harm for the individual's life, health or safety"[136], which they argue would result in less rather than more state intervention in the "private lives of all adults".[137] Whilst interesting proposals, there are a number of ways in which they are constrained by the binary framework that has proved to be problematic in this context and which can be dismantled when we begin to explore and highlight the ways in which the state is already intervening or responding in particular ways, even when it claims to be absent. In many ways, these proposals fall into what Sherwood-Johnson calls a 'discovery model', which sees 'safeguarding' as something that happens when an instance of 'harm' is discovered or suspected, which sees "identifying suspected instances of the problem, on the one hand, and deciding if and how to intervene, on the other…as separate or at least separable activities".[138] As has been argued above, there is a need to challenge the idea that the state has no role or presence prior to the 'event' of capacity being questioned, and that this involvement then becomes paternalistic. The idea of the 'private realm' existing and the unencumbered citizens falls away when this is engaged with. It is important instead to think about what responses are currently doing, and how they are working within particular configurations and

[135] E. Flynn and A. Arstein-Kerslake, 'State intervention in the lives of people with disabilities: the case for a disability-neutral framework' (2017) *International Journal of Law in Context* 13(1), p39.
[136] *Ibid.*
[137] *Ibid.* See L. Steele, 'Temporality, Disability and Institutional Violence: Revisiting In *Re F*' *Griffith Law Review* (forthcoming 2018) for excellent critical discussion of the argument that law here can be neutralised of the disability element by a return to the doctrine of necessity.
[138] Sherwood-Johnson (n16) p126.

thinking about how these can be reconfigured. Moreover, there is a need to be careful not to reify and smuggle an individualistic, atomistic legal subject back into our new approaches given the conceptual ties that this has to the binary framework discussed above. This can reinforce ideas of individual responsibility and obscure the structural and institutional inequalities which then become naturalised. The CRPD does, and must, amount to more than a right to be left alone.

CONCLUSION

The MCA is currently a central feature of the legal landscape on decision making for adults with disabilities. As has been seen, it has been built upon a framework of interlinked and mutually constraining binaries, which enable a number of critical issues to be left unsaid and invisibilised. Central to this is the recognition that these binary frameworks are not natural or inevitable. The shifting of the legal subject from the liberal, rationalistic and autonomous being towards an interdependent, embedded and relational being has important consequences at both the material and ideal level in terms framing of key concepts. Concepts which are mutually imbricated with these liberal ideals must also shift and change as part of this process of reimagining, which in turn alters the material and conceptual space in which questions for law and policy arise. This shifting of the boundaries of this broader space is central to the paradigm shift in the CRPD- without engaging with the dynamic potential of challenging these concepts then broader exclusionary frameworks will be left untouched. The difficulty then is being attentive to where new binaries might arise as a result of these shifts. New lines in the sand may be drawn by legislation or regulations to try to capture these shifts in legal subjectivity. This is something which was implicitly recognised by the Committee on the Rights of Persons with Disabilities, who stated that, in relation to Article 12 at least,

> "…new, non-discriminatory indicators of support needs are required in the provision of support to exercise legal capacity.[139]

At one level this may be true, and as Richardson has said, "the process of defining them would at least generate express consideration of the underlying moral dilemmas".[140] At a broader level, however, this challenge offers critical questions for law and social justice- whether there is something essential to law and how we conceptualise law which necessitates such binary frameworks[141].

[139] General Comment 1, para 29(i) (n1). Also see G. Richardson, 'Mental Capacity in the Shadow of Suicide: What can the law do?' (2013) 9(1) *International Journal of Law in Context* 87-105.
[140] *Ibid.* p103
[141] See Davies (n4) for broader discussion of law and how we conceptualise it.