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Clough, Beverley  (2025) Temporal disruptions in the UNCRPD: an untimely future for legal capacity? Human Rights Law Review, 25 (2). ngaf007 ISSN 1461-7781

DOI: <https://doi.org/10.1093/hrlr/ngaf007>

Publisher: Oxford University Press (OUP)

Version: Published Version

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Temporal disruptions in the UNCRPD: an untimely future for legal capacity?

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ABSTRACT

This paper utilizes the conceptual tools offered by scholarship on temporality and extends their use through engaging with disability, legal capacity and the CRPD. Surfacing these temporal issues in light of the work of human rights scholars such as McNeilly, and the call to think through human rights in a way that it ‘untimely’ offers two key insights for human rights scholarship and for disability law, particularly in the context of mental capacity. Firstly, it opens up novel sites for critical attention directed at routes for progressive change, moving beyond the stagnant and fixed temporalities of current debates. Secondly, at a conceptual level it begins a dynamic conversation between critical disability scholarship and human rights scholarship, demonstrating the importance of being attentive to the temporalities underpinning legal frameworks and the ableist ideas that may inhabit these. Disability studies has the potential to disrupt temporalities and underpinning ideas of time in capacity law, disability law, and human rights frameworks beyond disability.

KEYWORDS: time, temporality, Mental Capacity Act 2005, UN convention on the rights of persons with disabilities, disability studies

1. INTRODUCTION

The turn to temporality in legal studies has enriched our understandings of the dynamic relationship between law and time.¹ Human rights law in particular has been a core focus and a vehicle for developing much of the thought in this area.² As McNeilly suggests, a deeper understanding of the relationship between human rights law and time opens up new routes for radical social change.³ This provides an urgent framing for progressive and transformative thinking in contexts which have been mired in complacency or resignation as to the fixity or ‘common sense’ nature of current legal frameworks. What is clear from such works is the importance of uncovering ideas and assumptions around time that inhabit legal frameworks and suspending these through

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This Article is part of a *Symposium* on ‘The Convention on the Rights of Persons With Disability: Next Generation Thinking’ in (2025) 25 *Human Rights Law Review*.

¹ Grabham, *Brewing Legal Times: Things, Form and the Enactment of Law* (201); McNeilly, ‘Are Rights Out of Time? International Human Rights Law, Temporality and Radical Social Change’ 28(6) (2019) *Social and Legal Studies*. 817–838; Chowdhury, *Time, Temporality and Legal Judgment* (2020).

² McNeilly and Warwick (eds), *The Times and Temporalities of International Human Rights Law* (2022).

³ McNeilly, *supra* n 1.

embracing the concept of the ‘untimely’. Untimeliness here refers to recognizing the ways that time is currently utilized in legal frameworks (often in hidden ways), how this shapes legal responses and imaginaries, as well as (re-)imagining alternative futures untethered from existing frameworks and norms. As McNeilly suggests, untimeliness requires ‘abandoning commitment to linearity, progression and predictability in understanding international human rights law and its development and viewing such as based on a conception of the future that is unknown and uncontrollable, that does not progressively follow from the present, and that is open to embrace of the new’.⁴ Building on this, untimeliness will be harnessed to reveal and then unsettle the fixed or static ideas about temporality that underpin legal frameworks, and to embrace the unknowability of the future, and the malleability that flows from this.

Despite the recent temporal turn across legal studies and human rights scholarship more specifically, the critical potential for engagement with disability has yet to be fully realized. In disability studies, there is growing recognition of the ways that time shapes experiences of disability and responses to it.⁵ As Morgan and Tutton suggest, ‘much envisioning of the future is inherently ableist’.⁶ The UN Convention on the Rights of Persons with Disabilities (CRPD) has been welcomed by many as offering a ‘paradigm shift’, a progressive vehicle for change and a transformative approach to disability rights. At the same time, however, the actualization of this has been ‘glacial’.⁷ Time is thus already a powerful yet unacknowledged presence in the context of the CRPD discourse. One of the reasons perhaps for such ‘glacial progress’ in this context is the stagnant, fixed and static assumptions that often pervade the legal frameworks that the CRPD touches upon.⁸ As a result, the radical edge of the CRPD has been blunted, resulting in the perpetuation of the ableist futures that Morgan and Tutton allude to. Drawing attention to the temporal assumptions circulating in the legal debates may thus offer novel sites for critical interrogation and challenge. In addition, close engagement with the CRPD through a temporal lens also signals a new, distinct and disruptive temporality for human rights law which unsettles some of the assumptions that underpin existing rights frameworks and approaches.

Socio-legal scholarship engaging with time demonstrates that temporal techniques and assumptions circulate within law and legal frameworks in a variety of ways, at various overlapping scales and through different nodes.⁹ It is, as such, important to engage with the granular ways in which time and temporal framings are constructed and sustained: ‘[t]ime doesn’t flow, it percolates’.¹⁰ In thinking through the temporal disruptions and unsettling potential that the CRPD facilitates, the paper then takes this temporal orientation from the abstract to the particular, harnessing the conceptual potential in enabling a closer interrogation of temporality in the context of mental capacity. Mental capacity law is an area that has attracted intense critical attention in light of the CRPD, which has served somewhat as a catalyst for conceptual engagements with the underpinning ideas and assumptions shaping the Mental Capacity Act 2005 and associated jurisprudence.¹¹ The legislative framework surrounding mental capacity is replete with temporal language and framing, and this paper will begin to surface some of the assumptions underpinning these. Drawing on existing literatures on temporality, as well as disability studies, it reveals the ways that time is explicit and implicit in mental capacity

⁴ *ibid*, 817.

⁵ Kafer, *Feminist, Queer, Crip*. (2013).

⁶ Morgan and Tutton, ‘Enabling futures? Disability and sociology of futures’ (2024) *J Sociol* Online First.

⁷ Carney, ‘Prioritising Supported Decision-Making: Running on Empty or a Basis for Glacial-to-Steady Progress?’ (2017) *Laws* 6(4) 1–14.

⁸ Clough, *The Spaces of Mental Capacity Law: Moving Beyond Binaries* (2022).

⁹ Grabham, *supra* n 1.

¹⁰ Latour and Serres. *Conversations on Science, Culture and Time* (1995) p 5.

¹¹ Clough, *supra* n 8, Ruck Keene and others. ‘Mental Capacity—Why Look for a Paradigm Shift?’ (2023) *Medical Law Review* 31(3) 340–357; Kong, *Mental Capacity in Relationship* (2018).

law, and how such ‘neutral’ techniques and tools can perpetuate exclusion. What emerges is a particular temporal vision of the (disabled) legal subject, the role of the state and the dynamics of responsibility and intervention. The literature around legal capacity and Article 12 of the CRPD, which has driven much of the critical attention in the mental capacity context, is, however, in danger of repeating and reinforcing these temporal norms and techniques.¹² Exposing this, and then bringing it into conversation with the transformative potential and the distinct temporalities latent in the CRPD, opens up a novel and productive site for critical attention for those seeking transformative legal change and futures which are not shaped by ableist pasts and presents.

Firstly, bringing this attention to temporality moves beyond the stagnant and fixed temporalities of current debates in the context of mental capacity law and the CRPD. Drawing attention to temporality—and the untimely—reveals hidden undercurrents within the legal frameworks and conceptual debates. As Grosz puts it, ‘We can think it only when we are jarred out of our immersion in its continuity, when something untimely disrupts our expectations’.¹³ Here, the CRPD and thinking through and with disability can jar scholarship, to invite recognition and excavation of time in current legal frameworks, and to open an untimely orientation for future legal responses.

Secondly, at a conceptual level it begins a dynamic conversation between critical disability scholarship and human rights scholarship, demonstrating the importance of being attentive to the temporalities underpinning legal frameworks and the ableist ideas that may inhabit these. Disability studies has the potential to disrupt temporalities and underpinning ideas of time in capacity law, disability law, and other legal frameworks beyond disability. Yet, in bringing these literatures into conversation, the paper highlights the need to recognize the particularities and the histories of disability and law, revealing hidden sources of exclusion which would otherwise persist in ostensibly ‘neutral’ and universal legal frameworks. Ideas about agency, subjectivity, resources and the role of the state come to the fore, with the potential to radically unsettle and shift the dynamic relationship between temporality and law in this context.

