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## Constructing Female Sexual and Reproductive Agency in Mental Capacity Law

### *Abstract:*

Respect for the sexual, reproductive, and relational choices of women with learning disabilities remains unrealised to date, despite the autonomy-based focus of mental capacity law in England and Wales as well as the UN Convention for the Rights of Persons with Disabilities. Instead, such women appear trapped within a triple-bind – where they not only act in ways that might reinforce oppressive norms around gender and disability, but they are mentally incapable of even making such self-subjugating choices. The triple-bind emerges for two reasons: first, learning disability is understood as an essentialist property that determines action; second, the normative logic of feminism and the social model of disability is bound to the binary between emancipation – subjugation, which excludes the nuanced and ambiguous agency of women with learning disabilities as a result. What is needed instead is an alternative framework of female agency that can accommodate a mode of *ambivalence*, *indifference*, *inhabitation*, and at times, *complicity* – in other words, instances where women make choices that appear contrary to their emancipation from disabling, patriarchal norms or relationships. Women with learning disabilities navigate a complex nexus of norms, power relations, and relational connections, some of which are coercive and oppressive, yet simultaneously subjectively affirming and enabling. I argue for an alternative analytical framework of female agency in order to accommodate how women with learning disabilities undertake the complex negotiation of power and social norms, as well as render visible their agency in their sexual, relational, and reproductive choices.

### *Introduction*

She was near normal as far as looks were concerned, it was only when one got to know her that you realized she was handicapped [sic] – so she was fair game to anyone who came along. I mean if she hadn't been sterilized think how many babies would she have had. At least she could go out to places and I'd know she wouldn't get pregnant which would have been wrong... Well I went to my doctor and he sent me to a specialist – he thought she, looking normal, was ok, but then, when he interviewed her he said 'I'll do it', the operation. [...] I made the decision as a mother and that was it.<sup>1</sup>

I still don't know why they did that surgery to me. The sterilization wasn't for punishment, was it? Was it because there was something wrong with my mind?<sup>2</sup>

Mrs A told Mr M that she had been trying to conceive and that she wanted a baby, 'because she could give it a good home'. She said she believed she could bring up a child, although she could

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<sup>1</sup> Qtd. in Elizabeth Tilley, et al, 'The silence is roaring': sterilization, reproductive rights and women with intellectual disabilities, *Disability & Society* 27:3 (2012): 419.

<sup>2</sup> Robert Edgerton, *The Cloak of Competence* (Berkeley: University of California Press, 1967), p. 155; qtd. in *ibid.*, p. 421.

not say why she could do so now when previously she could not. She explained that if she were not in her current relationship, she would not want to have a child, but was worried that Mr A might leave her if she did not become pregnant. [...] Mr M reiterated his opinion that Mrs A does not have capacity regarding contraception "... because she lacks the intellectual ability to look after a child of any age independently; furthermore she lacks insight into this fact and is adamant that she is capable of doing so".<sup>3</sup>

These quotations attest to the complex issues around the sexual and reproductive agency of women with learning disabilities,<sup>4</sup> where the putative vulnerability of such individuals, particularly around sexual exploitation and pregnancy, is often used to justify practices such as covert sterilisation, contraception, or the regulation of contact with sexual partners, often with the sanction of the courts. Such cases are rarely straightforward. In some instances, women with learning disabilities exercise and express their agency in ways that adhere or consent to oppressive social norms, or their reproductive and sexual choices fundamentally disable their long-term agency or are the result of coercive influences from family members, social care professionals, and through judicial decisions. This raises an important question: how are we to make sense of women's agency in such circumstances, particularly within the context of mental capacity law?

Answering this question is deeply problematic from both a practical and theoretical perspective. Within the practice of mental capacity law, the courts appear to move in two different directions. On a charitable reading, the courts seek to balance respect for a woman's reproductive and sexual choices, with the imperative to protect her from certain exploitative situations which fundamentally undermine her long-term agency. A more unforgiving interpretation of court decisions, by contrast, suggests that highly restrictive decisions in certain capacity and best interests cases reinforce disturbing patriarchal and disablist norms, particularly in the regulation of women's choices around motherhood, reproductive health, and sexual partners, by questioning her fundamental capacity to express such agency.

Through a theoretical lens the answer to this question is equally fraught, where it remains unclear as to whether the emancipatory political agenda of feminism or the social model of disability can accommodate the ambiguous motives behind the agency of women with learning disability. The normative logic of feminism equates women's agency with resistance to patriarchal norms, whilst the social model of disability focuses on individual and collective political action which challenges the unequal, discriminatory, and oppressive treatment of disabled bodies. Whether through the lens of feminism or the social model, women with learning disability seem subject to what I call the 'triple-bind'. The triple-bind describes the additional layers of oppression and presumed lack of agency which

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<sup>3</sup> *A Local Authority v A & Anor* [2010] EWHC 1549 (Fam), para. 46.

<sup>4</sup> The term 'learning disability' denotes a lifelong condition that is characterised by intellectual and social / adaptive impairments. 'Learning disability' is the preferred term in the UK, whilst it is also used interchangeably with the term 'intellectual disability' (which is more commonly used in Canada and the US). It is not presumed in this paper that those with learning disabilities form a homogeneous group.

putatively characterises women with learning disability, distinguishing them from other women and indeed, women with physical disabilities. On one hand, the agency of women with physical disabilities is often constrained by the double-bind, where the aspiration towards and embodiment of patriarchal norms related to female roles and objectification functions as a (conscious or unconscious) rejection of disablist norms. The choice to simultaneously reject and endorse different oppressive norms nonetheless remains available to women with *physical* disability, even as such agency remains problematic through an emancipatory lens. On the other hand, women with *learning* disability are subject to a third bind, where scepticism of their very cognitive capacity means they are presumed to be unable to intentionally act in ways that *either* adhere to *or* resist hegemonic social norms around gender and disability. This means that their agency is permanently undermined, invalidated, or misunderstood.

The purpose of this paper is to advance a way of conceptualising the agency of women with learning disabilities so as to avoid the triple-bind in mental capacity law. Ultimately, their negotiation of patriarchal and disablist norms results in highly nuanced, and at times, ambivalent choices that run contrary to the aims of emancipation. This negotiation comes to the fore only when two core premises operating in theory and practice are challenged. First is the treatment of learning disability as an essentialist, deterministic property that *causes or acts on* women, so they behave or choose in certain ways. This essentialism results in perceptions of ontological vulnerability, where something inherent to the very being of these women – that is, the way that their minds are wired – makes them vulnerable to the exploitative actions of others.<sup>5</sup> The second premise is that meaningful, authentic agency is intrinsically geared towards emancipation from hegemonic social norms in accordance with progressive politics. Agency takes on a binary character as a result, premised on either liberation from, or subjugation to, disciplinary socio-cultural norms. These two premises combined imply that meaningful agency will continue to elude women with learning disabilities, disempowering those whose agency already tends to be reduced to incapacity, inability, and passivity. *If* women with learning disabilities are to be empowered and enabled in their reproductive and sexual choices, *then* we must assume a more complex framework which engenders recognition of their agency in the first place, one which challenges the persistent binary logic of emancipation – subjugation in feminist and social model approaches.<sup>6</sup>

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<sup>5</sup> The term ‘vulnerability’ is applied very lightly here and throughout the paper, mainly to characterise the nature of essentialism conferred onto learning disabilities. My analysis does not in any way hinge on an analysis of vulnerability, though I am aware that the concept has gained traction in feminist philosophy (see Catriona Mackenzie et al eds., *Vulnerability: New Essays in Ethics and Feminist Philosophy* (New York: OUP, 2014)). I remain sceptical about the analytical usefulness of the concept of vulnerability and whether it can bear the normative weight of arguments surrounding it, though it remains beyond the scope of this paper to explore further. The analysis of the paper should be understood as forwarding an entirely different approach that is reliant on the *essentialising move which posits a relation of causality or determinacy* rather than the content of vulnerability as a concept.

