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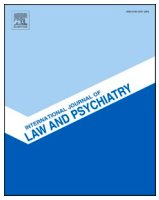

(Un)blurred lines? Sex, disability, and the dynamic boundaries of mental capacity law

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ABSTRACT

In this article, we consider the approach to decisions regarding capacity and sexual relations in the Court of Protection in England and Wales, and the boundaries drawn through its application of the Mental Capacity Act 2005 (MCA). We discuss recent developments in the law following the UK Supreme Court case *A Local Authority v JB* [2021] UKSC 52, which recast how capacity in relation to sexual relations ought to be assessed. Noting that this case has been warmly received by some feminist theorists for the centrality it affords to mutual consent, we draw on critical approaches from feminist, Black feminist, and disability scholarship, to call attention to the legal techniques and judicial reasoning in this case and the ways in which this embeds problematic norms and reinforces the marginalisation of disabled people. We call attention to the impoverished notions of equality advanced in the case and the assumptions that this appears to rely upon which obscure the realities and histories of legal intervention in disabled people's lives. We further argue that the approach in sexual relations cases appears to use capacity determinations as a vehicle to supplement gaps left by the criminal law, blurring their distinct rationalities and enabling further opportunities for control. We suggest that important insights can be gained from bringing these critical perspectives into conversation, including unsettling assumptions contained in the judgment and in mental capacity scholarship more broadly, manoeuvring us out of the perceived intractability of legal reasoning in this context, and offering productive ways forward.

1. Introduction

The Mental Capacity Act 2005 (MCA) provides the legal framework in England and Wales to make decisions on behalf of adults deemed to lack the capacity to decide for themselves. Despite its genesis as a mechanism to provide medical treatment to adults who were considered incapable of consent, the MCA is applied in far wider circumstances. One such area is sexual intimacy, where the MCA is utilised to assess whether a person has the capacity to make decisions in relation to sex. The assessment process purports to navigate a tension between encouraging the sexual autonomy of mentally disabled adults[1] and protecting them from harm and exploitation. Yet it is only the latest in a line of legal instruments which have been concerned with their sexuality and have often been a vehicle for the prevention, and latterly management, of their sexual lives (McCarthy, 1999). The MCA's approach, sitting alongside the criminal law on consent to sex and capacity, has come under renewed focus in light of the UK Supreme Court decision *A Local Authority v JB* [2021] UKSC52 ('*JB*'). In this case, the Supreme Court was asked to adjudicate on the relevance of the other parties' consent to the assessment of capacity, based on a concern that the adult in question posed a risk of sexual violence towards women.

The *JB* case brings to the fore several tensions that have underpinned the historical development of jurisprudence on capacity and sexual relations, at the same time as moving in new directions in response to the novel facts the Court were faced with. The surfacing and laying bare of these tensions invites us to carefully scrutinise the assumptions underpinning them, the techniques deployed in the jurisprudence, and the implications of the judgment. Reflecting on the borders that shape this area of law – including capacity/incapacity, disabled/non-disabled, civil/criminal, dangerousness/ vulnerability, feminist/disability – we draw attention to the ways that these borders are created, sustained and deployed through the jurisprudence, suggesting that their malleability

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[1] We use the term 'mentally disabled person' over 'person with a mental disability' throughout this paper to reflect our usage of the social model of disability, which focuses on the societal role in creating disability and disabling barriers, and responsibility to address these (Hollomotz, 2009; Oliver & Barnes, 1998).

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and porosity invites us to be attentive to power and its effects. Questions as to who has the power to draw and delineate, when and how this occurs, and where and when the effects settle and sediment, are centred through this analysis to unsettle and blur these purportedly obvious and intractable boundaries.

The paper begins by briefly outlining the historical context of disability and sexuality, being attentive to the role of law in regulating this. We then move to consider the Supreme Court decision in *JB* in more detail, noting its core strands and their significance. It will be seen here that the case raises some distinct challenges that the courts had not previously grappled with. However, whilst the factual circumstances are different and undoubtedly challenging, we argue that the way this is dealt with in the Supreme Court does not represent a departure from the pre-existing, problematic ideas underpinning the consent to sex jurisprudence, but a further entrenching and extending of it. Whilst it will be seen that the case was framed and has been received as a clash of feminist and disability approaches, it ought instead to be seen as a worrying development with implications that transcend any boundary framing of disability and feminism. As such, we bring together critical literatures including feminist legal and political theory, Black feminist theory, and disability studies. We recognise that this paper focuses primarily on disability and not race, however we would suggest that insights from Black feminist theory are important to engage with when considering issues of subjugation and marginalisation. This literature raises powerful questions about legal approaches to equality and discrimination, as well as important reminders of the ways in which claims to advancing feminism can exclude or leave behind those at the margins (Collins, 2022; Crenshaw, 1998; Davis, 1989). Using these literatures, we bring attention to the problematic assumptions and techniques of this area of law, the effects of this, and to demonstrate the importance of engaging with such insights when grappling with routes for progressive legal and policy change. This, we suggest, also speaks to broader debates around the limits of predominant understandings of equality, and the shortcomings of progressive efforts being built on 'consent'.

These new, generative insights come at an important moment in both feminist and disability scholarship. The UN Convention on the Rights of Persons with Disabilities (CRPD) has proved to be a catalyst for the opening up of debates around mental capacity, legal capacity and discrimination, with academics, as well as legal and medical professionals grappling with the implications in relation to consent to sex (Arstein-Kerslake, 2015; Ruck Keene & Enefer, 2022). At the same time, a broader societal awareness of the deficiencies of current legal frameworks in responding to, and indeed perpetuating, sexual abuse and violence has occurred through movements such as #MeToo and has prompted feminist legal scholarship to search for novel routes for rethinking consent (Sikka, 2021; Grossi, 2022). In contrast to the air of hopelessness that has recently permeated debates around the CRPD and mental capacity law, and the purported dead end that it may lead us down (Ruck Keene, Kane, Kim, & Owen, 2023), this paper suggests that a dynamic conversation between feminist legal and disability scholarship can provide productive ways forward. Bringing attention to the legal techniques and implications of the reasoning in cases such as this offers tools for activist and social justice movements, such as disability justice and/or reproductive justice movement. It highlights the ways that ableist norms can be cemented and reinforced through purportedly neutral legal frameworks, and this in turn reveals new sites for critical challenge.

2. Sexual relationships and mental disability: A troubled history

The lives of adults with cognitive and intellectual impairments have long been subjected to considerable legal interference, and it is perhaps unsurprising that attention has also been focused on their sexual intimacy. The story here is one of restriction and control, which denied them any right to form sexual relationships; this is reflective of problematic attitudes about the nature of disability and the ability of disabled people to enjoy such relationships. During the 19th and 20th centuries in particular, legal policy sought to prevent any form of sexual activity for such persons, both via criminalising any sexual activity with 'a female idiot or imbecile' (Criminal Law Amendment Act 1885, s5(2)) and institutionalising and sterilising disabled people to prevent sexual activity from taking place (Arstein-Kerslake, 2015, p. 1460). This approach is embodied by the Mental Deficiency Act 1913. The Act was developed on the back of the eugenics movement, which suggested that the 'prorogation of mental defectives' would lead to the degeneration of the British race (Sandland, 2013, p. 987). It allowed so-called 'mental defectives', 'imbeciles' and the 'feeble-minded' to be placed either in segregated institutional 'colonies', or under guardianship, where they could be supervised to prevent sexual activity, or even sterilised (Fennell, 1992, p. 27).

A dual portrayal of the mentally disabled body can be distilled in these early approaches to regulating sexuality, and both utilise the notion of protection to create a boundary between mentally disabled adults and the putative non-disabled norm. The first conveys that society needed to be protected from the threat posed by sexual activity of disabled adults (Arstein-Kerslake, 2015, p. 1460); viewing them as risky or dangerous. This depicts them as hypersexualised and unruly; their so-called 'erotic tendencies' and their lack of morality was said to make them more likely to engage in sexual activity (Jackson, 2004, p. 280). It then followed that if disabled people were having more sex, they are likely to reproduce at a heightened rate and thus dilute the British race (Sandland, 2013, p. 987). We cannot ignore the racialised nature of these concerns of racial purity, and the connection between race and disability in framing eugenic ideologies (Erevelles, 2011, pp. 104–106). A second portrayal is that mentally disabled people need to be protected from sex. This version of protectionism, most frequently associated with disabled women, views disabled people as asexual – either childlike, unable to express sexual desires and in need of protection from sex (McCarthy, 1999), or vulnerable, possessing a lack of will power to resist the advances of men (Jackson, 2004, p. 280), and in need of protection from sexual exploitation.