The opening section will outline the importance of temporality within socio-legal scholarship and bring it into conversation with similar debates occurring in critical disability studies. Following this, the CRPD will be turned to and situated within broader human rights debates as to the utility of human rights in challenging the marginalization and disadvantage of non-normative groups. Mental capacity law will then be turned to in order to provide a close interrogation of the granular ways in which temporality frames ideas of legal subjectivity and the role of the state in this context. This is an important area given that ideas of mental capacity have been a key battleground for debates as to the utility of the CRPD. In engaging with this through the lens of the untimely, and thinking through the potential of the CRPD, key insights emerge for broader human rights scholarship.

2. BRINGING DISABILITY INTO THE CONVERSATION

There has been a recent turn to temporality across legal and socio-legal studies, with scholars each utilizing and extending the utility of a temporal frame for different legal contexts and

¹² See Clough, *supra* n 8. For literature on Art 12 and mental capacity law, see e.g. Series, ‘Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms’, (2015) *Int J Law and Psychiat* 40, 80–91; 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) 15 *Human Rights Law Review* 45; Arstein-Kerslake and Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law’ (2015) 20 *The International Journal of Human Rights* 471.

¹³ Grosz, *The Nick of Time: Politics, Evolution and the Untimely* (2004) 5.

issues.¹⁴ Such works have challenged the objectivity and fixity of time, noting the role of the law in constructing and shaping temporality in ways which can privilege some interests over others, entrenching disadvantage and exclusion. Linearity and progress feature heavily across these works, with scholars seeking to reveal and disrupt the normative commitments that such approaches to time entrench. Chowdhury, for example, notes the temporal building blocks that shape adjudication in criminal cases, working to shape the construction of the event and the legal subject.¹⁵ Seeing the 'juridical power' that is facilitated through these temporal building blocks, Chowdhury also illuminates the ways that time could be seen and constructed differently, with alternative, more just outcomes. McNeilly similarly exposes the contingencies and thus the malleability of time in law, making space for new temporalities to shape legal debate and approaches to law.¹⁶

These recent works build on previous scholarship such as that of the anthropologist Carol Greenhouse.¹⁷ Greenhouse noted the particularly Western ideas of time and the ways 'that temporality and legality are conceptually fused in the West through their mutual implications of a total order in relation to which social life acquires meaning'.¹⁸ Through this anthropological lens, Greenhouse highlights that 'among the ways in which cultural systems differ are the ways in which they engage different temporal logics as fundamental rationales of social organization'.¹⁹ This orientation to see temporal logics as fluid, constructed and infused through a dynamic engagement with law and culture, serves to shift the 'givenness' of time in legal frameworks. As Grabham suggests, drawing on Latour, these approaches 'require attention to the world-making capacities of legal temporalities, as much as the subjective experiences of those coming into contact with law'.²⁰ The subjectivities and temporalities that law then privileges forms the basis for critical scholarship such as work by Renisa Mawani²¹ which demonstrates the legal dynamics of colonialism and the imposition of temporal frames through the vehicle of the common law, in tension with other jurisdictions and legal cultures. Similarly, Mellisaris points to the ways in which 'state law, with the corroboration of centralist legal philosophy, silences and does violence to those other legal orders partly by extending its imperium over alternative ways of perceiving normativity in time'.²² Such an orientation resonates throughout critical engagement with temporality, with a focus on time as a method of inclusion and exclusion and the temporal struggles inherent in this,²³ as well as challenges around futurity and the denial or erasure of the futures and temporal possibilities of some marginalized groups.²⁴

Disability scholarship offers important critical insights that resonate with and extend this work on time and futurity. Critical disability studies challenges the ways in which disability is often situated in the individual, particularly in the context of social welfare, health, and education in law and policy. In contrast to the individual and medical location of disability, critical disability scholarship tends to shift the focus to social, economic and political structures, cultures and

¹⁴ Grabham, *supra* n 1; McNeilly, *supra* n 1; Chowdhury, *supra* n 1; Fletcher, 'On Chronolegality: Reproducing Legal Time with Periodic Abortion Law' (2023) *forthcoming*; Fletcher, 'Entangled Rights and Reproductive Temporality: Legal Form, Continuous Improvement of Living Conditions, and Social Reproduction' in Hohmann and Goldblatt (eds) *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (2021); Garland and Travis, 'Gendered Childhoods, Linear Sex Development and Unruly Temporalities' *Feminist Legal Studies* (2023) (Online First).

¹⁵ Chowdhury, *supra* n 1.

¹⁶ McNeilly, *supra* n 1.

¹⁷ Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98(8) *Yale L J* 1631.

¹⁸ *ibid.* at 1631.

¹⁹ *ibid.*

²⁰ Grabham, *supra* n 1, at p13.

²¹ 'The Times of Law' (2015) 40 *Law and Social Inquiry* 253; 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4 *University of California Irvine Law Review* 101.

²² Mellisaris, 'The Chronology of the Legal' (2005) 50 *McGill Law Review* 839 at 842.

²³ Bastian, 'Time and community: A scoping study' (2014) *Time & Society*, 23(2), 137–166.

²⁴ Mellisaris, *supra* n 20.

institutions, often drawing on and extending the social model of disability. Alison Kafer, in *Feminist Queer Crip*, offers critical insights into disability and temporality, particularly with regard to the ways in which medical interventions in the lives of disabled people are structured and enabled through a ‘curative imaginary’, positioning disabled people as outside of the norms of human development and in need of repair.²⁵ Through this, the futures available to disabled people, and the temporal horizons, are shaped and constrained by medicalized ideas of the normative subject. Rice et al. note the ways in which “‘the future’ is normatively deployed in the service of able-bodiedness and able-mindedness, a deployment used to render bodies of difference as sites of “no future”.”²⁶ In drawing on Kafer, Rice et al. signal the importance of engagement with temporality and disability, in order to ‘imagine new kinds of feminist-disability futures, asking audiences to reconsider the very terms by which normative understandings of “the future” are stabilized.’²⁷ As they go on to argue, ‘feminist, queered time becomes nonlinear, not marching on unabated toward a singular future, but instead multidirectional, plural, even circular’.²⁸

Across this rich tapestry of work, a prominent thread is the often-hidden assumptions about time that inhere in liberal legal frameworks and the effects of these, but also, importantly, the recognition of the ways that such dynamics can be changed. This forms the basis of the discussion in the following section, where a disability informed perspective on law and temporality can be brought into conversation with human rights law and, in particular, the CRPD. The way that temporality is produced, through the dynamics of legal ‘sorting’, and the material and discursive effects of this, emerge as an urgent focus for those seeking to engage with progressive approaches to activism and legal reform in this area. It is curious then, that there has been limited explicit engagement with time in the context of disability law, particularly given the impetus for social change that has driven literature in this area. As will be seen, the social model of disability, for example, challenges individualized or medical approaches to disability and instead focuses on the interaction between the individual and societal structures and institutions. Advocacy and activism is thus channelled into shifting these broader social dynamics. The following section will bring these threads from the socio-legal and disability studies literatures into conversation with the CRPD and the work of scholars in human rights law to explore the productive intersections. Drawing on McNeilly’s invitation to embrace an ‘untimely’ approach to human rights law, re-evaluating and reimagining legal temporality/ies through disability can offer new conceptual horizons for legal subjectivity and our understanding of the role of the state and institutions.

3. HUMAN RIGHTS AND THE “PARADIGM SHIFT” IN THE CRPD

Temporality literature in the context of human rights law has developed as a critique of the idea of human rights as fixed, linear, and progressive. It is also a response to a turn away from rights in critical scholarship, and a malaise as to the effectiveness of human rights as an emancipatory tool for marginalized groups. McNeilly’s work has been prominent in pushing for a more radical re-evaluation and reimagining of the critical potential of human rights, challenging the ways that such critiques of rights may inadvertently inhere rights approaches with a fixed and given nature. Instead, McNeilly urges attention to the contingencies and malleability of rights frameworks, and the concepts that underpin and drive them.

²⁵ Kafer, n 5.

²⁶ Rice and others, ‘Imagining Disability Futurities’, (2020) *Hypatia* at 215.

²⁷ *ibid.*

²⁸ *ibid.*, 217.