<sup>6</sup> To be clear, my argument should not be read as sanctioning oppressive social or abusive relational practices, nor am I denying the harsh reality of the relational abuse, sexual exploitation, and persistent disempowerment of

Section I outlines the seemingly inevitable problem of the triple-bind that afflicts the agency of women with learning disabilities. Section II examines the essentialist presumption underlying the concept of learning disability, drawing an informative comparison with feminism's problematic treatment of women's agency within Islamic culture. I then explore Saba Mahmood's critique of the emancipatory analytic within feminism in Section III, suggesting that her analysis of the Islamic Piety movement in Egypt can be highly useful in constructing a more nuanced account of women's agency in mental capacity law – one that transcends the binary logic of emancipation-subjugation.

### I. *The Triple-Bind*

The bodies and choices of women with disabilities remain a site of contestation. Historically, such bodies have been treated as asexual, and child-like, imbued with a vulnerability that putatively justifies regimes of paternalistic care, control, or surveillance, particularly around sexual and reproductive choices.<sup>7</sup> Such treatment is no longer presumed to be appropriate or warranted under the autonomy-based focus in mental capacity law, as implied in the Mental Capacity Act 2005 in England and Wales (MCA) which states as one of its core principles in s.1(1) the presumption of mental capacity. This presumption is to be overturned through a diagnostic threshold and functional test of capacity, and should an individual be found to lack capacity, decisions could be made on their behalf according to a best interests standard, though s.4(6) clearly asserts the importance of the individual's wishes, feelings, beliefs and values. Even more explicitly, the United Nations Convention for the Rights of Persons with Disabilities (CRPD) states in Article 23 that disabled persons have a right to make their own reproductive choices and retain their fertility on an equal basis with others. These explicit statements in the MCA and CRPD mean that, at least in theory, women with disabilities possess the right to sexual and reproductive autonomy from the perspectives of both domestic law and international human rights convention.<sup>8</sup> The reality, however, is that this right remains largely unrealised, where their bodies continue to be regulated in clinical and social care regimes, with forced sterilisation and covert contraception still common, particularly amongst those with learning disabilities.<sup>9</sup>

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people with learning disability, let alone women. See, for instance, Camillia Kong, *Mental Capacity in Relationship: Decision-making, Dialogue, and Autonomy* (Cambridge: CUP, 2017); also Michelle McCarthy, 'Women with intellectual disability: Their sexual lives in the 21<sup>st</sup> century', *Journal of Intellectual and Developmental Disability* 39:2 (2014): 124-31.

<sup>7</sup> Licia Carlson, 'Cognitive ableism and disability studies: Feminist reflections on the history of mental retardation', *Hypatia* 16:4 (2001): 124-146; Rita Rhodes, 'Mental retardation and sexual expression: An historical perspective', *Journal of Social Work & Human Sexuality* 8:2 (1993): 1-27.

<sup>8</sup> Carolyn Frohmader and Stephanie Ortoleva, 'The sexual and reproductive rights of women and girls with disabilities', in *ICPD International Conference on Population and Development Beyond*, 2014.

<sup>9</sup> *Ibid.*; Susan Ledger, et al, 'Contraceptive decision-making and women with learning disabilities', *Sexualities* 19:5-6 (2016): 698-724; Sam Rowlands and Jean-Jacques Amy, 'Sterilization of those with intellectual disability: evolution from non-consensual interventions to strict safeguards', *Journal of Intellectual Disabilities* 2017: 1-17; Tilley, 'The silence is roaring', pp. 413-26; Sarah Earle et al, 'Who makes crucial decisions on reproduction and contraception?' *Learning Disability Practice* 15:8 (2012): 34-35.

How women with disabilities come to reclaim and assert these rights can lead to an ambiguous picture of female agency. Both as a political and philosophical agenda, feminism has sought to resist and challenge the male sexual objectification of women's bodies, highlighting its dehumanising effects on women and the promotion of male sexual entitlement and violence. This feminist framework, however, both excludes and fails to make sense of the objectification experienced by women with disabilities, whose bodies are characterised as asexual, frail, childlike, and warranting paternalistic protection. As a result, the assertion of their agency often appears caught within a double-bind, where the rejection of disablist norms involves the endorsement of patriarchal expectations regarding female bodies and roles. Choices express an aspiration to become sexually objectified *in the same way as* women without disabilities, with such objectification functioning as a form of emancipation and resistance to the asexual, infantilising norms of disability.

The story of Ellen Stohl is a compelling illustration of this tension. Stohl became a paraplegic after a car accident and was famous for carrying an eight-page pictorial in the June 1987 issue of *Playboy*. She asserted in an interview that 'I didn't pose for *Playboy* to please men. I posed for *Playboy* to discover my own sexuality, to celebrate that part of me that was stripped away by a disability because our society doesn't put sexuality and disability together. They're completely non-existent. *Playboy* was my forum to explore that.'<sup>10</sup> Her wheelchair was nonetheless absent in the stylised soft porn shots, effectively rendering her disability invisible and separable from her body – particularly her *sexualised* body. In the article itself Stohl made some remarkable comments:

Especially since my accident, I've felt that sexuality is the very essence of who we are...and if somebody or something takes away your sexuality, you don't know who you are or where you fit in...[After the crash] I was a child again, and people treated me as such, not as a woman...*I was really lucky in that two orderlies in the hospital harassed me relentlessly – tried to pull my sheets off and stuff. They treated me like a woman...* I suppose there'll be those women's libbers who say, "I don't want to be seen as just a sex object." No, of course you don't want to be seen as *just* that. But would you want that taken away from you? What does that make you? I think every woman wants to be a sex symbol of some sort. When you take that away from us, we're not whole.<sup>11</sup>

Through a feminist lens, Stohl's pictures and statements are inherently problematic due to her effective endorsement of male objectification, harassment, and sexual entitlement over women's bodies. Her adherence to sexist norms would very likely be dismissed as a form of invalid agency through a feminist lens. Yet for Stohl, the sexual objectification that feminists reject becomes the

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<sup>10</sup> 'Hugh Hefner and Playmate Ellen Stohl talk with Chet Cooper', *Ability Magazine: Ray Charles Issue*, 1995. Online at: <https://abilitymagazine.com/charles-Hugh%20Hefner-stohl.html> (accessed 28 January 2019).

<sup>11</sup> Playboy editors, 'Meet Ellen Stohl', 7 June 1987, *Playboy*, pp. 68-74; qtd. in Schriempf, '(Re)fusing the amputated body', p. 66, emphasis added.

medium through she challenges the disablist asexual objectification of her body. The sexual harassment of the hospital orderlies was embraced as a confirmation of Stohl's status as a sexually desirable, mature, and visible woman.<sup>12</sup> Stohl's case illustrates the *double-bind* facing women with disabilities: the rejection of hegemonic social norms around disability comes in the form of acquiescing – even actively affirming – the patriarchal subjugation and objectification of female bodies; emancipation from one oppression means falling into the oppressive trappings of other norms and expectations. Agency therefore involves a constant negotiation between 'eschewing culturally dominant models of femininity and striving to approximate them'.<sup>13</sup> A feminist framework might struggle to track Stohl's choices, but her simultaneous adherence/rejection of feminine and disability norms respectively is not presumed to be unreflective, incapacitous, or expressing cognitive deficiency which renders her unable to choose how she presents herself and her sexuality. Problematic as it might be, those agential choices remain available to her and arguably express some kind of reflective negotiation of oppressive norms.