As argued by Sandland, the coexistence of these two ostensibly competing accounts somewhat destabilises the distinction between dangerousness and vulnerability when it comes to regulating sexual intimacy (Sandland, 2013, p. 988), opening the door for either – or indeed a combination of both – to be used to justify control. This, we would argue, also furthers the 'Othering' of the disabled body. The two portrayals seek to highlight the deficiencies of mentally disabled people when compared to their non-disabled counterparts, pointing to their lack of morality and, their incapability to care for themselves or make rational decisions. Their abnormality and monstrosity is emphasised (Sandland, 2013, pp. 990–994), devaluing disabled subjects in law and simultaneously asserting the primacy of the non-disabled norm. This positioning helps normalise intervention to correct or cure the troublesome 'Other' (Shildrick, 2009, p. 107). Also emergent within this programme of control is the differential portrayal of male and female disabled sexuality. Women were most frequently seen as vulnerable in their sexual immorality, with decisions to sterilise or institutionalize reflecting an impetus to protect individuals from their own sexuality (Savell, 2004). On the other hand, disabled male sexuality was portrayed as threatening, dangerous and in need of restriction and control, with chemical and surgical castration used as a means to curtail their purportedly deviant sexuality (Jarman, 2012).

Despite the legislative changes since the 1913 Act, as we argue below, many of these attitudes endure through the operation of the current legal framework. As will be seen, much of the earlier case law from the Court of Protection on capacity to consent to sex can be viewed as an extension of this.

3. Consent, capacity and the law on sexual relations

Against the backdrop of this troubling history, we now turn to consider the current legal context – namely the MCA 2005 and Sexual Offences Act 2003 (SOA). The approach under these statutes demonstrates a shift in focus, with 'consent' now playing a central role in driving legal responses to the sexual behaviours of disabled people, especially those with intellectual difficulties. This shift has taken place within a broader social context of changing attitudes towards disability. Spearheaded by the disability rights movement, powerful calls have been made to recognise mentally disabled adults as sexual beings, whose intimacy should be facilitated (Shakespeare, Gillespie-Sells, & Davies, 1996). These calls are further supported by the CRPD which asserts that disabled persons should enjoy legal capacity in all aspects of life (Arstein-Kerslake, 2015). Whilst a focus on consent may appear in theory to be a significant and progressive shift from the legal frameworks of the 19th and early 20th century, and less overtly premised on starkly ableist tropes, the same tensions and underpinning normative drivers can be traced through the extant framework. It appears that many of the same normative assumptions persist or re-emerge in new forms, challenging such claims to progress.

Beginning with the criminal law, sections 30 to 33 SOA contain provisions for 'offences against persons with a mental disorder impeding choice'. An offence is committed where sexual activity takes place with a person who is unable to refuse by reason of mental disorder, meaning they lack the capacity to choose whether to agree to the activity because of a lack of understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason. Whilst this moves away from criminalising activity with persons with particular diagnoses, the provisions continue to reflect the concern about vulnerability noted above in the previous section: they are aimed to mentally disabled individuals from abuse (Ruck Keene & Enefer, 2022). Thus whilst not preventing sexual activity, ideas of being the disabled person as a passive recipient of sexual advances who is 'unable to refuse', remain.

The SOA's definition of capacity differs from that contained within the MCA, despite the parallel development of the two statutes in the 1990s (Ruck Keene & Enefer, 2022). The MCA can be viewed as being based on a number of normative assumptions and organising boundaries, including capacity/incapacity, autonomy/protection, disabled/non-disabled (Clough, 2021). Section 2 MCA states that a person lacks capacity in relation to a particular decision (or 'matter') if they are unable to make a decision as a result of an impairment or disturbance in the functioning of the mind or brain. Under Section 3, an inability to make a decision means they are unable to understand, weigh, use, and/or retain the information relevant to that decision, which includes its reasonably foreseeable consequences. The MCA does not give any statutory definition regarding decisions around sex; however section 27 confirms that no individual may provide consent to sexual relations on behalf of someone found to lack capacity in relation to that matter. In essence then, there is a very binary approach to capacity to consent to sex. Should somebody be found to have capacity to consent to sex then their decision-making will not be interfered with; should they be found to lack capacity then no best interests decision can be made in relation to their sexual relations, and therefore any sexual relations that do occur would be seen as non-consensual. This dividing line between capacity and incapacity, with disability as the mediator, becomes crucial terrain for regulating the sexual lives and relationships of those who may fall under the reach of the MCA.

Questions as to when a person has capacity to consent to sexual intimacy pre-date the MCA, but in recent years a body of case law in the Court of Protection has considered this in depth. The pre-MCA case law focused more on the consequences of sexual activity rather than the issue of consent and capacity. In *Re F (Mental patient sterilisation)* [1990] 2 AC 1 for example, it was accepted that F was in a sexual relationship with another resident of her institution. The stated concern instead was that she would not cope with a pregnancy, and that sterilisation would be preferrable. Here, we cannot ignore the eugenicist undertones of this decision which chimes with the 1913 Act, nor the perception of permanent incapacity which dominated the legal reasoning in the case (Steele, 2017). Shifting from this, in the early 2000s capacity in relation to sexual activity itself came under scrutiny. This came about somewhat incidentally and can be traced to the case of *Sheffield City Council v E* [2004] EWHC 2808 (Fam). Whilst this case concerned capacity to enter into marriage, Mr. Justice Munby chose to consider capacity to consent to sexual relations, considering this as fundamental to the question of marriage, reflecting perhaps norms of what a 'typical' sexual relationship would look like (i.e., within a heterosexual marriage). Subsequent cases then dealt with consent to sex as a 'matter' (i.e. requiring assessment of capacity) in its own right.

Much like the criminal law, the focus on these early cases was on protecting vulnerable adults (frequently women) from the risk of harm, albeit balancing this with a stated need to encourage their sexual autonomy and freedom (Lindsey & Harding, 2021; Sandland, 2013). Situated around this purported tension, the courts grappled with how to conceptualise capacity to consent to sex and what the relevant test would be. It is notable that the emergence of a capacity-based approach coincided within a broader context of the disability independent living movement, which championed the inclusion of disabled people in communities, and sought to facilitate their independence and freedom,[2] ostensibly moving away from the institutional context of *Re F*. The shift in social norms is reflected in the recognition of sexual autonomy by these early cases, but there is something deeply paradoxical about the concurrent timing of the disability rights movement and this renewed focus on expressions of disabled sexuality. What this suggests is a refashioning of legal techniques to facilitate ongoing scrutiny of disabled adults sexual lives, moving from overt forms of control and regulation, towards more subtle and informal forms. We outline key elements of this new-found scrutiny below.

First, the information relevant to the decision that the person must be able to understand, use, weigh and/or retain included the sexual nature of the act, its reasonably foreseeable consequences (such as pregnancy or sexually transmitted disease) and that they could choose whether or not to engage with it (*X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam)). Second, capacity was considered on an 'act-specific' rather than person-specific basis, meaning that it is assessed on a general basis in relation to the sexual act, rather than in relation to a particular sexual partner (*IM v LM and Others* [2014] EWCA Civ 37). This was purportedly for both pragmatic reasons (for example, where the identity of sexual partners were unknown) and to prevent capacity being reassessed for every new partner, which was felt to constitute an undue interference with the right to a private life under Article 8 of the European Convention on Human Rights. Interestingly however, this approach is not mirrored in the criminal context where capacity to consent is assessed based on a particular person, in the interests of complying with Article 8. As Baroness Hale stated in the case of *R v Cooper* [2009] UKHL 42, "it is difficult to think of an activity which is more person- and situation-specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place" (para 27).

Considering these differing approaches, some of the implicit problems with the MCA framework and its application to sexual relations came to the fore (for example, the impossibility of assessing capacity 'at the material time' as necessitated by the MCA s2(1)). Yet pragmatism seems to drive the judicial response to these:

> '"it would be totally unworkable for a local authority or the Court of Protection to conduct an assessment every time an individual over

[2] For a more detailed exploration of the broader interplay of capacity law and deinstitutionalisation, see Series, 2022, chapter 4.