Whilst there is here recognition that current human rights frameworks have served to privilege the interests of some whilst excluding or marginalizing others, entrenching the inequalities that the frameworks have purported to challenge, McNeilly traces these effects to a particular relationship between human rights and temporality. Such a framework is premised upon ideas of linearity, progress and predictability,²⁹ ideas which resonate across liberal legal frameworks and which are mutually imbricated with Enlightenment ideas, prevalent in Western (neo)liberal societies. Valverde similarly recognizes that '[l]iberal legalism is not completely a-temporal: but its temporalization is limited to the highly normative and universalising temporality of the liberal Enlightenment . . . which assumes gradual change brought about by economic prosperity and greater education'.³⁰ Central to this critical manoeuvre then is revealing and being attentive to the contingency and constructed nature of time, in a similar vein to the scholarship discussed in the previous section. This opens up space to rethink and reshape temporality through legal processes, including human rights frameworks.

Here, McNeilly's articulation of an *untimely* approach to human rights is instructive. Drawing on Grosz, McNeilly articulates the untimely as 'that which is out of step or out of time, which goes beyond a linear and progressive relation between past, present and future'.³¹ This is a disruptive idea—one which challenges and unsettles current pervasive temporalities and exposes their underpinning normative commitments. Importantly, McNeilly goes on to stress that, in relation to human rights through this untimely approach, 'the future they offer is not knowable—outlined in relevant declarations, treaties or other instruments—not progressively following from the present'.³² For emancipatory and transformative social movements, this unshackles legal concepts and processes from the past and/or present logics and opens up the space to imagine them differently. It also demands more careful attention the various ways that time and temporality is produced in and through current legal processes, positioning temporality as a key node through which exclusion and inequality can be produced and maintained. The CRPD offers an invitation and important moment to undertake this rethinking, as—to echo Grosz—'it *jars* us out of existing temporal frames and assumptions, and is something untimely which 'disrupts our expectations'.³³ At one level, it provides new critical tools for an area that has become mired in debates, often at cross-purposes, and a lack of any real progressive change. Being attentive to the ways that temporality inheres in current frameworks, particularly around ideas of the legal subject and the role of the state and institutions, as well as how the CRPD may invite or indeed require a temporal shift, suggests novel routes for critical attention. At another level, the CRPD offers a distinct legal framework, doctrinally and conceptually, for human rights scholars seeking to forge new temporal approaches.

The CRPD has been broadly welcomed by disability legal scholars as signalling a move away from a medicalized and individualized approach to disability, towards one which posits disability as a social and human rights issue, placing it within the realms of discrimination and inequality. Lawson sees this as one of the key shifts that the CRPD signals, and further suggests that,

'Its provisions require the reshaping of societies in a way required by no other human rights treaty. The realization of human rights for disabled people requires fundamental changes to be made to building and product design, to modes of transport, of communication and of

²⁹ McNeilly, *supra* n 1, 838.

³⁰ Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (2015) at 109.

³¹ McNeilly, *supra* n 1, 818.

³² *ibid.* 819

³³ Grosz, *supra* n 10.

information and service provision, as well as to the attitudes and expectations of the general population and of political leaders'³⁴

I would go further than this, however, and note that this reshaping of society goes beyond these physical and attitudinal shifts, challenging conceptual, societal and legal norms with repercussions beyond a focus solely on disability. Quinn suggests similarly that the Convention ought to be viewed as part of an ongoing, broader debate about theories of justice.³⁵

Article 1, for example 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', demonstrating a more social model approach to disability (emphasis added). The Convention also places positive obligations on States Parties to give effect to the rights contained within it, melding civil and political rights with social and economic rights as it does so. This challenges ideas of the state and more negative approaches to rights (i.e. not to have the state or others interfere with these) which are often seen in other human rights frameworks. As Dhanda puts it,

'[p]erhaps more than any other human rights treaty, the Disability Convention has demonstrated the falseness of the dichotomy between civil-political and social-economic rights. This chasm has to be closed on both ends. Just as some civil-political rights, such as the freedom of speech and expression, are meaningless without reasonable accommodation of the physical infrastructure; other social-economic rights, such as the right to health, become oppressive without informed consent and freedom of choice'.³⁶

This acts as a *jarring* (following Grosz)—a temporal disruption—to the current ways of conceptualizing state involvement and interference. Melding civil and political right with social and economic rights involves a very different vision of the state, obligations and responsibility. Importantly, this does not necessitate subsuming these different rights logics into one or the other (i.e. progressive realization for civil and political rights) but instead requires a fundamental shift in what these obligations look like.

Bringing this into conversation with a temporal and untimely lens demonstrates the potential for reimagining subjectivity, driven by the CRPD and the alternative temporality of the state and the subject that can be harnessed through it. Drawing on Kafer, it is apparent that the CRPD opens up the space for seeing 'disability' as a potential site for collective reimagining and one which, in its future orientation, can recognize and grapple with the ways in which disability has been positioned as a site of 'no future', through normative assumptions of 'able-bodiedness and able-mindedness'.³⁷ This melding of civil and political rights with social and economic potentially signals an alternative temporality of the state, in contrast to that which inhabits in liberal legal frameworks. Thinking back to Valverde's recognition of the particular temporality of the liberal legal state, the social model and the more explicit engagement with the dynamic role of societal structures and institutions in creating disability signals a way to disrupt and open up alternative temporalities of the state and obligations. This recognition of the state as present in the shaping of disability and the structural and institutional scaffolding of subjectivity

³⁴ Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn' (2007) 34 *Syracuse J Int'l L & Com* 563, at 568.

³⁵ Quinn, 'Rethinking Personhood: New Questions in Legal Capacity Law and Policy' (2011) Lecture, Vancouver: University of British Columbia.

³⁶ Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future' (2007) 34 *Syracuse J Int'l L & Com* 429–457, 457.

³⁷ Kafer, *supra* n 5, 10.

and agency, rather than simply responding to disability, might shift some of the fundamental temporal assumptions in legal frameworks. The interconnectedness of the articles in the CRPD as part of this scaffolding disrupts and unsettles the linear temporality of the liberal state, and instead point to a more dynamic, multi-directional and multi-temporal relationship which exceeds current logics. Ideas of the absence/presence of the state, and intervention (including the *when* and *where* of intervention) thus open up for closer scrutiny.

A further way in which the CRPD catalyzes temporal disruption and reimagining is in the thread 'on an equal basis with others' which flows through the articles in the Convention. The CRPD centralizes universal legal capacity, and this can be seen as a key way in which all of the articles of the Convention can be actualized. Placing disabled people as legal subjects with agency, rather than passive, is often claimed to be one of the radical aspects of the Convention. At the same time, however, it is also one which is attracting intense resistance in practice. This focus on universality and, in turn, equality, whilst an important step in the disability rights movement, could potentially be curtailed by impoverished or exclusionary broader temporalities of legal subjectivity and equality. In another strand of scholarship, McNeilly engages with universalism, and critiques of universal approaches to human rights which see universalism as constraining radical or progressive change. There is a very real possibility for the transformative potential of the CRPD to be blunted or even stymied by an approach to equality that buttresses aspects of liberal legal subjectivity that exclude or actively work against the interests of disabled people. However, McNeilly argues for

“re-engagement with [universality] in a way that is compatible with the aims of radical politics. Instead of a static attribute or characteristic of rights . . . universality can be thought of as . . . an ongoing process of universalisation. Universalisation accordingly emerges as a site of powerful contest between competing ideas of what human rights should mean” . . . “universal concepts are continually reworked through political activity”.³⁸

Here, the scope for challenging temporal renderings of legal subjectivity becomes apparent, in tandem with the shifting ideas and location of the state. When civil and political rights become entangled with social and economic, the vision of the legal subject as unencumbered and the state as separate, only interfering in carefully circumscribed, time-bound and contained ways becomes harder to maintain. Notably, and driven by the 'on an equal basis with others' thread that weaves through the CRPD, this necessitates rethinking legal subjectivity beyond disability, causing us to question the normative standard that is being upheld here when we are seeking to achieve equality.³⁹

A phrase that has now become almost synonymous now with the CRPD is 'paradigm shift', with most contemporary scholarship seeing the Convention as signalling a paradigm shift in disability rights and questioning whether this paradigm shift has, will or ought to occur. Carney, for example, points to and seeks to understand the 'glacial progress' in actualizing the CRPD.⁴⁰ Ruck Keene et al. have begun to question the utility in seeking to actualize a paradigm shift, particularly in the context of mental capacity laws.⁴¹ Stavert asks 'whether the CRPD paradigm shift can be realistically achieved by simply adapted or supplementing current legal and policy

³⁸ McNeilly, 'Reclaiming the Radical in Universal Human Rights: Universality as Universalisation' (2015) 4 *International Human Rights Law Review* 257.