By comparison, the agency of women with learning disabilities is conceptualised in an even more restrictive fashion, where they appear trapped within a *triple-bind*. The possibility of consciously escaping one oppression through another (what we might call Stohl's 'reflective' double-blind) is not even an available option for these women. Similar to those with physical disability, women with learning disabilities may consciously or unconsciously seek to embody patriarchal norms around female roles and objectification, as a confirmation of their maturity, in response to disablist presumptions of their asexual, childlike status. But others interpret such choices as evidence of their intrinsic cognitive limitations, so they appear unable to 'act', one way or another. This is mainly down to an essentialist characterisation of learning disabilities which treats these conditions as an overriding deterministic cause on women's agency, rendering them ontologically vulnerable: unable to not only choose their sexual partners or how to express their sexual, reproductive agency, but also reject third-party interference in these choices. Further, when they appear to embrace or consent to their oppression, such choices are thought to be caused by their cognitive impairments which prevent 'critical reflection' towards underlying oppressive norms. The upshot is that her agency is no longer taken seriously.

## II. *The essentialism of learning disability*

Essentialist views of certain social categories inject a deterministic quality into our descriptions of female agency, as we clearly see with women with learning disabilities. Such essentialist moves are not the sole preserve of disablist assumptions; progressive frameworks such as feminism can likewise be susceptible to essentialist characterisations of certain structural categories. Indeed, the essentialism of culture within feminism – specifically in the context of Muslim women – is an instructive

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<sup>12</sup> See Schriempf, '(Re)fusing the amputated body', p. 57.

<sup>13</sup> Margaret Lloyd, 'The Politics of Disability and Feminism: Discord or Synthesis?' p. 718.

comparison for my analytical purposes. The reason for this is twofold: first, the language of causation and determination which hampers descriptions of women with learning disability has close parallels to feminism's essentialist descriptions of women's agency in Muslim culture, with similar repercussions. Second (and as discussed in Section III), feminism's failure to track the ambiguous agency of Muslim women applies to the similarly complex sexual and reproductive choices of women with learning disability, thereby clearly illustrating the limitations of theoretical frameworks premised on an emancipation logic.

The essentialism of culture within feminism stems from a broader scepticism regarding the possible coexistence of multicultural commitments with aspirations of female emancipation and equality.<sup>14</sup> Feminists from the liberal philosophical tradition, for example, worry that assertions of cultural adherence could sanction patriarchal power and the continued subordination of women. It is through this prism that feminism struggles to make sense of the choices of Muslim women which appear to perpetuate patriarchal norms, such as the observance of restrictive norms around women's bodies, dress, sexual modesty, and female subordinate roles to men. Female complicity in these norms is perceived to stem from a complete lack of freedom to do otherwise, meaning the agency of Muslim women is invalidated, deemed inauthentic, and perceived to be the result of false consciousness and cultural indoctrination.<sup>15</sup> As a structural category culture is viewed as something that requires individuals to do X or makes it impossible for them to do Y: choices are depicted as *caused and determined by* culture rather than the result of their own free will or individual intent.<sup>16</sup> It therefore becomes impossible for Muslim women to freely choose to wear a veil, for example – rather it is her culture that causes or forces her to adopt this manner of dress.

By contrast, female agency is thought to navigate and coexist with other structural and social categories that influence personal identity. Class and gender are widely acknowledged as impacting how choices are framed and the very formation of one's personal identity, with feminists recognising that these structural influences may even constrain us. Yet notably absent is the additional claim that these influences *undermine* a person's ability to act. For instance, Saharso describes how analogous constraints to sex-selective abortion were viewed entirely differently in the Netherlands: an abortion requested on the basis of a 'class' scenario (i.e. her poverty) was viewed as more acceptable than an abortion requested for cultural reasons, such as the greater cultural importance attached to a male child which meant that a woman could not 'afford' to have another girl.<sup>17</sup> The first scenario driven by

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<sup>14</sup> For a prominent political philosophical argument around the problematic connection between culture and gender, see Susan Moller Okin, *Is Multiculturalism Bad for Women?* In Joshua Cohen, Matthew Howard and Martha C. Nussbaum (Princeton: Princeton UP, 1999); for a critical view of Okin, see Anne Phillips, *Gender and Culture* (Cambridge: Polity, 2010).

<sup>15</sup> Sirma Bilge, 'Beyond subordination vs. resistance: An intersectional approach to the agency of veiled Muslim women', *Journal of intercultural studies* 31, no. 1 (2010): 9-28.

<sup>16</sup> Phillips, *Gender and Culture*.

<sup>17</sup> Sawitri Saharso, 'Feminist Ethics, Autonomy and the Politics of Multiculturalism', *Feminist Theory*, 4:2 (2003): 199-215.

economic necessity is not envisaged as undermining a woman's agency. Likewise, a woman who waives her maternity leave (in order to avoid discrimination in her workplace) is still acting of her own will, even as her choice reflects very real constraints of gender inequality. Not so in the case of culture, where we are far more likely to question the woman's choice and deem her oppressed under patriarchal norms, invalidating her right to make certain choices.<sup>18</sup> This shows that feminists continue to set culture apart in way that is different from other social categories, such as class and gender. The language of inability and causation, of 'being acted on', renders such women passive non-actors; their complex motives for adhering to these cultural norms are either oversimplified or ignored altogether.<sup>19</sup>

Essentialist assumptions likewise inhere in learning disability as a basic social category, affecting both women and men. The language of causation has made its way explicitly within legal interpretations of capacity, for instance, where judgments have asserted the importance of establishing a causative nexus between mental impairment and lack of decision-making capacity under the functional test of MCA.<sup>20</sup> Though a charitable reading of the causative nexus may provide space for a non-deterministic understanding of learning disability (i.e. the diagnosis itself need not be inconsistent with mental capacity, especially in light of the MCA's presumption of capacity), the reality is that *if* one were to be influenced in some way by one's learning disability, *then* one's agency is called into question, much like the woman who seeks to abort her baby due to cultural norms around the desirability of a male child. To be clear, I am not denying the possibility that learning disability can sometimes bear on a person's agency. Sensitive engagement and attuned understanding relies inherently on recognising the phenomenological experience of individuals with certain impairments, and how these might impact on generating a consensual reality, or how the individuals interact with their physical and social environment.<sup>21</sup> The presumption of similarity rather than difference can be deeply problematic because it forecloses the obligation to engage in deep and meaningful ways as to how individuals see and experience the world. That said, dangerous consequences follow when learning disability is automatically treated as a determinant of action. This is particularly so in the presumptive appeal to women's ontological vulnerability as justification for the covert and at times, coercive regulation of reproduction, motherhood, and sexual relations.

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<sup>18</sup> See Anne Philips, *Multiculturalism without Culture* (Princeton: Princeton University Press, 2007), pp. 113-32.

<sup>19</sup> *Ibid.*

<sup>20</sup> *PC & Anor v City of York Council* [2013] EWCA Civ 478, MacFarlane LJ of the Court of Appeal interprets the functional test as establishing whether there is 'a clear causative nexus between mental impairment and any lack of capacity' (para. 52). There are genuine questions as to whether more 'relational' interpretations of capacity are legitimate within the MCA following that judgment. See Kong, *Mental Capacity in Relationship* and Kong and Alex Ruck Keene, *Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues* (London: Jessica Kingsley, 2018) for a defence of more relational readings of mental capacity which implicitly challenge the causative nexus model. See also the judgment from Singapore's Court of Appeal, *Re BKR* [2015] SGCA 26.

<sup>21</sup> Kong, *Mental Capacity in Relationship*.

Two cases in the Court of Protection illustrate this problem well. First, *P (Sexual Relations and Contraception)*<sup>22</sup> was a follow-up case where a woman with learning difficulties had previously undergone general anaesthetic for the covert insertion of a copper inter-uterine device (IUD). The court had approved this procedure in 2012 despite the fact ‘there was some evidence at that time that P might acquire the mental capacity to consent to sexual relations and contraception if educational work was undertaken’.<sup>23</sup> However, P was thought to be ‘vulnerable to sexual exploitation, pregnancy and sexually transmitted disease’ with evidence that she had in fact been sexually assaulted. The police further argued that P ‘should not access the community unsupervised’.<sup>24</sup> The question of P’s capacity to consent to contraceptive treatment and sexual relations was re-evaluated in later court proceedings, with the suggestion that work done in the interim could mean P’s capacity to make such decisions could meet the threshold set by the MCA.