> whom there was doubt about his or her capacity to consent to sexual relations showed signs of immediate interest in experiencing a sexual encounter with another person …' (*IM v LM,* para 77)

As will be returned to and developed further throughout this paper, this ability to utilise the statute to shape 'pragmatic' approaches, that are workable for local authorities, raises important questions around the disempowerment of those potentially subject to the MCA, as well as inviting further reflection on the purpose of the legislative framework and the ways it serves to render workable health and social care practices at the expense of careful engagement with the lived realities for disabled people. This is not a new trend, and in many ways reproduces one of the reasons behind the development of the MCA; ensuring that medical treatment could still take place without formal or burdensome bureaucratic obstacles.[3]

Because sexual activity with a person deemed to lack capacity becomes potentially illegal, the local authority responsible for their care is required to take steps to prevent any sexual activity taking place. This demonstrates an enduring level of control and restriction over sexual expression, but even when capacity to consent to sex is established this may not mean a disabled adult is free to choose any sexual partner. The MCA's requirement to assess capacity in relation to a precise 'matter', and case law in this area, has siloed from capacity in relation to sex with capacity to make decisions about contact with other people (i.e., to make decisions regarding contact with others).[4] This makes it possible for a person to be deemed to have capacity to consent to sexual relations but to be found to lack capacity to decide who a safe sexual partner is. This scenario was considered in depth in *Re TZ (No 2)* [2014] EWCOP 973, ('*TZ*'), where Baker J, attempting to strike a balance between sexual autonomy, human rights, and protection, held that the local authority was "under a positive obligation to take steps to ensure that [the person] is supported in having a sexual relationship should he wish to do so". (*TZ*, para 47). This required the development (and court approval) of a care plan to facilitate TZ's contact with potential partners in a manner that controlled any perceived risks.

Considering these developments, despite the binary focus of capacity/incapacity, there is a clear element of judicial creativity in navigating this boundary and shaping spaces of regulation and intervention into sexual decision-making. The re-centring of questions of consent rather than segregation and control means that issues associated with the institutionalisation of the 20th century, noted earlier, become less readily apparent. The language of autonomy, choice and empowerment instead circulates in the legal and policy frameworks (Huysamen, Kourti, & Hatton, 2023). But despite these changes, there are recognisable elements of continuity from earlier normative frameworks, not least in the attention paid to sex and intimacy. What is clear from this body of case law, and which resonates across the literature on women with learning disabilities and sexuality (Hollomotz, 2009), is that concerns about vulnerability and exploitation drove the use of the MCA here. Whilst the patterns of exploitation and abuse of learning disabled women are well recognised (Harpur & Douglas, 2014), the MCA in effect entrenches their disempowerment by shifting responsibility to the individual through assessing their functional abilities, their capacity to consent, controlling and constraining their behaviours and leaving the broader sources of abuse untouched.

The focus on consent and capacity, and the normative boundaries of the MCA shapes this constrained understanding of the dynamics of sexual relations. As one of us has argued elsewhere, the approach to vulnerability and risk that underpinned this case law was deeply problematic and reinforced ideas of learning disabled people as passive and in need of protection (Clough, 2014). The structural context and background of the individual's life and engagement with services, often involving a deeply embedded and ingrained lack of choice, as well as lack of access to accessible and meaningful sex and relationships education, becomes invisibilised. The case law's dominant focus on disabled women and the risk of abuse seems to struggle to conceptualise and appreciate them as sexual beings (Hollomotz, 2024; Kulick & Rydström, 2015). Instead, it continues to situate disabled people, particularly those who may be deemed to lack capacity, as the 'Other' to the non-disabled, rational, autonomous (and therefore capacitous) norm. This echoes Shildrick's reflections on societal perceptions of disabled embodiment whereby;

> "considerations of sexual pleasures and sexual desires in the lives of disabled people play very little part in lay consciousness, and practically none in the socio-political economy. The most significant exception is when a negative reading of such concerns serves to activate an inclination to contain and control supposedly troublesome expressions of sexuality. The problem is that in the context of mainstream values, the conjunction of disability and sexuality troubles the parameters of the social and legal policy that purports both to protect the rights and interests of individuals, and to promote the good of the socio-political order […] The concern of both social policy and law is to encompass the bodies of all within a governmental grasp, yet some forms of corporeality exceed the limits of what is thinkable." (Shildrick, 2009, p. 44)

The development of the jurisprudence in this context is therefore testament to the ways that disability – and disabled sexuality – exceeds the governing boundaries of the MCA. Struggles around the definitions of capacity to consent to sex, and the explicit crafting by the judiciary of techniques in the name of pragmatism or workability, reveal the impulses to control, protect, and prevent that have long underpinned law in this area, despite the purported shift towards consent as a vehicle for autonomy. In this process of drawing finer and finer distinctions and placing the weight of significance on consent (and, by extension, individual capacity), the broader contexts, histories and societal structures that perpetuate disempowerment, disavowal, and exclusion are obscured and left untouched. Such concerns resonate with the insights from feminist literatures on the inappropriately individualised notion of consent in sexual relations, which assume "the mind to be dominant and controlling, irrespective of material circumstances" (Lacey, 1998, p. 117), portray sexual consent as an isolated event, and fail to capture power imbalances which can exist prior to that moment (Cowan, 2007, p. 52). Moreover, as relational approaches to autonomy recognise, this individualist notion fails to recognise the social and relational nature of these kinds of decisions (Nedelsky, 2012). As Arstein-Kerslake has suggested, "[t]he continuing use of the concept of 'capacity to consent to sex' seems to be a remaining plague of [the] era where society wanted to de-sexualize people with intellectual disabilities" (Arstein-Kerslake, 2015, pp. 1460–1461).

4. The JB case

Whilst the majority of this early jurisprudence focused on vulnerability and exploitation, the *JB* case presented a factually distinct situation, with driving factors of risk and dangerousness coming to the surface. JB was a 38-year-old man with a range of cognitive and physical health issues including a diagnosis of Autistic Spectrum Disorder (ASD). He lived in supported accommodation and since 2014 he had been subject to a restrictive care plan which limited his access to social media,

[3] See, for example, Lord Bridge in *Re F* [1990] 2 AC 1, para 52: ""It seems to me to be axiomatic that treatment which is necessary to preserve the life, health or well being of the patient may lawfully be given without consent. But if a rigid criterion of necessity were to be applied to determine what is and what is not lawful in the treatment of the unconscious and the incompetent, many of those unfortunate enough to be deprived of the capacity to make or communicate rational decisions by accident, illness or unsoundness of mind might be deprived of treatment which it would be entirely beneficial for them to receive."

[4] A decision to have contact can be act or person specific dependent on the circumstances – see *PC and NC v City of York Council* [2013] EWCA Civ 478.

his contact with others, and his access to the community without supervision. He expressed a longstanding desire to engage in sexual relations with women and was said to have exhibited 'inappropriate' sexual behaviour on a number of occasions, including towards vulnerable women (the driving factor behind the care plan). Evidence from healthcare professionals suggested that he could have difficulty understanding other's emotions and responses and he was said to represent a "moderate risk of sexual offending to women" (*JB,* para 37). The local authority responsible for his care commenced proceedings in the Court of Protection in 2019 seeking declarations on JB's capacity to litigate, to make decision about residence, care, support, contact, use of internet and social media, and sexual relations. The Official Solicitor, acting as his litigation friend, reached agreement as to his lack of capacity on all matters, except sexual relations. The key issue turned on whether the 'information relevant to the decision' – a long-standing source of litigation in the Court of Protection, as already seen – included understanding that the other person also had to give consent.

Roberts J, hearing the case in the Court of Protection, concluded that JB did have capacity to consent to sexual relations. She felt that including an understanding of consent would impose a test that is too high, deprive JB of his sexual autonomy, and would inappropriately extend the boundaries of the MCA to focus too heavily on protection (*JB (Capacity: Consent to Sexual Relations and Contact with Others)* [2019] EWCOP 39). The Court of Appeal, however, overturned her decision, and recast the 'matter' in question capacity to *engage in* (rather than consent to) sexual relations. In doing so, they held that it becomes 'inevitable' that information relevant to the decision includes that the other person must be able to consent and does in fact consent *(A Local Authority v JB* [2020] EWCA Civ 735, para 94). The Official Solicitor appealed to the Supreme Court. Lord Stephens, giving the leading judgment, dismissed the Official Solicitor's five grounds of appeal. We highlight some important elements of the decision, which we return to in discussion below.