³⁹ For further exploration of this issue see B. Clough and R. Reed-Berendt, 'Disability Neutrality and the CRPD: Revisiting Universality in Human Rights through an Intersectional Disability Lens' (forthcoming).

⁴⁰ Carney, *supra* n 7.

⁴¹ Ruck Keene and others *supra* n 11.

models'.⁴² Underpinning these debates as to the 'paradigm shift' is a distinctly temporal question, which becomes more pressing once we think through the lens of the untimely. Curiously, and despite the temporal nature of the literature in this context, temporality has not featured in these debates in any critical way. As Bastian points out from their review of literatures on temporality generally, common features include that 'implicit assumptions about time might be obscuring the complexity of a research area . . . the failure to adequately grasp the importance of the symbolic and explanatory role of time . . . and lack of attention to the role of time in attaining political and/or social goals'.⁴³ The lack of attention to time in the context of the CRPD is emblematic of this broader trend, and as such debate in this context is often taking place on static and stagnant terms. What becomes clear is that often the existing legal framework is being held up as the conceptual yardstick, as the 'common sense' that CRPD-inspired reforms or conceptual shifts ought to be measured against. In this regard, the broader concerns that human rights scholarship reflects, and the turn away from human rights frameworks as an emancipatory vehicle ring true. There is a real danger of reinforcing exclusionary legal processes if these are taken as pre-given and fixed. Suspending these normative frameworks, and engaging carefully with the potential to unsettle the norms of the present, and to open up unknowable futures, underpinned by explicit engagement with the voices and experiences of currently excluded groups. Currently, whilst challenges are occurring to the dominant frameworks in the context of disability, and—as will be seen below—mental capacity, these existing frameworks are proving difficult to unseat. As Krieger argues, and as perhaps is starkly evident in the current debates as to implementing the CRPD,

'entrenched norms and institutionalized practices, operating as taken-for-granted background rules, systematically skew the interpretations of transformative legal rules so that those rules increasingly come to resemble the normative and institutional systems they were intended to displace'.⁴⁴

In the disability context, such rules and norms are often intertwined with broader logics of liberalism,⁴⁵ and hidden normative sources of ableism⁴⁶ and a more focussed interrogation of the temporalities that drive these and their stubborn persistence creates space for critical challenge. Disrupting and opening up alternative temporalities becomes a pressing concern for progressive change, both at the level of interrogating and revealing temporalities that the law constructs and sustains, and their effects, but also in terms of recognition at a broader level of the radical potential of a future that is unpredictable, rather than flowing from the contours of the present.

However, there is an important tension in these calls for a 'paradigm shift', or a rupture from existing ideas. Whilst dominant modes of thinking and legal logics must be resisted and unsettled as part of the embrace of the untimely, we must also be attentive to the past and understand the hidden logics which might otherwise seep through into these imagined futures (see Krieger, above). There is a need to be attentive to the temporalities of current legal logics at a granular level in order to guard against their persistence or their re-emergence in 'new' legal

⁴² Stavert, 'Paradigm Shift or Paradigm Paralysis? National Mental Health and Capacity Law and Implementing the CRPD in Scotland' (2018) *Laws* 7, 26.

⁴³ Bastian, *supra* n 23, 154.

⁴⁴ Krieger, 'Sociolegal Backlash' in L. H. Krieger (Ed), *Backlash Against the ADA: Reinterpreting Disability Rights*. (2003) 349.

⁴⁵ Clough, *supra* n 8.

⁴⁶ Kumari-Campbell, 'Inciting Legal Fictions: Disability's Date with Ontology and the Ableist Body of Law' (2001) 10 *Griffith Law Review* 42; Kumari-Campbell, *Contours of Ableism: The Production of Disability and Abledness* (2002).

approaches. As such, in the following sections, mental capacity law is turned to in order to demonstrate the importance of a temporal approach to law for informing debates in this context.

4. TEMPORAL TENSIONS IN MENTAL CAPACITY LAW

As the above discussion has shown, the potential that was felt to reside in the CRPD has not yet been actualized, and this paper has advanced the importance of being attentive to temporality as part of understanding the sites of resistance or friction in achieving progressive ends. One area which has generated a substantial body of debate since the passing of the CRPD relates to the importance of legal capacity in the Convention. Article 12 sets out that disabled people have the right to legal capacity on an equal basis with others, as well as placing positive obligations on states parties to support the exercise of legal capacity. This stands in stark contrast to legal regimes that enable the denial of legal capacity (i.e. legal agency, or recognition of the individuals' legal status) on the basis of disability. The Mental Capacity Act 2005 can be seen as once such framework, given that it utilizes the concept of mental capacity (explicitly based on the existence of a cognitive impairment) in order to deny legal agency in respect of certain decisions. Scholars have honed in on Article 12 as a site for intense challenge, which is unsurprising given the potential upheaval to many areas of law—most notably mental health and mental capacity laws, but also central ideas in contract, criminal law, probate and so on. As such, engaging this temporal lens, and embracing untimeliness, in the context of mental capacity law thus reveals a number of important insights which have the potential to offer new insights for area, moving us out of the stagnant and static parameters of current debate. Firstly, it will demonstrate the struggles around temporality that are currently evident in case law, opening up new lines of critique but also offering a clearer understanding of why these temporal tensions are becoming so intractable. Such a discussion reveals the ableism that tends to underpin the legal logics in this context, but also the logics of legal liberalism more broadly. From here and harnessing the interventions that disability studies and critical approaches more broadly can offer, we can recognize novel routes for change. As McNeilly puts it, 'embrace of the new—that which is unexpected, unpredictable or unknown—holds potential to stimulate attention to previously invisible relations of exclusion or ways of structuring society that differ from those currently perpetuating inequality'.⁴⁷ From these insights, in conversation with disability studies, novel questions around the types of temporal shifts necessary in order to achieve the potential in the CRPD and in human rights law more broadly become apparent.

In starting to uncover the particular temporality of mental capacity law, it is important to look to its historicity and roots in the common law doctrine of necessity. Linda Steele's work here is instructive, given her careful interrogation and critique of the case of *Re F*⁴⁸ which is recognized as a key node in the development of the Mental Capacity Act 2005.⁴⁹ *Re F* involved a 36 year old woman who had formed a sexual relationship with another patient in the mental hospital in which she lived. She was said to have 'an intellectual age of five or six years'. There were concerns about the potential for F to become pregnant and her mother and health professionals involved felt it would be better for her to be sterilized, in order to avoid pregnancy. It was argued that she was unable to consent to the sterilization, given her cognitive impairment, and a declaration was sought as to the lawfulness of the operation. What became apparent during the passage of the case through the courts was that there was no clear legal basis upon which such treatment ought to be given, as F was seen as incapable of providing the requisite consent. This then left

⁴⁷ McNeilly, *supra* n 1. 822.

⁴⁸ *Re F* (Mental Patient: Sterilisation) [1990] 2 AC 1

⁴⁹ Steele, 'Temporality, Disability and Institutional Violence: Revisiting *In re F*' (2017) 26 *Griffith Law Review* 378.

medical professionals in a precarious legal position, potentially providing treatment without valid consent and thus open to tortious claims.

The House of Lords then utilized the doctrine of necessity to authorize such treatment for individuals who are deemed to be incapable of providing consent. They extended its application beyond 'emergencies' to encompass situations that they framed as pertaining to individuals who are 'permanently incapacitated'. In such cases '[t]he doctor must act in the best interests of the patient just as if he had received the patient's consent'.⁵⁰ The House of Lords therefore held that 'a doctor can lawfully operate on, or give other treatment to, adult patients who are incapable, for one reason or another, of consenting to his doing so provided that the operation or other treatment concerned is in the best interests of the patient'.