Notably, the reasoning behind the judgment relied heavily on an essentialist view of learning disability which then led to an overarching scepticism about the capacity of P to exercise her decision-making agency – notwithstanding the possibility that she could have in fact achieved capacity to consent to sexual relations and contraception. Equally, the presumption of her ontological vulnerability fed into a finding of incapacity and the best interests decision. Although Baker J did declare P to have capacity to consent to sexual relations, he also concluded that where a person has such capacity ‘but lacks the capacity to make decisions as to her contact with other people, there may be – indeed, are likely to be – circumstances in which her relationships need to be supported, managed, and if necessary, controlled by the court’.<sup>25</sup> He considered P’s case to be a ‘paradigm example’, particularly due to what was characterised as her extreme vulnerability to exploitation. Not only is P’s decision-making ability around sexual and reproductive matters fundamentally questioned, but paternalistic interventions were then considered necessary – such as P’s covert contraceptive treatment and keeping her ignorant of decisions regarding her body, made by others on her behalf. Baker J recognised that the covert insertion of the IUD represented a ‘significant interference with her personal autonomy and her human rights’ but ‘[g]iven that it is plainly in her best interests for the IUD to remain fitted’ he concluded that ‘she should not be told about the presence of the IUD at this stage’ due to the ‘very considerable harm to her relationships with professionals and her family on whom she is utterly dependent’.<sup>26</sup>

A second case reveals even more explicitly how the courts have used a woman’s learning disability to justify the coercive regulation of her reproductive and sexual choices. The extraordinary case history is worth recounting in detail, as the woman’s assertions of control, ‘normalcy’, privacy, and bodily integrity are continuously interpreted through an essentialist lens. In *The Mental Health*

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<sup>22</sup> *P (Sexual Relations and Contraception)* [2018] EWCOP 10

<sup>23</sup> *Ibid.*, para. 5.

<sup>24</sup> *Ibid.*, para. 3.

<sup>25</sup> *Ibid.*, para. 34.

<sup>26</sup> *Ibid.*, para. 62.

*Trust & Ors v DD & Or*<sup>27</sup> the court was charged with determining the capacity and best interests of DD with regards to long-term contraception and/or therapeutic sterilisation. DD was a 36-year old woman with autistic spectrum disorder and mild to borderline learning disability, and the court had to decide whether, if finding DD lacked capacity, it was within her best interests to impose sterilisation. She had had six children, all of whom were either adopted or being raised in foster care, and it was noted that ‘DD has never demonstrated the desire or capacity to engage with the level of support which is likely to be required to assure a child’s safety in her care’.<sup>28</sup> There was a case made for the medical necessity of sterilisation, in so far as her life would be at risk through internal haemorrhaging should she have another pregnancy.

Both her and her partner were ‘fiercely resistant to medical and professional support’;<sup>29</sup> she refused to engage with her appointed legal advocate and stated in a letter that ‘she is “normal. I was born completely perfect”’, expressing ‘an intention to move somewhere “peace[ful]” and that “my body is mine, by human rights”’.<sup>30</sup> Cobb J noted that ‘DD’s continual discussion of Child 1 indicates that pregnancy serves a function of allowing her to hope that she may be able to “replace” him, and prove that she is fit to parent’.<sup>31</sup> DD had further stated at various times that sterilisation would leave her feeling “empty and unhappy”... “I want all my organs inside me”<sup>32</sup>, and explained her agreement to be sterilised at other times “to get the idiots off my back”, changing her mind at times to agree to contraceptive injections, saying ‘she had had enough of all the letters and knocking on the door as it was “doing her head in”’.<sup>33</sup> There were several authorised forced entries into their premises for various purposes associated with her sixth pregnancy and coercive contraception, each with escalating distress, anger, and aggression. Indeed, one forced entry was to administer contraceptive injection against her will, during which professionals used full seat restraint.<sup>34</sup>

Importantly, DD’s resistance to these intrusions by statutory services was fully explicable in light of the alleged history of abuse she suffered by her father/brother which exacerbated her ‘feelings of being violated, controlled and intruded on.’<sup>35</sup> This would be worsened if a copper coil was to be inserted, particularly in light of the sexual symbolism of insertion, ‘but also more simply because the device can be removed by those who control her, but they refuse to do so’.<sup>36</sup> The relationship between DD and BC was further described as ‘co-dependent or mutually dependent’<sup>37</sup>, with the psychological report reading that ‘they boost each others [sic] beliefs that they do not need support. ... The complex

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<sup>27</sup> *The Mental Health Trust & Ors v DD & Or* [2015] EWCOP 4.

<sup>28</sup> *Ibid.*, para. 1.

<sup>29</sup> *Ibid.*, para. 10.

<sup>30</sup> *Ibid.*, para. 118.

<sup>31</sup> *Ibid.*, para. 119.

<sup>32</sup> *Ibid.*, para. 120.

<sup>33</sup> *Ibid.*, para. 120.

<sup>34</sup> *Ibid.*, para. 135.

<sup>35</sup> *Ibid.*, para. 109.

<sup>36</sup> *Ibid.*, para. 109.

<sup>37</sup> *Ibid.*, para. 126.

dynamics of their relationship are such that at times they will ... both seek to retain control, inevitably leading one to feel that they are being ‘abused’ and overwhelmed’.<sup>38</sup>

Ultimately, Cobb J not only found DD to be lacking in capacity to decide about contraception / sterilisation, but judged it in her best interests to be forcibly sterilised, without giving her or her partner advance notice of the planned date, authorising the applicants to remove DD from her home and take ‘necessary and proportionate steps’ to convey her to hospital for the purposes of the sterilisation procedure, including ‘forced entry and necessary restraint’.<sup>39</sup> Though sterilisation could be considered the most restrictive *medical* option, Cobb J’s judgement was that

DD’s “*rights and freedoms*” must be viewed in a wider context than just the medical procedure itself; her ‘rights and freedoms’ include the clear right to respect for her privacy. Sterilisation is in this context, in fact, much more likely to free her from further intrusion of her ‘private life’ from professionals, whereas the insertion of a coil (carrying with it a greater need for monitoring and in due course replacement/removal) would not. In this wider sense, sterilisation is in my judgment the less restrictive of the two principal options under consideration.<sup>40</sup>

Indeed, the two factors of ‘magnetic’ importance were identified as, firstly, the high risk of future pregnancy to DD’s life; secondly, and most notably, ‘the fact that ‘sterilisation is the treatment which most closely coincides with DD’s dominant wishes and feelings to be left alone to enjoy a ‘normal’ life free from intrusion by health and social services’.<sup>41</sup> And he further stated that ‘it is clear that her fertility brings no realistic prospect of parenting a child. Rather than being a benefit, it is a burden to her, bringing with it the prospect of ongoing long-term intrusion by health and social services into her life.’<sup>42</sup>

The background capacity assessments for this case are worth highlighting for their deterministic depiction of DD’s agency. Prior to 2015 various interim declarations were made about mode of delivering her baby, where expert witnesses disagreed about DD’s capacity to make this decision. One had argued that ‘I accept that autism contributes to this inability to weigh *although do not believe that it wholly explains it* (there is in my view some *refusal to weigh*)’, thus implying DD’s lack of engagement with the weighing component of the capacity test could be partially understood as her conscious resistance to the intrusion of capacity assessment in the first place.<sup>43</sup> In contrast, the judge preferred the evidence of the opposing expert witness, given his experience of assessing women with autism. In the striking words of this witness, Dr F:

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<sup>38</sup> Ibid., para. 125.

<sup>39</sup> Ibid., para. 140.

<sup>40</sup> Ibid., para. 98.

<sup>41</sup> Ibid., para. 113.

<sup>42</sup> Ibid., para. 114.

<sup>43</sup> *The Mental Health Trust & Anor v DD & Anor* [2014] EWCOP 11 (04 July 2014), para. 77, emphases added.