First, Lord Stephens confirmed that 'the matter' in question should be interpreted as capacity to *engage in* sexual relations, which "better captures the nature of the issues in a case such as this". This, he held, embraces both the person's ability to consent to relations initiated by someone else, and their capacity to understand that when they initiate those relations the other person must in fact consent, and continue to consent throughout (*JB,* para 90).

Second, Lord Stephens held that the information relevant to a decision under the MCA included foreseeable consequences for persons *other than* P:

> the court as a public authority, in determining what information is relevant to the decision, must include reasonably foreseeable adverse consequences for P and for members of the public. In practice, by doing so, the court under the MCA protects members of the public. (*JB,* para 92)

In justifying this position, Lord Stephens rejected the submission that the MCA was confined to the protection of just the person, stating:

> the protection of the public provided by the criminal justice system or by a sexual risk order cannot detract from the protection which is provided in practical terms by including in the information relevant to the decision the reasonably foreseeable adverse consequences for P and for members of the public. (*JB,* para 92)

Third, whilst Lord Stephens accepted that the test for capacity to engage in sexual relations differed from the criminal law, he did not accept the submission by Mr. McKendrick, Counsel for the Official Solicitor, that this was impermissible. Rather, he held that countervailing policy reasons, namely the protection of the person and others, permitted the civil law to impose a more demanding test (*JB,* para 106).

The final two grounds of appeal were that the test would be inconsistent with international human rights instruments, namely Article 8 of the European Convention on Human Rights (ECHR) and Article 12 of the CRPD. Permission was refused to raise the ECHR argument, and regarding the latter, the Court stated:

> The appellant contends that (a) the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity creates "a separate standard or test of capacity for people with disabilities" and (b) this treaty obligation should "preclude the use of a separate standard or test of capacity for people with disabilities, for assessing consent to sexual relations." I reject the contention at (a). *There is no separate standard or test for persons with disabilities. The fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity applies to everyone in society.* This ground of appeal therefore fails at the first hurdle, but in any event the contention that this court should examine whether the United Kingdom has violated provisions of an unincorporated international treaty (which is the effect of the appellant's contention at (b)) has recently been considered, and rejected, by this court. (*JB*, para 120, emphasis added)

A further notable comment made by Lord Stephens was that whilst capacity to engage in sexual relations will usually be assessed in an act-specific manner, it did not always need to be assessed on this basis:

> Pragmatism does not require that consent to future sexual relations can only be assessed on a general and non-specific basis. … A general and non-specific basis is not the only appropriate formulation in respect of sexual relations as even in that context, "the matter" can be person-specific where it involves, for instance, sexual relations between a couple who have been in a long-standing relationship where one of them develops dementia or sustains a significant traumatic brain injury. It could also be person-specific in the case of sexual relations between two individuals who are mutually attracted to one another but who both have impairments of the functioning of their minds. (*JB,* para 72)

JB was the first case in the UK Supreme Court to consider the assignment of capacity under the MCA. The judgment therefore not only sets the precedent for assessing capacity to engage in sexual relationships; it also has relevance when considering the interpretation of the MCA in matters of capacity more generally. When it comes to sexual relationships, various commentators have welcomed the clarification the case has brought to assessing capacity in relation to sex (Currie, 2020; Kitzinger et al., 2021; Ruck Keene & Enefer, 2022) including feminist theorists who have highlighted its recognition of the sexual act as a mutually consensual activity rather than a one-sided and passive process (Lindsey & Harding, 2021; Subhi, 2021). This reconceptualisation resonated at a time when, prompted by the #MeToo movement, acute critique was being directed at liberal legal framings of consent in the context of sexual relations, both in broader feminist literatures and in wider public debates. Others however have called attention to the challenging implications of the case for facilitating sexual relationships for disabled adults (Kitzinger et al., 2021) and have raised concern that the decisions are being driven by safeguarding, which appears outwith the role of the MCA (Pritchard-Jones, 2021). The tension between these two views is indicated in the Supreme Court interveners, Respond and the Centre for Women's Justice (CWJ). Respond, a charity which provides support to people with learning disabilities and autism, submitted an intervention suggesting that the Court of Appeal's test was overly abstract and that a more situation-specific test ought to be developed to ensure individuals like JB are not set up to fail (an argument the Supreme Court rejected). The CWJ, on the other hand, a charity which conduct litigation to challenge male violence against women and girls, supported the reformulation of the test for capacity, and submitted that the consent of a partner is information that all adults regardless of disability are expected to understand.

Thus far, responses either view the outcome as positive in relation to feminist concerns, or a step backwards for the recognition of the sexual

freedoms of disabled individuals. However, we would resist this binary framing between the interests of the disability movement, and those of feminists who seek to resist violence against women. Whilst sexual violence is and ought to remain an important concern for feminism, we would suggest that only concentrating on the positive facets of consent risks missing important insights into the implications of the case and the legal reasoning deployed to reach this desired aim. As feminists have demonstrated, judicial techniques can be sites of marginalisation, and the law's claims to truth and justice allows it to assert a particular legitimacy in the outcomes reached (Smart, 1990), obscuring hidden assumptions and value judgements (Mossman, 1986). This indicates a need to scrutinise the judgment and the lines of reasoning used which result in the bolstering of the liberal legal subject and the further 'Othering' of the disabled subject. When taken with other trends in mental capacity law, it also reveals the expanding boundaries of mental capacity law and the porous borders which ought to be of urgent concern.

5. Centring consent; marginalising disability

As noted above, the centrality of consent in JB has been met with approval, with the court ostensibly signalling a commitment to prevent violence against women and girls and recognise sex as a mutual and relational act. However, as we argue below, it is important to interrogate the reasoning in the case to surface some of the troubling implications, including the ways that equality and discrimination are understood; the responsibilising role of relationality; and the 'Othering' and disavowal of disability that is perpetuated through this case law. The legal techniques used to maintain and reinforce these consequences, through the MCA, the capacity/incapacity boundary and reasoning around the edges of it, warrant critical attention from both feminist and disability scholars as they speak to broader debates around the limits of equality discourses, and the shortcomings of progressive efforts being built on 'consent'.

5.1. The conditionality of equality

One of the core planks of the reasoning in *JB*, and one that seems central to the palatability of the outcome for some commentators, is that the potential implications in terms of constraining sexual behaviour is not discriminatory, as everyone engaging in sexual relations must think about the other person and their consent. The barrister representing *JB* argued that:

> …to include as part of the information relevant to the decision the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity imposes a discriminatory cerebral analysis on the potentially incapacitous. (*JB,* para 96)

However, Lord Stephens rejected the submission, agreeing with the Court of Appeal that "amongst the matters which *every person* engaging in sexual relations must think about is whether the other person is consenting". He added "if that is properly viewed as cerebral or as involving a degree of analysis, a decision to engage in sexual relations is necessarily cerebral or analytical to that extent" (*JB,* para 96). The submission of discrimination was rejected on a similar basis, with Lord Stephens emphasising (*JB,* para 120 quoted above) that the standard could not be viewed as discriminatory given the requirement of consent applied to all in society.

This robust and almost self-evident dismissal of any concerns about discrimination seems to systematically overlook and erase the ways that disabled people experience law, as well as the reality that the MCA is specifically focused on those with a cognitive impairment (Section 2) and is thus not present in the lives of non-disabled people. Those who do not fall within the scope of Section 2 will not have their capacity assessed or run the risk of having sexual relations and opportunities for them severely circumscribed through close supervision. Similarly, they are not routinely dependent on gatekeepers such as support workers to allow the development of potential sexual relationships. As well as these material impacts on sexual decision making, we have also seen how the sexual lives of disabled people – particularly those with learning disabilities, autism and dementia – are discursively shaped and constrained. As Camilia Kong notes, disabled women in particular are trapped within a "triple bind" of oppressive norms around gender and disability which influence behaviour, but also a failure to recognise any form of agency (Kong, 2019) due to their deemed incompetence. As Hilary Brown observes, we ought to question the "ways in which people with learning disabilities are really free to be 'sexual' and the penalties they face in breaking out of the roles which have been prescribed for them" (Brown, 1994, p. 125).