Steele offers a careful critique of the case and it is underpinning reasoning, utilizing critical disability studies and work on temporality. In doing so, Steele reveals the problematic temporalities of 'othering' and of the 'curative imaginary' that shaped this area of law. First, the differentiation between the more standard usage of the doctrine of necessity in the context of an 'emergency', in contrast to the more extended application to disabled people in a state of 'permanent incapacity' is considered through the lens of Kafer's curative imaginary. Steele points to the ways that Lord Goff 'rationalised disregarding vital temporal restrictions on the scope of the defence—imminence, urgency and peril—specifically as they apply to disabled people'.⁵¹ Here, interventions are premised on a normative construction of disabled people as 'other' and outside of the realms of the more temporally-limited scope of emergency for interventions that is usually available to those invoking the doctrine. Here, however, it is worth extending this analysis and engaging with the ways that the boundaries of 'emergency' are in and of themselves malleable and can be invoked readily by those in positions of power in order to exceptionalize, to 'other', or place subjects outside of the normative temporal realm.⁵² Whilst not as stark as the 'permanent incapacity' route, we need to be alive to how the boundaries of emergency can be stretched, shaped and deployed, as intense interventions here can be equally as entrenched in a 'curative imaginary' and the ableist assumptions that inform this, with ongoing effects that persist beyond the parameters of the 'emergency'. As Puar suggests, we need to be attentive to the 'unevenness of how populations live and get to live time'.⁵³

Turning to reflect on the purpose of state intervention as advanced in *Re F*, the 'curative imaginary' is instructive for recognizing the 'constant positioning as legitimate subjects of medical and care interventions' that occurs through this 'temporal dislocation of disabled people'.⁵⁴ The focus of such interventions is thus on 'cure', a linear narrative of intervention to 'fix' in the service of the non-disabled ideal. This approach can be situated within broader recognition of what Elizabeth Freeman terms 'chrono-normativity',⁵⁵—or the idea that we all follow the same heteronormative timeline. The dominant temporality here is thus figured through a medicalized conception of normativity, chiming with biopolitical approaches to the subject. As the social model of critique demonstrates, however, disability is socially, culturally and politically shaped, necessitating alternative approaches to intervention levelled at societal, structural and institutional dynamics. Taking seriously the shift that the CRPD seeks to enable, driven by the social model of disability, requires attentiveness to the normative temporalities and logics of intervention.

⁵⁰ *Re F*, supra n 46.

⁵¹ Steele, supra n 49, 382.

⁵² Garland and Travis, supra nc14.

⁵³ Puar, 'Prognosis Time: Towards a Geopolitics of Affect, Debility and Capacity' (2009) 19 *Women & Performance: A Journal of Feminist Theory* 161–172, 166.

⁵⁴ Steele, supra n 49, 383.

⁵⁵ Freeman, *Time Binds: Queer Temporalities, Queer Histories* (2010).

Notwithstanding the broader compelling critiques of the case of *Re F*⁵⁶ this temporal engagement with the case provides an important starting point for understanding whether and how these logics have been transposed through and into the MCA. It is notable that Steele's work here arose as a response to suggestions, prompted by Article 12 of the CRPD, which a progressive move towards universal legal capacity and disability-neutrality might be to utilize the doctrine of necessity. This excavation of time is a stark reminder of the ableist assumptions that can shape purportedly neutral frameworks, reinforcing the need to be attentive to particularities of disability and how it is shaped, produced and responded to through law. These threads around subjectivity and othering, and the role of the state and institutions, will be returned to throughout the discussion of the more recent MCA jurisprudence in order to reveal and open to critique the underpinning logics.

4.1. Shaping the parameters of 'intervention'—temporality and decision-specificity

The drive to develop the MCA stemmed from this uncertain terrain of decision-making on behalf of individuals who were seen as lacking the capacity to provide valid consent.⁵⁷ The legislation sets out a clear framework for decision-making, outlining the ways in which capacity is to be assessed, and how best interests decisions ought to be made. There are some important temporal dimensions to this framework, which might be seen as disrupting the ableist temporalities that inhered in the common law doctrine of necessity framework discussed above.

The MCA s 2(1) states that

'For the purposes of this Act, a person lacks capacity in relation to a matter if *at the material time* he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain' (emphasis added)

Moreover, capacity must be assessed in a 'decision-specific' way i.e. a person lacks capacity in relation to a particular matter, rather than lacking capacity in a general or global sense.⁵⁸ This clear delineation around the time at which capacity must be assessed, and purported minimizing of the scope of intervention that may occur could be a useful vehicle against which to guard against the problems that Steele asserts as underpinning the doctrine of necessity. Yet, as will be seen in exploring the ways that temporality is navigated in mental capacity case law, many of these problematic temporal assumptions have become further entrenched and baked-into the statutory framework. In many ways, this is compounded by the objectivity and neutrality that is presented through the legislation in terms of assessing capacity and best interests. Such purported neutrality can often obscure some of the troubling assumptions that underpin law, as long recognized by critical and feminist legal scholars. Looking at these cases through the lens of the untimely—and suspending and questioning the temporality that is residing in them, as well as the struggles against this—we get a sense of the legal production and 'sorting' of time, and the effects of this. Following Chowdhury, we can see where alternative temporal lenses can open up alternative routes forward.⁵⁹

The temporality of the decision has become an underrecognized battleground for furthering and reinforcing problematic ideas around disability. The shape and scope of the decision has become malleable and temporally stretched, for example, with 'pragmatic' exceptions or

⁵⁶ Shaw, 'Sterilisation of Mentally Handicapped People: Judges Rule OK?' (1990) 53 *Modern Law Review* 91–106, 92; Keywood, 'Hobson's Choice: Reproductive Choices for Women with Learning Disabilities' (1998) 17 *Medicine and Law* 149.

⁵⁷ For further elaboration of the drivers for the MCA see Law Commission, (1995) *Mental Incapacity*. London: HMSO; and Bartlett, 'Re-thinking the Mental Capacity Act 2005: Towards the Next Generation of Law' (2023) 86 *Modern Law Rev* 659.

⁵⁸ MCA 2005 s 2(1)

⁵⁹ Chowdhury, *supra* n 1.

diversions being crafted by the judiciary. Moreover, the ideas of the state, temporally informed by liberal ideas of state absence and interference, is reinforced in this context by a medical model approach to disability which situates disability within the individual. In this regard, the desire for a 'narrow' space for state intervention and a presumed absence of the state will be seen as persistent and shoring up the marginalization and disempowerment of those coming within the scope of the legislation. At the same time, and as will be further developed in the next section, these interventions when they do occur—on the basis of incapacity and disability, taking the individual outside of the realms of normative liberal legal subjectivity—are often intense and enduring, driven by ideas of chrono-normativity and the 'curative imaginary'.

One area in which the temporal struggles have recently emerged is in relation to 'fluctuating capacity'. Here, the judiciary and decision-makers trying to apply the MCA can be seen as struggling to contain the 'fluctuating' nature of some impairments within a framework that seeks to carve out a particular moment in time. In many ways here we see the ways that non-normative subjectivities exceed the neat liberal imaginary of the stable, linear legal subject.

The case of *RB Greenwich v CDM* [2018] EWCOP 15 is a clear example of this. The case involved a dispute as to a woman's capacity in relation to residence, personal affairs and the management of her diabetes. She lived at home with a number of dogs and cats who she called her babies. There was a concern that the conditions that she was living in were unsafe and unhygienic and there were concerns about her ability to care for herself following amputation of her lower leg as a result of poorly controlled diabetes. She was taken to hospital on one occasion following being found at home in vomit and faeces. She was adamant, however, that she wished to return home to be with her pets. The difficulty for the medical expert in this case however was that capacity was seen to be fluctuating—it seemed to vary according to her control of her diabetes. Cohen J surmised the position that poor diabetic control led to unwise decision making and an inability to engage with professionals, stating that 'when making appropriate decisions she has capacity but when making manifestly inappropriate decisions she lacks capacity'.⁶⁰ There is here a clear individualized and medicalized focus, as warranted by the legislation, suggesting that the inability arises as a result of her inappropriate decision-making, rather than a disability studies and social model informed approach which would recognize the ways that such abilities will always hinge upon a number of other actors and resources being made available. The issue of *when* and *how* capacity can be assessed in these situations where it is recognized that it fluctuates over time is also problematic. The pragmatic concern was raised in *CDM* by the Official Solicitor, who was concerned that professionals may find it very difficult to assess capacity at specific moments given its fluctuating nature and as such, a prospective—or future oriented—order ought to be made. Cohen J disagreed with this position, stating that,

'Paragraph 4.4 of the Code of Practice says that an assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made and not their ability to make decisions in general . . . I accept that in some examples, for instance, the capacity to consent to sexual relations the capacity albeit fluctuating will be one that will either be present or not present. But management of her diabetes is a different matter. It covers a wide range of different situations which may arise frequently or infrequently. The treatment required may be of very different natures. I cannot see that this particular form of fluctuating capacity can properly be managed other than by a decision being taken at the time that the issue arises'.⁶¹

⁶⁰ At Para 52.