[T]he diagnosis of ASD in women is often more difficult than in men. Women tend to have less marked abnormalities in social interaction as they seem better able to observe and imitate others. Their ASD becomes ‘masked’ as they imitate others, and can superficially present as having normal social interaction. However, these interactions lack the emotional understanding that is found in those without ASD.<sup>44</sup>

DD’s refusal to be assessed of her capacity was taken as further evidence her rigid thinking due to her ASD and inability to weigh up issues around contraception. The expert witness noted that ‘My view based on my assessment, she has made a blanket choice not to engage with professionals and *that choice is not down to weighing up the pros and cons, there is a high probability that she lacks capacity to make the decision about assessment of contraception*’.<sup>45</sup> Cobb J cited this as ‘important evidence’ which ‘bears on (but does not determine even for an interim declaration) capacity to make decisions about contraception’ but ‘gives me...reason to believe that she lacks capacity to consent to an assessment of her capacity to make decisions in relation to contraception’.<sup>46</sup> The language of causality is even more explicit in a subsequent judgment, where Cobb J concluded that DD’s inability to weigh up the risks of her pregnancy or information relevant to contraception, particularly risks of future pregnancy, ‘stems from (or is “*because of*”: *section 2(1)*) her autistic spectrum disorder’.<sup>47</sup> In his 2015 judgment, Cobb further cites Dr F’s assessment of DD’s ‘lack of cognitive flexibility and rigid thinking style, both of which are caused by her mental disorder’.<sup>48</sup>

This remarkable case history reveals how DD’s resistance to the care and assistance of external professionals is read as evidence of her lacking mental capacity, of a fundamental inability to properly assess her needs. The gendered inflection of Dr F’s assessment is striking, illustrating well the seeming triple-bind that traps women with learning disability: a woman with ASD may aspire to, and track, so-called feminine traits (such as the empathy to ‘observe and imitate others’, to show some ‘emotional understanding’), but she will typically be questioned as to whether these traits are, in fact, ‘authentic’. DD’s agency would be judged as falling short regardless. When she tries to live up to gender norms around what it means to be a mature, independent woman capable of giving care to others, she violates norms surrounding care recipients with learning disabilities – norms premised on compliance towards carers and external assistance. Thus, in order to live a life free of paternalistic intrusion, DD was forced to undergo one of the most extreme forms of personal violation – forced sterilisation – despite her core wish to maintain her bodily and reproductive integrity. To state the same point more generally: women with learning disabilities may act and express themselves in ways that assert their bodily integrity, independence, and right to privacy. Yet this agency is viewed through the prism of causation – as

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<sup>44</sup> Ibid., para. 78.

<sup>45</sup> Ibid., para. 82, emphasis added.

<sup>46</sup> Ibid., paras. 83, 84.

<sup>47</sup> *The Mental Health Trust & Ors v DD & Anor* [2014] EWCOP 13 (15 July 2014), para. 21.

<sup>48</sup> *The Mental Health Trust & Ors v DD & Or* [2015] EWCOP 4, para. 53.

evidence of, not just her incapacity to decide as a result of her learning disabilities, but further justificatory reasons as to why her bodily integrity and reproductive agency need not be respected.

Ultimately, we need to challenge the treatment of learning disability as an essentialist category that causes or determines practical agency, otherwise the motivations and actions of such women appear inevitably trapped in a triple-bind. Though the social model of disability initially seems able to spearhead this challenge, it too ultimately falls short. On one hand, the social model rightly problematises the concept of disability – questioning its presumed ontology and its use as a social category to justify discrimination and paternalistic control over certain bodies and minds. On the other hand, the social model's distinction between impairment (as value-neutral features of embodiment) and disability as socially constructed, discriminatory norms means that it too remains vulnerable to a type of essentialism about impairment that disregards the interplay between social norms and the subjective experience of female embodiment. As Schriempf writes, '[e]fforts to separate impairment and disability, as the social model does, will always miscarry because they fail to recognize the material-semiotic complexity of the multiple interactions between body and culture, nature and society, sex and gender, and impairment and disability'.<sup>49</sup>

And this interplay, this complexity, is vital if we are to offer an alternative analytical and normative logic around the agency of women with learning disabilities, particularly in cases where the waters are muddy – cases where women consent to or embody hegemonic male or able-bodied norms, or use language consistent to these norms in explaining their choices. Such complexity has led some to rightly argue for a feminist-disability in order to rectify the respective myopia of feminist and social model approaches when taken in isolation.<sup>50</sup> However, it remains unclear whether a feminist-disability approach shares the emancipatory logic of feminism and the social model, whereby the normativity of agency is equated to the liberation from hegemonic social norms.<sup>51</sup> In the next section, I urge this feminist-disability approach to adopt an alternative theoretical grounding which critically examines the utility and normative power of an emancipation framework, particularly as through such a lens it

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<sup>49</sup> Schriempf, '(Re)fusing the amputated body', p. 70.

<sup>50</sup> Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (Routledge 1997); Susan Wendell, 'Toward a feminist theory of disability', *Hypatia* 4:2 (1989): 104-24; Jenny Morris, 'Feminism and Disability', *Feminist Review* 43 (1993): 57-70; Rosemarie Garland-Thomson, 'Integrating disability, transforming feminist theory', *NWSA Journal* 14:3 (2002): 1-32; Rosemary Garland-Thomson, 'Feminist Disability Studies', *Signs* 30:3 (2005): 1557-1587; Margaret Lloyd, 'The politics of disability and feminism: Discord or synthesis?' *Sociology* 35:3 (2001): 715-28; Alexa Schriempf, '(Re)fusing the amputated body: An interactionist bridge for feminism and disability', *Hypatia* 16:4 (2001): 53-79.

<sup>51</sup> This ambiguity is present in Wendell, 'Toward a feminist theory of disability', for example, when she states: 'an adequate feminist theory of disability will examine all the ways in which disability is socially constructed; it will explain the interaction of disability with gender, race and class position; it will examine every aspect of the cognitive authority of medicine and science over our experiences of our bodies; it will discuss the relationship of technology to disability; it will question the belief that disabled lives are not worth living or pre- serving when it is implied in our theorizing about abortion and euthanasia; it will give us a de- tailed vision of the full integration of disabled people in society, and it will propose practical political strategies for the liberation of disabled people and the liberation of the able-bodied from the social oppression of their bodies' (p. 122, fn. 17).

becomes impossible for the ambiguous reproductive and sexual choices of women with learning disabilities to avoid the triple-bind.

### III. *Beyond agency as emancipation*

Thus far I have suggested the agency of women with learning disability often remains in a problematic mode of consensual but incapacitous objectification: to resist disablist norms that infantilise them, they might embrace problematic social norms around gender. As she adheres to norms associated with femininity to assert her maturity, she not only falls foul of the emancipation agenda of feminism, but is also assumed to lack the cognitive capacity to make such choices. Likewise, if she complies with the recommendations and direction of social care and health care workers, of family members around treatment, she falls foul from the social model due to her acquiescence to the disciplinary norms around disabled bodies which sanction their containment, medical treatment, or condescension. She too is presumed to lack the reflective capacity to make such a self-subjugating choice. In all scenarios, essentialist assumptions around learning disability reduce her agency to deterministic action and project a condition of ontological vulnerability which warrants paternalistic action accordingly.