These material-discursive differences in the application or potential application of the MCA are striking, but invisibilised by the Supreme Court. This is not to reinforce difference as a reason for a distinct legal regime for disabled people, nor to reinforce the ideas of the liberal legal subject as the autonomous rational norm against which disability is to be positioned. As feminist scholarship has long argued, we all face societal, structural, and interpersonal constraints on our sexual freedoms. However, the situation created by the MCA and overlapping legal and policy frameworks in the context of care and support enables an intensification and immediacy of dependency and gatekeeping which the law plays a role in buttressing. To then ignore or actively obscure this is a deeply problematic manoeuvre which feeds into the disempowerment and disavowal of disabled people. It is a move seen elsewhere in mental capacity jurisprudence,[5] and can be viewed as a judicial tool through which difference is simultaneously reinforced and hidden.

The failure or indeed refusal of the Supreme Court to engage with this perhaps speaks to broader problems with ideas of equality and discrimination at play. It chimes with a longstanding commitment in Black feminist theory, critical race theory, and feminist legal studies to challenge dominant framings of equality which work to reinforce marginalisation and discrimination. Black feminists such as Kimberlé Crenshaw and Patricia Hill Collins for example have challenged how the US courts have interpreted the requirements of equality in the context of race, noting that the rhetoric of colour-blindness deployed, whilst purporting to be equal, overlooks difference and proceeds from the (false) basis of sameness:

> equality meant treating all individuals the same, regardless of the differences they brought with them due to the effects of past discrimination or even discrimination in other venues … Within this logic, the path to equality lies in ignoring race, gender, and other markers of historical discrimination that might account for any difference that individuals bring to schools and the workplace (Collins, 2022, p. 353)

As Crenshaw notes, the denial of differentials in social power through these judicial responses helps reproduce and entrench them: "formal equality in conditions of social inequality becomes a tool for domination, reinforcing that system and insulating it from attack" (Crenshaw, 1998, p. 285).

Political theorists have also provided fruitful critiques of dominant ways of thinking about equality. Anne Phillips, in *Unconditional Equals,* has invited a renewed challenge to theories of equality and discrimination, critiquing the pervasive assumptions of universal equality, where it is simply assumed that this is the base line. Instead, she points to the ways in which certain groups have been excluded from the parameters of equality from the start:

> a high-minded discourse about equality, humanity, and the Rights of Man coincided with the dehumanisation of most of the world's inhabitants, and this coincidence cannot be dismissed as accident … From its inception, the modern idea of equality came with the

[5] See discussion of 'dichotomies of powerlessness' (Clough, 2021, Chapter 7).

conditions as regards character, temperament, rationality, and intelligence (Phillips, 2021, pp. 14–15).

These insights resonate with the particularities of mental capacity law and the histories of exclusion and erasure of populations that fall within its scope, as outlined by Simon Jarett in '*Those they Call Idiots*' (Jarrett, 2020). The conditionality of inclusion rests upon meeting certain socially imposed and prescribed normative characteristics, such as cognitive ability and rationality. As critical disability scholars such as Altermark, Goodley, and Shildrick have drawn attention to, inclusion here is premised on the shoring up of non-disabled norms, and of 'Othering' (Altermark, 2017; Goodley, 2020; Shildrick, 2009). Those failing to meet such norms are placed outside of the realms of equality, as 'Other' to the liberal legal norm. This can be seen starkly in this context of the MCA and the positioning of individuals as either capacitous or incapacitous, based on an evaluation of a person's ability to be rational in decision-making. Despite the centrality of disability to that process, it becomes marginalised or hidden at the point of evaluating inequality and discrimination.

Returning to the consent to sex case law and the *JB* case, we see the centralising of consent as a key tool in this marginalising of disability, reinforced through impoverished understandings of equality. It is notable that the Supreme Court deployed a conditional basis for equality (i.e., premised on a particular knowledge of consent) and held JB can be excluded from the standards of equality and discrimination because of his disability and its impact on his capacity. The declaration that equality is being served via this manipulation of the legal framework helps obscure this exclusion. As Crenshaw recognises, "Law in its almost infinite flexibility can assist in legitimating hierarchy simply by labelling the realm of the social equal, declaring victory, and moving on" (Crenshaw, 1998, pp. 281–282). In approaching the ideal of consent as the benchmark for legal equality, the Supreme Court leaves intact structural inequalities concerning sexual freedom and education and masks the embeddedness of individuals within these. Instead, the person and their disability are positioned as the root cause of the problem, and they are situated as the locus of change. The legal response facilitated through the MCA is that JB needs to be brought up to the normative standard of capacity. As one of us has argued elsewhere, this poses a number of problems given the slipperiness and high levels of subjectivity in this assessment of capacity (Clough, 2014, 2021),[6] a point we return to below. Additionally, the 'fixing' of the individual that is driving this case is explicitly noted in the judgment, as the response is framed as 'treatment':

> 43. [the consultant clinical psychologist] advised, in general terms, that there should be ongoing or periodic involvement from the Forensic Service for People with Intellectual and Neurodevelopmental Disorders to support JB's team of carers. More specifically she considered that the work with JB could involve, for instance, helping him to understand his ASD and the impact it has on his thinking, together with the associated need to develop strategies to address things which upset him, and from there his behaviour.
>
> 44. [another consultant clinical psychologist] advised that treatment should be focused on risks of sexual offending coupled with his ASD, which "is most likely to be effectively provided as part of a bespoke treatment package rather than as part of a group

Such an approach falls squarely within an individualised or medical model of disability, which places the source of disability within the person and focuses on cure (Kafer, 2013, pp. 4–10), and is central to many of the underpinning assumptions around disability within the MCA (Clough, 2017). JB's autism is rendered the reason for his problematic views about sex and thus something to be fixed. Broader problematic societal attitudes to consent and the structures that have prevented JB from accessing effective sex education and opportunities for intimacy (Hollomotz, 2009; Huysamen et al., 2023) are in effect insulated from critique.

One potential response to dealing with these problems, as proposed by Lindsey and Harding, is adopting the capabilities approach to facilitate sexual intimacy. As they suggest:

> "the capabilities approach provides a convincing social justice argument to underpin the claim for the resources necessary to help a person to achieve capacity, something that has not been achieved through the MCA alone, notwithstanding that there is a right to support embedded in the foundational legal principles of the Act" (Lindsey & Harding, 2021, p. 73).

The focus of capabilities theory is on "what people are actually able to do and be" (Sen, 2010, p. 231) and ensuring a certain level of background societal conditions to facilitate meaningful access to rights. It avoids formal equality measures and instead interrogates the social and contextual realities, and barriers to rights enjoyment.

Notwithstanding broader critiques of the capabilities approach, the ability of it to inject a more socially just approach in the context of the boundaries of mental capacity framework specifically is dubious. Whilst such an approach may be commended for its emphasis on resources for supporting the person's exercise of capacity, the capabilities approach has been criticised by some disability scholars given the potential for ableist assumptions to underpin the framing of the core capabilities, particularly with regard to Nussbaum's work (Harnacke, 2013). It is notable that the support or 'treatment' envisaged is focused on bringing the individual – here JB – up to the capacitous norm. This support is not chosen or driven by the individual, and it is explicitly tied to a challenge to their capacity. Indeed, it is contingent on the devaluing and disavowal of the incapacitous individual, and intensive interventions in their life. Questions also remain here about who decides when this level of capability and/or capacity has been reached, and the concerns around the normative underpinnings of capacity assessments and the 'Othering' of those falling outside of the boundaries of liberal legal subjectivity become amplified as a result. In this way, a capabilities approach in the context of the MCA can reinforce the conditionality that Phillips critiques. What this indicates is a need for a more expansive approach to support and resources and the ways that agency is facilitated, which is carefully decoupled from normative judgements about capacity. Rather than focusing on fixing the individual and endorsing interventions and restraints in the name of preventing any sexual contact (most often, this involves the intense supervision of the individual and preventing contact with others) there is a need for this support to be seen as an ongoing process which is not tied to capacity and its consequent denial of agency (Kukla, 2021).