⁶¹ At Paras 50–51.

The temporal struggle here is particularly stark—with the assessment of capacity at the relevant point at which the decision ought to be made standing, in order to preserve some decisional autonomy, in tension with the ability of professionals to undertake their work. The case returned to the Court of Protection in light of fresh expert evidence. Here, Newton J tried to deal with the difficult temporality of such cases by essentially sorting decisions into macro and micro decisions. In framing diabetic management and control as a global, macro decision (comprising of a number of smaller, micro decisions) he was able to declare that she lacked capacity in relation to such decisions, thus side-stepping the problematic pragmatic issue of having to continually assess and re-assess capacity. Newton J,

‘acknowledge[d], as do the experts, that there may be occasions when CDM has the capacity to make micro-decisions in respect of her diabetes and occasions when she does not, i.e. that her capacity does in fact fluctuate. However, if the court accepts the expert’s opinions, as I do, and approaches the matter on the basis of their conclusions, logically, legally and practically, it is a macro-decision, and CDM lacks capacity to take the macro-decision, the issue of fluctuating capacity simply does not arise’.⁶²

This static demarcation of a decision as ‘macro’, and the consequent ability to make a declaration of incapacity here to enable decisions to be made provides a convenient way to avoid troubling the boundaries of the mental capacity framework and underpinning temporal assumptions. In doing so, however, it reinforces the medical model approach to decision making as individualized and constant, rather than recognizing that abilities will and do ebb and flow in a multitude of directions as the societal context shifts. The pragmatic necessity of a flawed framework thus takes precedence in this judgment over recognizing and challenging its problematic assumptions.⁶³ Moreover, and extending the logics of the doctrine of necessity, such individuals who are perceived as troubling the liberal temporal norm are positioned outside of it, opening up the space for these interventions and, through the MCA, authorizing these interventions in an ongoing manner in order to minimize disruption to the working of the professionals involved. Troubling the temporal ideas surrounding disability than underpin the framework here, and embracing an untimely approach, invites questioning of who or what fluctuates—the individual or the societal context? Who or what remains static? And how does law sort this and produce time, and to what effect? How might law, and time, be sorted differently?

Such tensions also arise in the recent development of case law in relation to ‘anticipatory declarations’. These cases have so far all involved questions as to the authorization of caesarean sections for pregnant women who it is thought *have* mental capacity at the time the case is brought, but *may* lose that capacity at some point in the future. They further reveal the malleability of temporality in this context, creating space to weave in some of the ableist assumptions underpinning the common law framework. Moreover, they demonstrate the temporal stretching of the MCA into future locations which are ultimately unknown, but which the law here shapes as knowable and flowing from the present. As will be seen, this closes off the potential for recognition of the shifting nature of the social and institutional scaffolding and, in turn, the potential for interventions to be aimed at such structures rather than situating the individual as the locus of intervention and change. Through an individualized focus in the mental capacity legislation—honing in on an individual’s decision-making abilities rather than the societal structuring of disability and responses to it—a medicalized model is reinforced.

⁶² [2019] EWCOP 32. Para 49.

⁶³ Also see *A Local Authority v PG* (2023) EWCOP 9.

The first of these anticipatory declaration cases, *United Lincolnshire Hospital Trust v CD* [2019] EWCOP 24, involved a woman with schizophrenia who was 35 weeks pregnant and had been detained under the Mental Health Act 1983. The issue arose as to the management of her labour, as clinicians were concerned that she may come to lack capacity during labour (although she was deemed at the current moment as having capacity to make such decisions). The question arose as to whether and how the MCA would and could apply here—could declarations be made about anticipated incapacity in the future, and did the Court of Protection have jurisdiction to do so in relation to somebody who at present has capacity?

It was held, that the Court could make an anticipatory declaration of lawfulness should the obstetric team need to intervene, contingent upon CD losing capacity. Francis J went on to say that he was doing this on the basis that

‘For so long as CD retains capacity to make decisions about her obstetric care and the delivery of a baby, she will of course be allowed to do so, even if those decisions are considered to be unwise. If, however, her mental health deteriorates and she loses capacity I consider that it would be in the best interests to try for a normal vaginal delivery if possible and this is consistent with either CD’s expressed wish or best interests. The care plan drawn up by the applicant records the expectation that CD will comply with what is proposed but also includes fall back options, including for appropriate minimal restraint, should this not be the case. Restraint would potentially be used to transfer her to the maternity suite, insert a cannula (although only if medically required) or provide general anaesthetic in order to proceed to a caesarean section. A caesarean section would be very much a last resort’.⁶⁴

Such an approach has been reinforced, in variously different circumstances, in cases that have followed,⁶⁵ and there is strident critique of the doctrinal and conceptual problems with these cases.⁶⁶ Aside from these powerful challenges, these cases reveal important temporal assumptions underpinning the legal framework, as well as demonstrating the temporal malleability and pragmatism that seems to underpin the legal response, including the legal sorting of the temporal messiness in order to facilitate the working of the framework. The temporal stretching to some future point in time not only pulls against s2 of the legislation and the control mechanism of ‘at the material time’, carving out broader scope for intervention in the lives of disabled people, but it also reveals assumptions as to the ways that ‘the future’ is framed through this liberal legal imaginary. This evidences the ways that bodies and temporality that ‘do not fit’ are shaped to adjust to this linear, chrono-normative timeline.

In these cases, it is evident that the ‘future’ point at which somebody may be found to lack capacity maps onto and mirrors the present, with the social, cultural and political context remaining static. Thus, following this medical model frame, the source of the disability and the problematic actor in need of change (as will be developed further below) is the individual. The linearity of time here, and the future flowing unproblematically from the present, becomes a

⁶⁴ Para 16.

⁶⁵ *GSTT & SLAM v R* [2020] EWCOP 4; *North Middlesex University Hospital NHS Trust v SR* [2021] EWCOP 58. Notably, Mostyn J was critical of this approach in *Somerset NHS Trust v Amira* [2023] EWCOP 25, and there has been similar resistance against using them in *The Shrewsbury and Telford Hospital NHS Trust v T and Midlands Partnership NHS Foundation Trust* (2023) EWCOP 20.

⁶⁶ Fovargue, *Anticipating Issues with Capacitous Pregnant Women: United Lincolnshire NHS Hospitals Trust v CD* [2019] EWCOP 24 and *Guys and St Thomas’ NHS Foundation Trust (GSTT) and South London and Maudsley NHS Foundation Trust (SLAM) v R* [2020] EWCOP 4, (2020) 28 *Medical Law Review* 781; Hulme, *An Emerging Pattern? A Further Case of Anticipated Capacity Loss in Pregnancy: North Middlesex University Hospital NHS Trust V SR* [2021] EWCOP 58, (2022) 30 *Medical Law Review* 544; Clough and Reed-Berendt, ‘Consent and Mental Capacity’ in Austin and Miola, *Research Handbook on Medical Consent* (forthcoming). Notably, in the move away from anticipatory decisions, there is more of a push towards advance decision making, which raises further temporal issues warranting careful critical engagement.

productive lens through which to critique these cases and the logics that underpin them. The temporal horizon is shaped and limited by the ableist structures and institutions of the present. As Rice et al. suggest, these approaches which situate disabled people as ‘out of time’ or other assume that ‘certain trajectories are inevitable [and] “close off the future” . . . to instabilities and a range of possibilities’.⁶⁷

4.2. The purpose of intervention—linearity and progress

The future imaginary and the medical and individual scope of intervention warrants further critical attention as a temporal technique reinforcing the exclusion and marginalization of disabled people. Coming back to Steele’s argument in relation to the doctrine of necessity, and Kafer’s work on the ‘curative imaginary’, we can glean the ways that this has been pulled through into the MCA and jurisprudence surrounding it, despite the language shift from a proposed focus on medical best interests and towards one which is purportedly ‘holistic’ and at least informed by the views of the individual. As will be explored in this section, the curative impulse and the medical dominance can be seen as persisting and being reinforced through a deeply embedded liberal temporality which is underpinned by exclusionary norms.