The possibility of consensual objectification reveals a complex mode of agency comprised of ambiguous, sometimes ambivalent motivations amongst women with learning disabilities. This mode of agency is poorly addressed from the perspectives of feminism and the social model of disability, primarily because both remain committed to a normative logic premised on resistance and emancipation.<sup>52</sup> Distilled through this logic, the only possible agential options that remain are liberation from or subordination to hegemonic social and cultural norms. Even critics of the social model are not immune to the power of this logic, as different forms of agency are shoehorned within the analytic of resistance and subordination. For instance, Gabel and Peters try to accommodate the mixed motives and complex choices of persons with disability, but then argue for a ‘resistance theory of disability’ which seeks ‘to acknowledge the importance of all forms of resistance by disabled people, including resistance by those individuals who do not accept the ‘party line’ but who have valid perspectives and who share values of liberation and freedom for disabled people.’<sup>53</sup> With strict adherence to this analytical framework comes the risk of invalidating or dismissing the complex agency of women with

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<sup>52</sup> Of course, these complex forms of choice have been explored in some parallel discussions, particularly in feminist debates around the purported victimhood / agency of women who experience domestic violence. Yet even in these discussions the logic of emancipation remains a background assumption, as seen in Marilyn Friedman, ‘Autonomy, Social Disruption, and Women’ in Catriona Mackenzie and Natalie Stoljar, eds., *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: OUP, 2000). For a nuanced feminist-legal discussion of these issues, see Leigh Goodmark, ‘Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases’, *Florida State University Law Review* 37 (2009): 1-48.

<sup>53</sup> Susan Gabel and Susan Peters, ‘Presage of a paradigm shift? Beyond the social model of disability toward resistance theories of disability’, *Disability & Society* 19, no. 6 (2004): 596.

learning disabilities, particularly around their sexual, reproductive, and relational choices. At worst, what might follow is the sanctioning of inappropriate, unwarranted paternalistic actions, on grounds that their agency is not to be taken seriously.

Consider the case, *A Local Authority v A & Or*<sup>54</sup> which involved the assessment of capacity of Mrs A, a woman with learning disabilities, who had begun to refuse contraception following her marriage to Mr A. Prior to her marriage, she became pregnant twice and both babies were removed at birth. She had monthly depot contraceptive injections until her cohabitation and marriage to Mr A. During this period social services were unable to meet with Mrs A and she began to refuse to have her injections. Mr A wanted to have a child and Mrs A on occasion had made allegations that Mr A abused and exercised control over her. Whether Mrs A had capacity to make decisions about contraception was questioned, with the local authority suggesting that although she could understand the ‘proximate medical issues’, she lacked insight into the wider social consequences, namely the wider practicalities of bringing up a child. In contrast, Bodey J agreed with the Official Solicitor’s submissions that such a wider test of capacity would ‘set the bar too high’<sup>55</sup>, further observing it ‘obvious [...] that any step towards long-term court imposed contraception by way of physical coercion, with its affinity to enforced sterilisation and shades of social engineering, would raise profound questions about state intervention in private and family life’.<sup>56</sup> Nonetheless, Bodey J found Mrs A to be incapacitated as regards to contraception due to relational dynamics between Mr and Mrs A, which called into question her ability to properly weigh up the options to make a decision.<sup>57</sup>

On one hand, a convincing argument could be made that Bodey J’s judgment reflects a nuanced understanding of the supportive conditions of decision-making which accords well with feminist commitments to relational autonomy.<sup>58</sup> On the other hand, it is important to highlight how Mrs A’s agency could appear trapped within the triple-bind, particularly in relation to her acceptance of certain gender norms following her marriage to Mr A. When asked about various forms of contraception Mrs A expressed views about her fitness as a mother, suggesting that ‘she felt she could look after a baby on her own; but on further questioning, agreed she would need support, like a carer coming in. She added that Mr A would give her a lot of support.’<sup>59</sup> When asked about which contraception she would choose, Mrs A replied, ‘None. I want to have a baby’<sup>60</sup>, stating that she now had the ability to care for

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<sup>54</sup> *A Local Authority v A & Or* [2010] EWHC 1549 (Fam)

<sup>55</sup> *Ibid.*, para. 63.

<sup>56</sup> *Ibid.*, para. 77.

<sup>57</sup> *Ibid.*, para. 73.

<sup>58</sup> See Kong, *Mental Capacity in Relationship*, pp. 138-44.

<sup>59</sup> *Ibid.*, para. 49.

<sup>60</sup> Cf. Margaret Lloyd, ‘The politics of disability and feminism’, p. 270: ‘The common experience of learning-disabled women remains that, even if sterilisation is not as routine as it once was, there is rarely any consideration of the possibility that their desire to have children, even within a stable partnership, is legitimate. Pregnancy is more likely to be viewed with a mixture of horror and panic by family and professionals alike. Thus, where feminist discourse has moved from the construction of motherhood as a burden to the rights of women to make choices about and within motherhood, disabled women are denied the opportunity to exercise such choice, until and unless they can prove that they are capable of fulfilling the stereotypical mother role and function. The plea

a child because ‘I’ve got Mr A. I’m a married woman’.<sup>61</sup> To different medical professionals, she also stated that it was Mr A who wanted to have a child. Denying he coerced her, she ‘...admitted he might leave her if she does not have another child’. Both the consultant gynaecologist and obstetrician considered that she answered their questions appropriately and concluded that: ‘...she understands her contraceptive choices...[although]...she did not want to make any decision today without consulting Mr A first and involving him in the decision-making process’.<sup>62</sup> Thus, Mrs A’s responses appear to espouse patriarchal views about her submissive decision-making role in marriage. Such views seemed to emanate from her husband. According to the psychologist in the case,

[Mr A] presented quite a rigid view of marriage, in that Mrs A as his wife is his responsibility and there would be no requirement for support from external agencies. [...] His profile suggests rigid adherence to social conventions, seeking to avoid disapproval of others ... He reported that he believed decisions surrounding contraception should be made either by Mrs A herself, or by both of them as a married couple. ... He also demonstrates rigid beliefs about personal matters being kept within his marriage and that it is not a concern for external agencies. He...appears to view seeking support from outside the marriage as weakness.<sup>63</sup>

Mr A further communicated to Bodey J that ‘social service involvement made him feel there were ‘three parties to the marriage’. His views about unwanted interference have thus grown and fed on themselves, creating split loyalties for Mrs A’ and ultimately leading to a completely unequal dynamic’.<sup>64</sup>

Through an emancipation lens, Mrs A’s agency would seem to fall foul from two directions. From the feminist angle, Mrs A adherence to and endorsement of strict gender norms raise difficult questions as to whether she actually ‘freely’ consents to her oppression. From the angle of the social model, her agency likewise fares poorly, where her compliance to social care workers in contraceptive treatment is likewise problematic, representing an implicit acquiescence to the medicalised paternalism, control, and regulation of disabled bodies. Either way, Mrs A’s conformity to social norms invalidates her agency through the binary prism of emancipation-subordination. Importantly, this presumed logic is not confined to theory, but also influences the domain of practice: the expert witness statement – which proved to be persuasive to the judge – claimed that Mrs A’s ability to weigh information was ‘impeded by her ambivalence (mixed feelings, ‘confusion’) about her husband and the pressure he seems to place on her to have a family.’ Mr B’s pressure was further contributed to ‘by Mrs A’s personal

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in some more recent feminist writing for the reinstatement of childlessness as a positive state is difficult to embrace if one’s status as a ‘non-parent’ stems from one’s inability to convince others of one’s capacity to be a mother, in both its biological and social meanings.’

<sup>61</sup> *A Local Authority v A & Or*, para. 49.

<sup>62</sup> *Ibid.*, para. 44.

<sup>63</sup> *Ibid.*, para. 40.

<sup>64</sup> *Ibid.*, paras. 42, 73.

characteristics, associated with both her learning disability and her personality, such as her eagerness to please, her suggestibility and her tendency to acquiescence'.<sup>65</sup>

The expert statement is also extraordinary in its confirmation of the triple-bind that effectively invalidates Mrs A's agency. Female socialisation often involves instilling characteristics of eagerness to please, setting aside one's own needs for others, agreeability, subservience. In inhabiting these character traits, Mrs A could be read as behaving as the ideal woman under patriarchal norms – and in doing so, embodying the commonly perceived societal role of a wife who exudes the ability to care for, and submit to, the needs of her husband and family. Moreover, the scepticism that met Mrs A's claims regarding her ability to care for a child with Mr A's support further illustrates the triple-bind. The female caregiving role is often upheld as a standard through which capacity around reproductive choices are measured. Women with learning disabilities often require support to give care to others and their failure to adhere to standards of femininity consequently excludes them from motherhood and childrearing, or at least sets them a highly difficult standard to realise. A woman's reliance on the guidance of third-party care may be used as further evidence of her incapacity to become a mother and provide care to others. Conversely, the rejection of third-party support may be an attempt to assert and prove her capacity to embody these deeply entrenched norms around feminine care, yet the essentialism of learning disability misreads such rejection as a fundamental inability to properly assess one's capabilities and needs.