5.2. *Unpacking the shift to engage*

Another purported positive element of the JB case is shifting the question of capacity, from 'consent' as a passive action, towards 'engage' as a means of recognising the interpersonal dynamic of sex and the ways that disabled people can be 'instigators' as well as 'recipients' in sexual relations. Whilst this chimes with feminist literatures on consent as being dynamic and situationally shaped (Lacey, 1998), and with disability studies' calls for recognition of the sexual agency of disabled people (Shakespeare et al., 1996) we would suggest that the constraints of the MCA do not in fact enable this more relational approach to consent, despite superficial tinkering with the test. The legislation is explicitly premised on assessing capacity via assessing cognitive ability, and the inner workings of that decision-making process rather than actual exercise of it. This individualised process does nothing to challenge the power imbalances that scholars such as Cowan have noted as underpinning consent models (Cowan, 2007). Even if the scope of the information relevant to the decision is broadened to recognise the

[6] On this issue, see also the Committee on the Rights of Persons with Disabilities General Comment No1.

importance of the ongoing consent of the other party, this does nothing to solve the difficulties of situational and relational constraints when that capacity is exercised, which is one of the concerns that has prompted academic and judicial disquiet in this context (Clough, 2014; Herring & Wall, 2015; Lindsey & Harding, 2021).

For example, we know that sexual abuse is often not a single isolated event, but part of an ongoing pattern or relational dynamic (Doyle, 2010; McCarthy, 1999). The MCA, on the other hand, is supposed to be focused on assessing capacity at the material time and is decision-specific. This is one of the real difficulties with applying the legislation in this context generally – something which we saw in relation to *IM v LM* and the recognition of the practical impossibility of assessing capacity to consent to sex at the material time. The language of 'engage' offers little in response to this issue, as abstract, forward-looking assessment of capacity will still generally be required, dislocated from the particularities and dynamic of individual sexual encounters, including those with a known partner. Moreover, despite the superficial shift from 'consent' to 'engage', the idea of decision-making it utilises continues to rely on an internal (as opposed to interpersonal or context-dependent) process of rationality, reasoning and communication. In other words, the shift to engage does not necessarily help to recognise the contextual nature of sexual choices which feminist scholarship calls attention to. Equally, the use of 'engaging' in *JB* also appears to reinforce gendered and ableist ideas of the sexual act; JB as the disabled man is positioned here as asserting his active but risky sexuality, whereas his potential partners are vulnerable to his sexual advances. This furthers the positioning of women as the objects of male sexual behaviour and aggression which has been challenged by feminist scholarship for its failures to recognise female agency (Moore & Reynolds, 2016). There are again clear extensions of the historical narratives of dangerousness and vulnerability, yet these gendered dynamics are hidden within the MCA's ostensible objectivity and neutrality. This suggests that, far from moving to a dynamic framing, the language of 'engage' appears to freeze or lock individuals into either the active (male) 'instigator' or passive (female) 'consenter', failing to capture the participatory nature of sex and the ongoing collaboration it entails (Kukla, 2021, p. 272).

It is also worth emphasising that the main impetus to reformulate the matter as 'capacity' to engage was not to recognise relationality, but to facilitate the inclusion of the other person's consent in the information relevant to the decision. Indeed, as noted above, in reformulating the matter, the Court of Appeal made the explicit link with expanding the information relevant to the decision, on the basis that it is 'inevitable' that capacity to engage in sexual relations includes understanding the other person's consent. The legal reasoning deployed through the prism of 'inevitability' allows the change to be framed as a neutral and common-sense choice. This assertion was quoted and implicitly affirmed in the SC, who concluded the language of 'engage' better captures the reality of the situation. Yet as Mossman notes, these determinations and statements are not as objective as they appear and can legitimise oppressive hierarchies (Mossman, 1986). As we have argued above, the shift to engage and including the other person's consent in the test to capacity appears to entrench the differential treatment of mentally disabled adults and their exclusion from standards of equality. Through the language of inevitability, this material impact is disguised, as is the active role of the courts in casting capacity in this manner. The decision of Roberts J in the Court of Protection demonstrates the ability of courts to think differently about capacity and the implications in terms of holding disabled people to higher standards, yet in framing the decision as one of 'engagement', the Court of Appeal was able to sidestep such concerns. Smart notes that law's claims to truth in its determinations gives it the ability to silence different (Smart, 1990), and the deployment of common-sense creates a perception that no other outcome is possible, rendering resistance to this formulation purportedly illogical and allowing the courts to assert the fairness and correctness of their decision without critical justification.

From this perspective, reformulating the matter to 'engage' seems little more than a judicial technique to facilitate the control and regulation of JB's sexuality. This also serves to emphasise the inherent malleability of the MCA, whereby particular decisions are cast in different ways by judges to affect the assessment of capacity or enable a finding of lack of capacity. The Supreme Court appeared to view this as a positive facet of the Act, noting that it is "open and flexible, so as to accommodate any matter in relation to which an issue arises as to whether P is unable to make a decision for himself". Yet this also appears to enable judicial power, speaking to Crenshaw's argument regarding the flexibility of law: here, manipulating the approach of capacity helps facilitate the disempowerment of those within the reach of the legislation.

When considering the legal framework here through such a lens, we can see the ways that the problematic constructions of disability and sexuality have enabled the privatising and individualising of sex and consent. There is a lack of obligations upon states to facilitate the sexual and intimate lives of disabled people. We see this starkly in the context of autism in particular, with Huysamen et al noting the dearth of references to support for sexual relationships and intimacy across legal and policy documents (Huysamen et al., 2023). As has been seen, it is only once someone is positioned as incapacitous, or as troubling the liberal norms of autonomy and capacity, that support becomes relevant. Whilst recent scholarship in this context suggests a role for the capabilities approach to facilitate support to enable capacitous decision-making, and buttressing state obligations to provide this, the underpinning assumptions of the MCA risk reinforcing problematic normative ideals of capacity/incapacity and disability, as well as situating the locus of change at the individual level. As such, far from demonstrating a socially just response to the tensions in the consent to sex case law, *JB* instead lays bare the problematic assumptions around equality and the responsibilisising of the individual.

6. Protection, risk, and the role of capacity law

Having considered the problems with a shift to 'engaging' in sexual relations, and the false dawn for relationality and equality here, it is worth looking further at how the Supreme Court justified its finding. Firstly, Lord Stephens made clear that when capacity is assessed, the reasonably foreseeable consequences of making or failing to make a decision can extend to the consequences for others. He noted that in the context of *JB*:

> there are reasonably foreseeable consequences for JB of a decision to engage in sexual relations, such as imprisonment for sexual assault or rape if the other person does not consent. There are also reasonably foreseeable harmful consequences to persons whom JB might sexually assault or rape. (*JB,* para 73)

This expansion of the foreseeable consequences to consider the consequences for others was justified as providing protection to the public, with the Supreme Court confirming the MCA is not confined to only protecting the person. This aspect can be viewed in a positive light, in that it opens up the concept of harm to consider broader harms which can eventuate from decision-making. Yet as we argue below, the court's use of the language of protection, and the framing of JB that this entails, has worrisome implications.

6.1. Public protection and its consequences

The concept of public protection is not commonly associated with the MCA, but rather maintains close links not only with the criminal law, but with the MCA's close neighbour, the Mental Health Act 1983 (MHA). The MHA explicitly regulates the compulsory treatment of adults deemed to have a mental disorder on the basis of risk or dangerousness, to themselves and/or others. The MCA on the other hand purports to centre empowerment and protect autonomy, as Hayden J noted in *Re NB* [2019] EWCOP 27:

> The omnipresent danger in the Court of Protection is that of emphasising the obligation to protect the incapacitous, whilst losing sight of the fundamental principle that the promotion of autonomous decision making is itself a facet of protection. In this sphere i.e., capacity to consent to sexual relations, this presents as a tension between the potential for exploitation of the vulnerable on the one hand and P's right to a sexual life on the other. (*NB,* para 27)

On Hayden J's account, the Court's role is presented as dealing with vulnerability and safeguarding autonomy; its protective role is operationalised for that purpose. Previous cases have similarly constrained the court's function to protecting the person. For example, in *Re MN* [2015] EWCA Civ 411 Munby LJ held that the Court's purpose was limited to taking decisions on behalf of adults who lacked capacity. This was confirmed by Lady Hale in the Supreme Court case *Aintree v James* [2013] UKSC 67 [18] where she held the court had no greater powers than those of a person with capacity. The court's role in these cases was said to be to stand in the person's shoes and make decisions for them. Yet in *JB,* we see the Supreme Court actively asserting its jurisdiction to protect the public as well. Its harnessing of 'public protection' appears to blur the rationalities of the MCA with those of the MHA. By making reference to the potential risks posed to the public by JB, far beyond standing in his shoes and doing for him what he cannot for himself, the Supreme Court appears to make an implicit judgment in relation to JB's dangerousness. This calls back to discourses discussed above in relation to the sexuality of disabled men, where the threat this is seen to pose requires controlling through law. We can also see the blurring that Sandland notes between vulnerability and dangerousness (Sandland, 2013, p. 988): as the quote above demonstrates, JB is positioned as simultaneously vulnerable to becoming an offender, and dangerous to others by virtue of being a potential offender. The 'Othering' of the disabled body is intensified through the rhetoric of protection, and by positioning JB as simultaneously *at* risk, and *a* risk, he and others like him, perceived to present a threat to others, are cast back into the monstrous and deviant framing of disability (Shildrick, 2009, pp. 110–115).