Steele’s critique of the doctrine of necessity and ableist temporality underpinning it carefully highlighted the differential approach to disability that was created within the doctrine. In effect, for non-disabled people, the ‘emergency’ was carefully circumscribed and thus interventions were seen as temporally finite. On the other hand, disabled people were placed into the realm of potentially limitless intervention on the basis of their exclusion from this norm, and perception that this disability would endure, as discussed above. We have already seen the ways that the MCA can perpetuate and facilitate ongoing, intense interventions, despite the ostensibly bounded nature of the capacity assessment as being ‘at the material time’, thus extending the logics of the doctrine of necessity at the same time as purporting to provide some order to it. Linked to this is an interesting aspect of the MCA and the best interests assessment under it is the stipulation that, as part of this assessment, the decision-maker must consider-

S4(3) (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

There is again a stark but often overlooked temporal aspect to this which is often overlooked, potentially as it might be seen as unproblematic. It might be thought that it is right that interventions are more time limited for those whose deemed incapacity is short-lived and controllable, whereas for those outside of these realms—those who are more unruly or in excess of the norms of legal subjectivity—there is a need for more ongoing, delimited interventions. Being attentive to this temporal assumption however reveals the persistence of the differentials that Steele highlights from the doctrine of necessity, and invites ableist norms to drive the scope and purpose of state intervention. Those who are viewed as more likely to have an enduring disability will be positioned outside of the realms of the norm, as in a state of exception⁶⁸ and thus allowing unrestrained intervention.

These liberal legal norms, and the temporalities that inhere within them, are further buttressed by the curative imaginary and the chrono-normative impulse driving interventions. The ideal of the legal subject—positioned in a linear mode of progress and development along a

⁶⁷ Rice and others, *supra* n 26 citing Browne, *Feminism, time, and nonlinear history* (2014) p17.

⁶⁸ Weller, ‘Mental capacity and states of exception: revisiting disability law with Giorgio Agamben’ (2017) 31 *Continuum* 400.

normative life-course—is reinforced in jurisprudence justifying the role of the state and their response to disability. A stark case in this regard is *Re WMA*⁶⁹, a case involving 25-year-old man with atypical autism and a pervasive development disorder. He had lived at home with his mother, however there was a history of local authority and police involvement due to concerns about WMA's care at home. Previously, for example, the family had been moved out of their home into new accommodation due to concerns about the lack of hygiene in the home. Delos, who provided care to WMA, were also concerned that both WMA and his mother, MA, did not engage with their services and found the mother to be obstructive. It seems that WMA did not want the level of support that Delos were offering (12 hours a week) and wanted this to be reduced. However, the local authority wanted to move WMA into a supported living arrangement to facilitate his 'independence'. Ultimately, it was decided that WMA lacked capacity and that it was in his best interests to move to supported living. This is not an unusual case, and it is instructive to look at the reasoning deployed by the service providers and the judge in the case to reveal the temporal assumptions, particularly around the normative life-course and scope of independence.

'WMA struggles to contemplate changing his life and understand the long term implications of staying at home; and with WMA and MA there is a degree of "unhelpful mutuality.'

'So what would happen, asked Mr. O'Brien, when she died? She became confused and spoke of seeing a lawyer and making a will but that was not the point . . . Would it not be better for WMA to move to an environment where he could learn these skills? But she would not accept that. She conceded that upon her demise WMA would have to live in the social services accommodation. Was it not better for him to learn new skills now? She did not agree and that seemed to me to be entirely unrealistic.'

"He does not like change," she said later. He could not decide whether to move home, for example. But, "He can be more intelligent than I am," she insisted, yet people expect too much of him. Delos tried to plan two to three days ahead and he liked to plan just one day at a time. He did not like new routines, though seemed to me to be a defeatist approach.'⁷⁰

We see from these three quotes—all pushing on different aspects of WMA's life and his relationship with his mother, which a particular vision of independence as self-sufficiency, as a negation of interdependence is central. Moreover, the putative norm of the able-bodied life course—of moving away from a parent, as becoming an independent adult, of the parent dying first and leaving a will—are reinforced through this case. Disability scholars have long challenged this framing both of the life-course and of independence as self-sufficiency. The shaping of services upon this model, and the expectation of disabled people to fit into these normative temporalities of independence and progress, lest they become unruly and situated as outside of the normative realm, is also stark. As Rice *et al* put it, '[n]ormative time thus might be understood as the expected life course of the unmarked (white, Western/ized, nondisabled, middle-class, straight, cis-gendered male) human subject—from childhood into adolescence, adulthood, productivity, partnership and progeny, retirement, and death'.⁷¹ This is a key site of challenge for disability studies, and to begin to disrupt this normative temporal approach, entangled as it is with the curative impulse outlined by Kafer earlier, can shift the terrain upon which individuals can assert their subjectivity in ways that challenge current legal orderings.

⁶⁹ [2013] EWCOP 2580.

⁷⁰ Para 48.

⁷¹ *Supra* n 26, p 216.

As Puar suggests, ‘severing’ this time line ‘puts pressure on the assumption of an expected life span—a barometer of one’s modernity—and the privilege one has or does not have to presume what one’s life span will be, hence troubling any common view of life phases, generational time, and longevity’.⁷²

The way that Delos sought to plan further in advance than WMA, and the situating of his own preference for planning day-by-day, or indeed not planning at all—became evidence of his ‘defeatist approach’ and ultimately his incapacity. This reinforcement through law of the normative priority of the temporalities of service providers, and thus the interpretative power given to such provider models as setting the parameters of ability/disability can serve to further entrench ableist ideas within these legal frameworks. As Soldatic et al. have noted, in the context of workfare regimes and the reinforcement of neoliberal ideology through these in the lives of disabled people, ‘the lived ramifications for disabled people, as they are expected to surmount the temporal rhythms of the body for the nation, are very real, as they are required to negotiate these mobilized temporal technologies of governance’.⁷³

These examples also attest to the narrow vision of the state and state involvement in the lives of disabled people—with the ‘curative imaginary’ positioning the state as *becoming* involved and shaping the individual towards the normative, non-disabled ideal. Indeed in the case of *Davey v Oxfordshire CC*⁷⁴ this is illustrated by an image of the state as actively retreating in order to buttress independence, resonating with the neoliberal temporalities that Soldatic et al. speak to. The case involved Luke Davey, a disabled adult who had been supported by a team of personal assistants almost 24 hours per day. This support was vital to his independence. However, following the closure of the Independent Living Fund, the local authority assessed his needs and felt that his eligible needs could be met for less, essentially resulting in a significant cut to his personal budget and, in turn, to the amount of support he would be able to access. In endorsing this decision, and the assessment of needs that this was premised on, Morris J stated that the relevant need is to

“develop independence and reduce anxiety”. Spending more time alone is the means of achieving that . . . and this will be developed by spending time without his carers present . . . [I]n her witness statement, Ms Lovelock accepted that the Claimant does experience anxiety when left alone, but that she assessed that the need, and the way to reduce that anxiety, was to develop greater independence rather than a need never to be left alone’.⁷⁵

The judicial endorsement of this thin concept of independence, and of the role of the state in facilitating this, echoes a broader theme in liberal legal temporalities. Through this, the state is either absent or present at a particular moment—their role carefully circumscribed and for limited purposes. The goal is the disappearance of the state. The state *responds* but does not cause—chiming here with the medical model of disability discussed earlier (situating the cause of disability within the individual) and something which the social model of disability has sought to resist. Such an approach ignores the pre-existing role of the state and societal institutions in shaping the lives of disabled people, as well as de-temporalizing interventions through obscuring their historical roots, and the potentially diffuse ongoing impacts. As will be discussed in the final section, engaging with our understandings of intervention and temporalities of state intervention is a key site of debate in the CRPD and legal capacity context. When, how, why

⁷² Puar, *supra* n 53, p 166.

⁷³ Soldatic, ‘Appointment Time: Disability and Neoliberal Workfare Temporalities’ (2013) 39 *Critical Sociology*, 405, at 419.

⁷⁴ [2017] EWHC 354 (Admin).