Moreover, why would Mrs A be different from other women who similarly internalise gender norms and expectations around female roles and behaviour? If women without learning disabilities behave in submissive ways, internalise expectations about what it means to be a wife, married, a mother, and so on, without imperilling their agency, why are more demanding expectations imposed on women like Mrs A – where they ought to act in ways that externalise these norms, critically reflecting and rejecting them, if we are to take their agency seriously? The reality seems that we are setting these women up for failure, particularly as social care regimes directly reinforce female socialisation in its encouragement of individuals to please clinicians, avoid disturbing others, defer and submit to the wisdom and guidance of professionals and experts. Years of third-party involvement in Mrs A's life likely fostered character traits associated with compliance and acquiescence, in accordance with the concept of the ideal 'patient' or 'social care recipient' who submits to the disciplinary social care regimes. The social norms of what makes a good 'woman/wife' and what makes a good female 'patient' or 'service user' in these scenarios overlap. Yet the expert statement not only presumes a vision of agency which departs radically from the reality of Mrs A's socialisation, but also reduces these character traits – typically viewed as consistent with 'a good woman', 'a good patient' – to her learning disability.

We need an alternative descriptive and normative analytic that accommodates the possibility of women inhabiting or embodying social norms, where one *negotiates* the power of these influences

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<sup>65</sup> Ibid., para. 51.

on one's identity and choices. Mrs A's agency cannot be characterised as 'resisting' feminist or disablist norms, nor merely passive and repressed. Beyond resistance is a full range of human actions that may be 'socially, ethically or politically indifferent to the goal of opposing hegemonic norms'.<sup>66</sup> Arguably, the actions of Mrs A, DD, and many others, fall within this indifferent or ambivalent class of action. Through its descriptive oversimplicity, the binary analytic of emancipation-subjugation discounts and potentially disrespects the complex reasons and motives behind actions which are presumed contrary to progressive politics.

Here again the analogy with Muslim women proves fruitful, particularly through the work of Saba Mahmood who challenges the emancipatory logic within feminism. Mahmood examines the agency of Muslim women in the Islamic Revival movement in order to question the external and internal meanings of resistance, as well as its putative relationship to progressive politics. Western feminism typically views Muslim women as 'incomparably bound by the unbreakable chains of religious and patriarchal oppression', particularly as attention remains on 'expressions or moments of resistance that may suggest a challenge to male domination'.<sup>67</sup> Through this analytical lens, agency is understood as 'the capacity to realize one's own interests against the weight of custom, tradition, transcendental will, or other obstacles (whether individual or collective)'.<sup>68</sup> It presupposes an ideal of negative freedom premised on breaking free from the restrictions of hegemonic norms. Equating agency with resistance to relations of domination therefore naturalises the social ideal of freedom and autonomy in a way that not only predetermines the descriptive experience of women (in that society is always structured to serve the interests of men and the suppression of women's interests), but also prescribes the normative solution of liberation and self-realisation across cultures.

Yet freedom conceived as such is not always an intrinsic and overriding motivation for many women whose agency embeds connections to certain identities and operations of power, and is necessarily mediated by cultural, historical, and relational conditions.<sup>69</sup> The operation of power – and women's negotiation of such power – can lead to different notions of the female body, knowledge, and subjectivity in various circumstances, expressing multiple projects and discourses. This suggests that

what may appear to be a case of deplorable passivity and docility from a progressivist point of view, may actually be a form of agency – but one that can be understood only from within the discourses and structures of subordination that create the conditions of its enactment. In this sense, agential capacity is entailed not only in those acts that resist norms but also in the multiple ways in which one *inhabits* norms.<sup>70</sup>

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<sup>66</sup> Saba Mahmood, *The Politics of Piety: The Islam Revival and the Feminist Subject* (Princeton: Princeton UP, 2011), p. 9.

<sup>67</sup> *Ibid.*, pp. 7, 8.

<sup>68</sup> *Ibid.*, p. 8.

<sup>69</sup> *Ibid.*, p. 14.

<sup>70</sup> *Ibid.*, p. 15.

Considering women's reasons and narratives will reveal actions within certain contexts that may not uphold freedom and liberation as the primary objective of agency. Yet women can still *act* and *be agents* even when they are not acting from these motives, particularly in the way that cultural and social norms are inhabited, lived through, and realised.

Challenging the political and analytical certainties within the progressive movements of feminism and the social model may open up alternative avenues and multiple relations through which to explore the agency of women with learning disabilities – some of these relations will be bound up with power regimes that strike an uneasy balance between subordination and subjective affirmation. Indeed, agency within relations of subordination is often ambiguous, making the language of negotiation central in such contexts, sometimes sitting with the discomfort of indecision, indifference, and uncertainty. Mrs A's ambivalence was remarked as evidence of her incapacity to decide – yet acting from mixed motives is unremarkable. Alison Weir provides a compelling example of the 'single black woman on welfare' to illustrate well the process of negotiating between – sometimes simultaneously – contested intersubjective narratives and social relations.<sup>71</sup> This woman will grapple regularly with questions of independence and what it means to her, how and which communities she aligns herself with ('black' and / or 'woman') what she values and cares about. In negotiating these multiple relations she will not have a singular or unified way of understanding her agency: at times she will see herself as dependent, other times she will feel like she embodies the worst views of her community (e.g. that she is a drain on society). Yet, at other times, she may feel connected to those relations that promote resistance to pernicious narratives about various parts of her identity. The motives fuelling her agency reflect a 'struggl[e] to live between the two frames of faith and suspicion. Between faith in defining identities and the unmasking of their forms of oppression'.<sup>72</sup> Many women share this single black mother's navigation of multiple, competing relations and identities. But as Weir writes, 'we will not find our freedom only by unmasking them as oppressive, and we cannot always – and often do not wish to – escape or subvert them'.<sup>73</sup> Sometimes we find ways to transform them, live them in different ways, sometimes we simply inhabit and embody them.

This analysis advances a more complex lens through which to understand the ambiguous sexual, reproductive, and relational choices that initially imply consensual objectification or self-subjugation. Certain judgments in mental capacity law do in fact recognise this complex process of negotiation, such as Bodey J's decision in *A Local Authority v Mrs A & Or*. Even as he ultimately concluded that her husband overbore Mrs A's will, his statements about Mrs A's testimony seem to recognise her as expressing ambivalence rather than passivity:

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<sup>71</sup> Alison Weir, *Identities and Freedom: Feminist Theory Between Power and Connection* (Oxford: OUP, 2013) p. 35.

<sup>72</sup> *Ibid.*, p. 36.