The return of dangerousness and risk in driving legal responses should be of concern when we consider how this acts as a gateway for further intervention, which can be justified on the basis of the person being at risk, a risk, or indeed a combination of both. As Rodriguez et al suggest, the understanding of public protection enacted via mental health statutes (like the MHA) can be described as "carceral protectionism", whereby "the innocent" are protected from bodyminds that pose a danger, or these individuals are protected from their own danger:

> Carceral protectionism relies on a particular understanding of both vulnerability and virtue, employing both law enforcement rescue and coercive "therapeutic" interventions in order to make particular bodyminds safe and incorruptible (Musto, 2010: 389). Within our view of carceral protectionism, "innocent" women and children are constructed as deserving protection from the invulnerable other. Those othered are disproportionately funnelled into corrections (through psychiatrization, jails and prisons), incapacitation, or early death. (Rodriguez, Ben-Moshe, & Rakes, 2020, p. 501)

When protection is cited as a concern, the dominant framing becomes one of risk, which can justify controlling and at times punitive forms of intervention. In JB's context, it enables a potential finding of lack of capacity where one was not previously available. This creates a subtle shift in the obligations of those who care for JB. Following *TZ* (discussed above), if JB is held to have capacity in relation to sex, the local authority would be under an obligation to support him in developing sexual relationships (*TZ* [2014] EWCOP 973). Yet, if deemed to lack capacity, JB's care plan can focus on restricting contact with others and bringing him up to the normative standard of capacity, foreclosing his ability to develop safe and consensual sexual relations. Huysamen et al highlight the significant challenges for autistic adults more broadly here, observing that sex and relationships for autistic people are frequently framed as risky, and providers are made responsible for managing those risks and thus regulating their intimate lives. As they argued:

> when risks are emphasised disproportionately, and in the absence of positive discourses around sex and relationships, this reinforces common tropes about autistic people as victims or perpetrators of sexual violence, thereby perpetuating tropes that contribute to the marginalisation and social exclusion that autistic people experience (Huysamen et al., 2023, p. 10)

This seems to be entrenched in *JB,* which not only enables restrictions on the sexuality of disabled people based on risk, but as noted above relies on a positioning of mentally disabled people as either victims or perpetrators. This creates space for moral judgements to drive judicial and legal responses. An example of this is the blurring of the act and person specific aspects of the capacity test, justified in the interests of 'pragmatism'. Explicit space is carved out for a person-specific test in the context of ongoing, sexual relations between long-standing couples where one becomes newly disabled *(JB,* para 72, quote above). Moreover, and somewhat strikingly, relationships between individuals 'who both have impairments of the functioning of their minds' are similarly exceptionalised, here with both parties positioned as outside of the realms of the 'standard' legal approach. These exceptions are simply stated without justification, but there are clear signals here of the normative hierarchies noted above, wherein certain relationships may be encouraged and privileged.

The language of 'pragmatism' and the malleability this enables is worth dwelling on in the context of the choice between act and person-specific approaches. Subtle, or not-so-subtle, biases or norms can readily become entrenched in legal frameworks in the name of pragmatism. Indeed, in subsequent cases, the option of person-specific approaches has been endorsed to prevent sexual contact with a partner who is considered to pose a risk to the disabled person (Reed-Berendt, 2022). What this demonstrates is the entrenchment of these narratives of risk, vulnerability, and dangerousness, which operationalise at the intersections of disability and gender. With disabled women, we see them positioned as at risk of harm, in which case the test may be person specific (*Hull City Council v KF* [2022] EWCOP 33), with disabled men, we see them positioned as a sexual risk to others, or indeed a risk to themselves of offending (*JB, DY v A City Council and Another* [2022] EWCOP 51). In these cases, the disabled 'Other' is cast as the problem, it is for the state to provide promised protection, and the MCA becomes the vehicle to do so.

6.2. *Practical protection and the criminal interface*

Another boundary blurred through this expanded approach is between the criminal and civil law, through what the court referred to as 'practical protection'. Mr. McKendrick argued that the protection sought could be achieved via the criminal law through a sexual risk order (under section 122A SOA 2003), however the Supreme Court held that this did not detract from the protection that could be provided "in practical terms" under the MCA (*JB,* para 92). A sexual risk order is available where a person has done an act of a sexual nature which suggests they pose a risk to the public, children or vulnerable adults, but does not require them to have been convicted or charged with an offence. Whilst this may in theory be available in *JB,* it would require an application to a magistrate's court by police and an identified 'sexual act' (albeit undefined in the legislation) to have taken place which necessitates making this order. However, a finding of lack of capacity on a basis that JB does not understand the requirements of consent circumvents these processes, offering a more informal mechanism to achieve the same preventative outcome. This is suggestive of what Beckett and Herbett term 'legally hybrid' techniques or control tools, where elements of the criminal and civil law are blended to the benefit of the state (Beckett & Herbert, 2010). With the criminal law operating on a lower

threshold for capacity, and only able to intervene after an inappropriate act has taken place, the civil law can be called upon to hold mentally disabled people to a higher standard of capacity. This helps enable ongoing control and minimises opportunities to contest the arrangements. The standards and tools of the criminal law however continue to be relied upon to assess JB's behaviour; he is considered as a moderate risk of offending and his potential offending motivates the legal response. There appears to be a borrowing and blending of the civil and criminal law to enable the management of disabled people (Spivakovsky, 2014).

What this also suggests is that where it comes to disability and a perceived risk of criminality, the court are taking an active role in creating opportunities for further and ongoing intervention. At one level, this might be seen as a positive development, as it may signal the need for support to facilitate an individual's decision-making capacity and act preventatively rather than reactively in the face of criminal tendencies, thus protecting them from interactions with the criminal justice system. Whilst this could be viewed as aligning with a social model approach to disability and inviting recognition of the socially situated nature of sexual decision-making, we need to be attentive to the ways that the MCA works in making this assessment. Support in the MCA is focused on bringing individuals up to the normative ideal of capacity, an ideal that we have already seen excludes marginalised groups and is often the source and site of this marginalisation. Normative assumptions (here, around putative risk) have underpinned the 'Othering' that occurs through the navigating of the capacity/incapacity binary, and arguments about support to facilitate capacity can reinforce this. It adheres to what Alison Kafer terms a 'curative imaginary': "an understanding of disability which not only *expects* and *assumes* intervention but cannot imagine or comprehend anything other than intervention" (Kafer, 2013, p. 27). This attitude of a requirement for intervention or cure is emphasised in the case's discussion of the support being offered to JB to change his views and attitudes about sex, which as we noted above appear in the guise of 'treatment' for his abnormality.