⁷⁵ Para 120.

and where the state ought to intervene in the lives of disabled people has become a central battleground for debate, in turn reinforcing the temporal assumptions that have underpinned the current legal framework. Surfacing these assumptions and adopting an untimely perspective offers potential new routes forward for activism, scholarship and reform in this area.

5. ARTICLE 12 AND THE CRPD—AN UNTIMELY FUTURE?

Returning to the CRPD and the untimely approach advocated earlier, we can begin to draw out some of the key shifts that engaging with temporality can offer to scholarship in this area. In essence, Article 12 and the CRPD as a whole offers potential for untimely engagement with ideas of capacity, not constrained by the past or current understandings or approaches to subject and the role of the state. As McNeilly puts it, rights can only be of use if they are ‘conceived not as concepts drawn upon in the present for a predictable and linear future, but as untimely politico-legal concepts orientated towards a future which, like human life, is endlessly becoming’.⁷⁶ Our approach to capacity therefore must not be constrained by current visions of what a right to legal capacity is (and all the conceptual baggage that flows from this) and to be attentive at a granular level to where static and linear time is embedded within legal frameworks. We perhaps need to be most alive to this when we are seeking to utilize universal concepts—such as that of universal legal capacity—and to think with broader temporality scholarship that recognizes the ways that putatively neutral or universal principles can apply differently to those bodies situated as ‘out of time’. The *jarring* that the CRPD creates, and embrace of the untimely, allows us to untether from existing approaches and to redraw these concepts in new ways. Such an approach can thus create the space for alternative visions and futures for law and disability, but also human rights debates more broadly. It is clear that ableist ideas and temporal techniques are deeply entrenched in the MCA and approaches to legal capacity which exclude disabled people. It is important then to recognize the very different temporality that the CRPD can offer.

Current debate in relation to Article 12 has tended to reinforce the conceptual boundaries of current temporalities of the legal subject and the state. There has been, for example, an evident concern that Article 12 and the focus on legal capacity, including respect for an individual’s will and preferences as part of this, may reinforce a liberal individualist autonomy approach to decision-making.⁷⁷ Others have raised similar concerns that Article 12 would prevent interventions when individuals are in crisis, thus being actively harmful to disabled people.⁷⁸ As such, prominent scholars have recently concluded that ‘[t]he functional model of capacity is undoubtedly imperfect, but there has, however, yet to be an approach put forward by the Committee which has equivalent—or greater—legitimacy to it. In Kuhnian terms, we suggest that it has not therefore been displaced as the paradigm’.⁷⁹ Yet it is not clear that this reading and presentation of Art 12 is necessary or correct, and the conclusions drawn by such scholars are somewhat premature. Such conclusions are only inevitable if the current temporality is seen as the yardstick for progress. When we are attentive to temporality, it becomes clear that these approaches are being driven by the current temporal approach to legal subjectivity and the role of the state and intervention. The question as to legal capacity (or mental capacity) is positioned as the starting point, and the legal sorting through this is the gateway to state intervention/non-intervention.

⁷⁶ McNeilly, *supra* n 1, 825.

⁷⁷ Kong, *supra* n 11.

⁷⁸ Ward, ‘Abolition of Guardianship? “Best Interests” versus “Best Interpretation”’ (2015) 32 *Scots Law Times* 150.

⁷⁹ Ruck Keene and others, *supra* n 11.

In contrast, the ‘untimely’ potential residing within the CRPD is implicitly attested to by those working within the disability context, and those in human rights scholarship more broadly, who highlight the novelty and significance of the Convention.⁸⁰ Atrey points to the ‘state of the art’ nature of the CRPD, and the more complex characterization of non-discrimination that is central to the Convention.⁸¹ Dhanda, writing specifically in relation to Article 12, highlights the ways that legal capacity is central to accessing all of the other rights in the Convention, and the interconnectivity of these rights is being a key driver of the emancipatory potential.⁸² The Committee, in General Comment No 1, demonstrate further that ‘[r]ecognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the Convention’,⁸³ and go on to outline in detail the interaction with a number of other articles. Indeed, the melding of social and rights with civil and political in a holistic way further unsettles the liberal state temporality, and the ideas of non/intervention and independence that we have seen perpetuated in current temporal registers.

As such, the shift in the temporal dynamic inhering in the CRPD can be seen as challenging the linearity and progressive nature of subjectivity and state responses. Instead, whilst there is recognition of the ways in which legal agency (or capacity) is central to accessing all of the rights in the Convention, equally accessing these rights requires positive obligations on states to enable and scaffold this legal agency via support. Such support, importantly, does not hinge upon legal sorting as ‘out of time’ or outside of the realms of contemporary legal norms and subjectivity. Support—via the meaningful access to other rights in the Convention—is ongoing and as such requires shifting temporalities of the state, from a binary of absence/presence, and towards recognizing the ‘always, already’ presence of the state and institutions. This embracing of the ‘untimely’ and broadening temporal horizons opens up the vision of the state and alternative temporalities of intervention, recognizing varied sources of disability and histories of these, following the social model orientation away from individualizing the source and responsibility for disability. Moreover, this approach avoids the ‘exceptionalizing’ and othering of disabled people, and the temporal ordering that is currently pervasive in the MCA and in the doctrine of necessity before it. To really embrace the untimely potential of the CRPD then, following Grosz, debates in this area must look to ‘bringing into existence futures that dislocate themselves from the dominant tendencies and forces of the present’.⁸⁴

6. CONCLUSION

Untimeliness has been presented here as an important orientation for CRPD scholarship in a number of key ways. Firstly, it reveals the temporal assumptions that currently underpin legal frameworks, and demonstrates how neutral frameworks may perpetuate these if they are remade with such temporalities intact. This allows scholars and activists seeking to shape progressive approaches to law in this area to recognize and address these hidden sources of ableism. Secondly the intransigence in current literatures in the context of the MCA and Article 12, and the CRPD more broadly, can be productively viewed as a temporal clash. Whilst there is a level of hopelessness in current literatures, and an abandonment or indeed negation of the radical potential of the CRPD, recognizing time and embracing untimeliness offers a route out of

⁸⁰ Quinn, n 35; Lawson, n 34; de Beco, ‘The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities’ (2019) 68 *International and Comparative Law Quarterly* 141.

⁸¹ Atrey, ‘Beyond Universality: An Intersectional Justification of Human Rights’ in Atrey and Dunne (eds), *Intersectionality and Human Rights Law* (2020) at 28.

⁸² Dhanda, *supra* n 36.

⁸³ Committee on the Rights of Persons with Disabilities, General Comment No. 1—Article 12: Equal Recognition before the Law (2014) <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-1-article-12-equal-recognition-1> at para 31.

⁸⁴ Grosz, *supra* n 13, p14.

this malaise. Once we are attentive to the very different temporal understandings of disability (and subjectivity) and the role of the state, that underpin the current legal framework and that which the CRPD can enable, a more open terrain to build upon is created. Debates will of course still occur, but on very different terms and with broader repercussions for legal arrangements of time.

Whilst particular focus has been placed on Article 12, given that this is where much of the critical heat has been focussed in domestic scholarship on the CRPD, attentiveness to temporality has broader importance for those seeking to understand and implement the CRPD. The untimely brings disability scholarship and human rights scholarship into a dynamic conversation. Human rights scholarship can be alive to the ways in which law perpetuates normative ideas around subjectivity and disability, even in ostensibly neutral frameworks, and as such can seek to guard against this. This is particularly important for thinking through universality and intersectionality in human rights law.⁸⁵ As McNeilly puts it,

“Untimeliness may assist in breaking through the kinds of impasses which international human rights law is experiencing, offering creative new pathways for the future of this discourse and its possibility—although, never certainty—to facilitate radical social change in the present.”⁸⁶

Through embracing untimeliness, and being attentive to the temporalities implicit in the jurisprudence in this area, we have the opportunity to unsettle deeply entrenched and often unrecognized assumptions, and to create the space for new temporal futures.

ACKNOWLEDGEMENTS

I am very grateful for feedback on early ideas for this paper at a workshop at the University of Nottingham in July 2023. Thank you to Peter Bartlett, Kay Lalor, Linda Steele, Ruby Reed-Berendt, the anonymous reviewers, and Shreya Atrey for invaluable comments on earlier drafts.

⁸⁵ Clough and Reed-Berendt, *supra* n 39; Atrey and Dunne, *supra* n 81.

⁸⁶ McNeilly, *supra* n 1 at p 833.