<sup>73</sup> *Ibid.*

In their oral evidence, both Mr and Mrs A denied [domestic abuse] has ever taken place. I have to be cautious in accepting the truth of any of Mrs A's allegations (i) because she has 'withdrawn' them and (ii) because there could be several reasons why they may not have been true. She may, for example, have found she gained attention by making them; or they may have been invented because she was annoyed with Mr A about something at the time; or they may have emerged through leading questions. There are also in the papers a number of historical references about Mrs A's facility to make things up to cause trouble.<sup>74</sup>

Yet Bodey J also stated

I have no doubt that the witnesses who report Mrs A's making complaints to them about Mr A's violent and bullying behaviour are telling the truth and I reject Mrs A's suggestion that they are making things up. The question is then whether Mrs A was reporting to three different categories of witness (college staff, staff at her place of voluntary work, and social workers) violence and bullying which simply had not happened at all. [...] It is difficult to see that Mrs A should have lied, exaggerated or been misinterpreted on every occasion she spoke out, even though that may have happened on some or even many such occasions. In addition, there are some references to a consistent demeanour: being tearful and distressed, and once crying at college repeatedly.<sup>75</sup>

Here is an acknowledgement of Mrs A's equivocal, at times conflictual, negotiation between different relations and identities – occasionally she shared her husband's 'drawbridge' mentality and expressed the subjective belonging she experienced through her role in relationship; at other times, she sought support from and valued her interactions with social care staff and others. It is too easy to view her acquiescence, not just towards her husband, but towards care workers as well, as evidence of her subordination to hegemonic norms around gender and disability. But this disregards moments in her agency where she clearly has made efforts to negotiate between her self-conception and the expectations of these different relations – sometimes with the result of her affirming and internalising those norms and expectations. This isn't to suggest that we ignore the extent to which her agency is situated within harmful relationships, nor the ways that socialisation distils pernicious norms around gender and disability. But it does leave open the possibility – indeed, recognises the necessity – of these women's complex negotiation between competing relations and identities, navigating the ambiguous terrain between the exercise and abuse of power on one hand, with a sense of genuine connection and subjective value on the other – sometimes coexisting *at the same time*.

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<sup>74</sup> *A Local Authority v A & Or*, para. 70

<sup>75</sup> *Ibid.*, para. 71.

Another pre-MCA case takes into account this subtle negotiation. In *A Local Authority X v MM & Anor* [2007] EWHC 2003 Munby J (as he was then) presented a nuanced judgment around a woman's ability to decide about contact and sexual relations. MM was a woman with a learning disability, paranoid schizophrenia, and history of childhood abuse, and her longstanding relationship with KM became a concern of the local authority, where there were worries about his treatment of MM, with allegations of abusive, aggressive, and exploitative behaviour that endangered MM's physical and mental health.<sup>76</sup> The local authority had sought best interests declarations to regulate and supervise contact between MM and KM, and powers to restrict or terminate KM's contact in certain conditions, particularly as his power and influence over MM was thought to cause emotional distress and undermine her care placement. Yet MM was noted to experience 'pleasure from her contact with KM and that they care[d] for each other deeply', whereby it would be 'very distressing' for MM if her long-standing sexual relationship with KM were to be stopped.<sup>77</sup> In her testimony, MM had no hesitation or difficulty in asserting her wishes, stating that she wanted 'all I want is to live with [KM]; I should live with him – I can think for myself – I want to live with him.' She stated that she loved KM 'very much' and 'he loves me – we both love each other,' though Munby J claimed 'she was in denial about KM's mistreatment of her [...]: "[KM] looks after me very good ... he has never done anything to me – he did not stab my leg." She said "I never fall out with him."<sup>78</sup> It was also clear that MM had capacity to consent to sexual relations, although an expert witness suggested that she 'd[id] not necessarily have the capacity to understand that having a relationship with a particular partner (in this case KM) could be harmful to her'.<sup>79</sup> Using the court's inherent jurisdiction, Munby J concurred with the local authority that MM warranted some protection from abuse and exploitation, not least to prevent relapse in her mental illness. The concept of vulnerability in inherent jurisdiction faces some obvious difficulties, not least in the way that it seems to echo essentialist presumptions which render certain minds and individuals ontologically vulnerable. Munby J's deliberations at times falls within that trap, but he is nonetheless careful to point out how MM's vulnerability with regards to her physical and mental health was 'significantly prejudiced because of the lifestyle which, under KM's tutelage, guidance and direction, she [had] chosen to live'.<sup>80</sup>

Moreover, the judge makes important allowances for MM's ambiguous choices, stating that 'the court must be careful to ensure that in rescuing a vulnerable adult from one type of abuse it does not expose her to the risk of treatment at the hands of the State which, however well intentioned, can itself end up being abusive of her dignity, her happiness and indeed of her human rights.'<sup>81</sup> Indeed, he stressed that '[t]he fact that MM lacks the relevant capacity does not mean that her wishes and feelings

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<sup>76</sup> *A Local Authority X v MM & Anor* (No. 1) [2007] EWHC 2003 (Fam).

<sup>77</sup> *Ibid.*, para. 31.

<sup>78</sup> *Ibid.*, para. 57.

<sup>79</sup> *Ibid.*, para. 28.

<sup>80</sup> *Ibid.*, para. 140.

<sup>81</sup> *Ibid.*, para. 115.

simply fall out of account'.<sup>82</sup> Although Munby J had clear concerns about the potentially harmful influence of KM, he had even fundamental reservations about the 'disproportionate interference with MM's right to respect for her private and family life' and 'the long-standing relationship between MM and KM',<sup>83</sup> He ultimately concluded that the local authority had positive obligations to enable MM and KM to continue their longstanding sexual relationship in accordance with their right to private life, noting that

it was testament to the strength of MM's relationship with KM, and its importance to her, that it had survived the artificiality of the arrangements to which it had been subjected and the very limited contact which had been permitted for much of the recent past. Furthermore, unless the arrangements for contact are modified sensibly so as to meet MM's reasonable wishes and feelings the very constraints imposed upon her may put her placement under such strain as to induce her to 'vote with her feet'.<sup>84</sup>

I am not suggesting that the judgments in these cases are perfectly justifiable. The use of vulnerability as a category, particularly explicit in the use of inherent jurisdiction (as in both of these cases), can replicate the problematic essentialism discussed above. But the significance of these judgments lies in the recognition (however imperfect) that women with learning disabilities *can* act from mixed motives, that ambivalence, ambiguity, or outright adherence to gender/disability norms is not equivalent to passivity, and that it is too simplistic to suggest that their inhabitation of certain norms, or their putatively self-harming choices around their sexual relationships, amounts to self-subjugating choices that fundamentally invalidate their agency. Of course, these relational conditions can have a significant part to play in how individuals constitute their identities and frame the options available to them; they can have a pernicious or empowering influence and fundamentally disable or enable one's agency.<sup>85</sup> However, to show due respect and recognition of the agency of women with learning disabilities in the domain of their reproductive health, family matters, and relational choices, it is vital to adopt the language of negotiation as the baseline, to acknowledge the potential and uneasy coexistence between connections of subjective value and belonging, with the coercive exercise of power and influence, amongst both intimate relations and third-party interventions.

### *Conclusion*

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<sup>82</sup> Ibid., para. 121.

<sup>83</sup> Ibid., para. 142.

<sup>84</sup> Ibid., para. 149.

<sup>85</sup> Kong, *Mental Capacity in Relationship*; Kong and Ruck Keene, *Overcoming Challenges in the Mental Capacity Act 2005*.

In this paper I have argued that there is a genuine difficulty in tracking the agency of women with learning disabilities in regard to choices that reflect acquiescence, endorsement of, or consent to problematic hegemonic norms around gender and disability. In theory and practice, their agency appears trapped within a triple-bind in decisions around motherhood, reproduction, and sexual relationships. On one hand, there is the tendency to essentialise these choices, as an expression of a learning disability that acts on them or causes them to be incapable of making such choices. On the other hand, normative commitments to an emancipatory framework invalidates ambivalence, inhabitation, complicity, and so on as valid classes of action, thus condemning these women to passivity, false consciousness, or incapacity. Both tendencies lend themselves naturally to paternalistic responses which discount the complex ways in which these women navigate competing relations and connections. Whilst both feminism and social model of disability are important for setting a political and social agenda directed at addressing the oppressions experienced by women and people of disability, both models should not predetermine the full scope of women's agency, particularly as they form too blunt an instrument to accommodate important nuances. Much of what I have written here builds on those who advocate for a feminist-disability model, though I suggest even this agenda requires reflection on whether the progressive analytic of emancipation-subjugation remains a universal framework that fully captures what matters to women with learning disabilities, and indeed women more generally, in their continual negotiation of patriarchal norms and expectations.<sup>86</sup>

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