Notably, these concerns about the role of the MCA have been echoed by Poole J in *Re PN (Capacity: Sexual Relations and Disclosure)* [2023] EWCOP 44 (*'PN'*), a subsequent case which similarly involved an autistic man and concerns about risky sexual behaviour. Here, Poole J cited Hayden J's comments in *NB* [2019] EWCOP 27 with approval, and cautioned against a 'protective imperative', where the capacity assessment being driven by safety concerns:

> although the issue of the consent of others to sexual relations has entered the list of relevant information, the Court of Protection must not allow the desire to protect others unduly to influence a clear-eyed assessment of P's capacity. The unpalatable truth is that some capacitous individuals commit sexual assault, even rape, but also have consensual sexual relations. An individual with learning disability, ASD, or other impairment, may act in the same way, but it is only if they lack capacity to make decisions about engaging in sexual relations that the Court of Protection may interfere. If P would otherwise have capacity, then the court should not allow its understandable desire to protect others to drive it to a finding that P lacks capacity, thereby depriving P of the right they would otherwise have to a sexual life. The Court of Protection should not assume the role or responsibilities of the criminal justice system. (*PN,* para 11)

This is perhaps indicative of a level of judicial discomfort with the direction the *JB* case appears to take the law, and we would urge similar caution around the potential 'protective imperative' Poole J references. A key concern in *JB* is ascriptions of labels of dangerousness and criminality prior to an offence being committed. Mithani and Boyd have argued in relation to race that a label of risk attached to a medical record can seek to reinforce racialised oppression:

> This can occur because knowing ahead of time that someone is labelled a high risk for violence, allows for time and physical space (away from the patient) in which to create an image of the patient. This in turn can modify our interactions with the patient in a multitude of ways, including subtle things such as how we position ourselves in the room and the tone of our voice, thus creating a way to institutionalize oppression. (Mithani & Boyd, 2023, p. 29)

What this suggests is that a label of being a risk of violence to others is likely to have considerable influence in interactions with health and social care institutions. This took place in *JB* – prior to the hearing, JB's contact with women was entirely restricted and he was not permitted any unsupervised interactions in the community. Not only can perceptions of criminal risk entrench institutional control, but as alluded to above, epistemic questions arise about who decides whether the normative threshold of capacity has been reached – how do we know when JB is 'fixed' through his 'treatment'? In *PN* for example, the relevant consultant psychiatrist gave evidence that:

> It is my current view that it is unlikely that [PN] will develop the requisite skills so as to satisfy the amended test [for capacity per *JB*], and I base this both upon the intrinsic characteristics of his mental disorders and also that a large amount of therapeutic work has already been undertaken with him … without evidence of any substantive internalisation of risk management or any shift within his undermining knowledge and consequent behaviours (*PN*, para 6)

This stark reference to the intrinsic characteristics of autism centralises, and almost locks the individual into, a deficit model. This situates them as in need of cure, seeming to suggest that it would be impossible for PN to ever have capacity to engage in sexual relations because of his failure to recognise the risk he poses. Whilst Poole J in this case did find PN to have capacity, the consultant psychiatrist's evidence suggests that risk-based concerns circulate in practice and have the potential to influence assessments of capacity. In the broader mental health context of the MHA, evidence suggests that fear of making the wrong decision makes practitioners more likely to make risk-adverse decisions, which can lead to greater restrictions on individual freedoms (Szmukler, 2017). A concern is that the use of labels of violence or risk may lead to a reticence to find that an individual has regained capacity in relation to sex, meaning that they are faced with additional barriers to developing sexual relationships. Moreover, there are implications for any potential future interactions with the criminal justice system, with the pre-emptive, always already positioning of JB as dangerous. There is a 'prolonged temporality' (Spivakovsky & Steele, 2022) to the interventions that are enabled through this attribution of risk to the individual. It is worth reiterating that JB had already been under a period of intense restrictions on opportunities for social interaction, since at least 2014 and potentially earlier. These dispersed and ongoing interventions may then be legitimised in the name of restoring capacity. Whilst the 'curative imaginary' (Kafer, 2013) is brought to bear on the individual, the broader societal context and dynamics seem to be curiously static, as there is little recognition that this context can and does shift and change, thus impacting on the risks and potentialities for sexual intimacy. This speaks to the point noted above, that the MCA and its underpinning assumptions cannot neatly account for these relational dynamics, given the primary focus on the individual and the 'material time', and scholars, practitioners and the judiciary are increasingly struggling to contain these temporal aspects (Spivakovsky & Steele, 2022; Steele, 2017).[7]

The filling in of the 'gaps' in the criminal law using the informal

[7] See e.g. *A Local Authority v PG and Others* [2023] EWCOP 9. Various judicial techniques were discussed by Lieven J to deal with the question of PG's fluctuating capacity. This included an anticipatory declaration regarding what course of action would be in PG's best interests if she lost capacity, or taking a longitudinal approach to assessing her capacity. In this case we can again see pragmatism as a key driver in judicial decision-making.

powers of the MCA has no certainty of achieving the desired aim of challenging violence against women and girls. As Cowan notes:

> As feminists have long known… tinkering with the law on sexual offences does nothing to undermine entrenched social views about the apportionment of responsibility between men and women in sexual assault cases … focusing on law, substantive or procedural, does not address fundamental underlying social inequalities, particularly those related to gender roles and stereotypes (Cowan, 2007, p. 68)

This echoes with the gendered nature of the decision in JB and subsequent case law. JB as an autistic man is positioned as the potential perpetrator, with 'vulnerable women' seen as particularly at risk from him. And as noted above, the case law has returned to disabled women and the risks they face from violence (*Hull City Council v KF* [2022] EWCOP 33) or exploitation (Reed-Berendt, 2022). Nothing is done here to disrupt existing norms discussed above regarding the passivity of (disabled) women, nor are the social inequalities faced by disabled people in accessing sex considered. Rather, the necessity of intervention is channelled through the individual, reinforcing ideas of individual responsibility, protection and the 'Othering' and control of mentally disabled people. The MCA and the refining and extension of it through the judgment in JB is engaged actively in constructing and perpetuating this.

7. Conclusion: Crossing the border between disability scholarship and feminism

This paper has sought to demonstrate the importance of bringing feminist scholarship and disability scholarship into conversation in order to interrogate legal developments in mental capacity law, with a particular focus on the troubling implications of the judgment in *JB*. As Kulick and Rydstrom suggest, "a focus on the erotic lives of people with disabilities unavoidably complicates understandings of and practices pertaining to things like boundaries, sociality and care" (Kulick & Rydström, 2015, p. 16). Yet, as they go on to point out, this critical approach and dynamic conversation across disciplines must not lose sight of "the kinds of serious injustices that many [disabled people] face in their day-to-day lives" (Kulick & Rydström, 2015, p. 17). *JB* is a stark reminder of the need to be attentive to these consequences. *A*t one level, this paper offers new conceptual insights through bringing critical scholarship on equality and discrimination as a lens for interrogating a more niche area of case law. At another level, it extends and deepens the understanding of the ways that ableist norms can become embedded in legal frameworks that claim to be built on more neutral ideas of consent, resonating with feminist literatures on the problematic nature of liberal consent models. The histories of disability and sexuality, and the legal focus on risk and vulnerability are a strong undercurrent in the current legal frameworks, despite the language of autonomy, empowerment and consent circulating in the MCA framework. These new languages and legal techniques hide their normative underpinnings; compounded by impoverished visions of equality and discrimination, they seem unable to capture the harms being perpetuated. As such, rather than an intractable conflict between feminist and disability scholarship, *JB* highlights much to concern feminist legal scholarship in its reinforcement of liberal legal structures and the MCA's problematic norms. Bringing these literatures into conversation in this way thus offers a productive way forward for more progressive and transformative approaches to mental capacity law, but also for re-imagining consent more broadly in a manner which does not leave behind those at the margins. As Black feminist Angela Davis reminds us:

> We must strive to "lift as we climb". In other words, we must climb in such a way as to guarantee that all of our sisters, regardless of social class, and indeed all of our brothers, climb with us. This must be the essential dynamic of our quest for power – a principle that must not only determine our struggles as Afro-American women, but also govern all authentic struggles of dispossessed people. Indeed, the overall battle for equality can be profoundly enhanced by embracing this principle. (Davis, 1989, p. 5)

Being attentive to the normative underpinnings of the legal frameworks here from both a disability and feminist perspective, and the consequences of the judicial techniques being deployed, offers important insights to those seeking to advance a transformative role for the CRPD (Arstein-Kerslake & Flynn, 2016). Whilst some scholars have suggested that the CRPD does not provide an answer to the tensions at the centre of cases like *JB* (Ruck Keene et al., 2023) there may be scope to leverage novel, intersectional approaches to equality and discrimination, such as those called for by Black feminism and envisioned by Phillips, as part of legal reform efforts. One of the key insights from these literatures is the way that ideas of the human underpinning social justice efforts contain endemic exclusions and are buttressed by conditionality and assimilation. Yet, as human rights scholars such as McNeilly suggest, understandings of universality in law are not static and fixed, but are ongoing sites of political contestation, and a space for new radical visions (McNeilly, 2015). The CRPD offers novel ways of understanding universalism through the phrase 'on an equal basis with others' which threads throughout the convention, and this opens up the space for critical alliances and approaches to sexual agency to drive deliberative thinking about the complexities of disability and sexual relations.

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Declaration of competing interest

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