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**A critique of**  
**utilitarian thinking**  
**in the context of**  
**adult social care**

Laura Wares

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## Précis

I would like to extend my thanks to Professor Helen Carr as my principal supervisor for her support, insight and encouragement during the course of this work. I also thank my second supervisor, Professor Judy Fudge, for her valuable feedback and advice which has helped me focus my arguments. I thank them both for their constructive and honest criticism which, I hope, has been addressed and helped to improve this work.

I also thank my family, particularly my husband and children, for their unending support and patience.

## Abstract

The aim of this work is to argue against the utilitarian framework which underpins care provision in the United Kingdom as the cause of many contemporary care problems. In the course of this work I identify feminist theories which I argue provide a more appropriate basis for care in the future. I discuss the assumptions built on gendered expectations, analysing the ways in which they particularly affect women. I consider factors including how care is in the process of transformation in other countries and whether they have a feminist influence. I analyse arguments of risk in care and examine the role of local authorities and the way the court approaches challenges to care plans. Finally I consider practical care technology and the application of paternalism in care practice. I argue that a feminist approach would provide a more human, responsive manner in which to practice care which focuses on the individual.

## Introduction

I was inspired to conduct this research because I have a longstanding interest in adult social care, stemming from employment in a care home during my younger years. My interest increased while studying Public Law as an undergraduate and adult social care was the subject of my dissertation. During that time, the Care Act 2014 was developed. The Act represented the biggest reconsideration of adult social care for over sixty years. Although it was seen as a breakthrough for those involved in care, it has not addressed some of the most critical problems in contemporary care. In recent years there has been a crisis of care in the UK including the collapse of Southern Cross in 2011 and the Winterbourne View scandal in 2012.<sup>1</sup>

**The purpose of this thesis is to examine why the state uses a utilitarian framework to think about care. I offer feminism as an alternative approach which I argue could lead to more progressive outcomes in connection with state provision of care.** I am not claiming to discuss all the problems of adult social care, nor do I attempt to solve the problems I identify. I am instead arguing we need to think differently about the problems of care and I suggest feminism may provide a more nuanced approach.

My research has been desk based, using a variety of sources to support my arguments. I have considered the main works of authors relating to the central theories

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<sup>1</sup> Carr, H., 'Legal Technology in an Age of Austerity: Documentation, 'Functional' Incontinence and the Problem of Dignity in Exploring the 'Legal' in Socio-Legal Studies' in Cowan, D., and Wincott, D., (eds) (Palgrave 2016).

of this work and positive and negative critiques of each. To develop my arguments I sought out leading academic writers in adult social care and pinpointed works which enrich my thesis. I have also identified case law which I discuss with a particular focus on judicial reasoning. It should be noted that there are relatively few adult social care cases which reflects the difficulties facing vulnerable people seeking to challenge local authority decisions. My thoughts around technology tend to draw on unreported cases relating to failings in health and safety. I have also used newspaper articles and blog posts because these provide useful opinions about recent developments or concerns in care. These articles and posts have helped me ensure this work has remained up to date.

In the first chapter I argue that utilitarianism provides the philosophical basis for current care policies. Utilitarianism, I suggest, has informed not only our thinking about care but has caused many of the ongoing difficulties. I discuss the theory of utilitarianism developed by J.S. Mill which was considered progressive in the eighteenth and nineteenth centuries.<sup>2</sup> A utilitarian response led to the development of the welfare state which was introduced to provide support to those who needed it. However resources have always been constrained, subsequently reinforcing utilitarian blanket policies which fail to address individual needs adequately. In response to resources becoming ever more stretched in the welfare state, levels of bureaucracy have increased correspondingly. I argue that in turn, bureaucracy has led to a seemingly impenetrable system for those subject to it. As a result it can be difficult to challenge decisions made by the state and this is particularly apparent where vulnerable people are concerned.

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<sup>2</sup> Mill, J.S., *What Utilitarianism Is* (Parker, Son and Bourne, London 1863).

I argue that utilitarianism has led to a particular masculinist approach to the problems of state provision of care.

I discuss the Supreme Court case of *McDonald*.<sup>3</sup> Ms McDonald's argument focused on her dignity whereas the local authority, supported by the decision of the court, focused on the best uses of resources, which is an implicit utilitarian approach. As care demands primarily affect women, in the second chapter I consider feminist approaches as an alternative way of thinking about care. I focus on Carol Gilligan's ethics of care and Martha Fineman's vulnerability approach.<sup>4 5</sup> I argue that social care is a feminist concern because, although women's activity in the paid workforce has increased, expectations that women will provide care have not diminished. The pressures of meeting each of these roles has resulted in adverse impacts on women's health. Gilligan's ethics of care argues that society has been built around male interests, and a shortage of state resources have increased pressure on women to deliver care where there are gaps in provision. The failure to engage more men in care further reinforces ideas that women should provide care. I examine a critique of the ethic of care which focuses on the need to raise the awareness of women in relation to the detrimental effects of expectations of care which reinforces normalised male biased interests.<sup>6</sup> I discuss Fineman's theory in the context of universal human vulnerability and suggest that building resilience enables individuals to develop coping strategies at times of increased vulnerability. Once we recognize that all humans are

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<sup>3</sup> *R (On the application of McDonald) (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2011] UKSC 33.

<sup>4</sup> Gilligan, C., *In a different voice: Psychological Theory and Women's Development*, Vol 326 (Harvard University Press 1982).

<sup>5</sup> Fineman, M and Grear, A. (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate Publishing Ltd., 2013).

<sup>6</sup> Hemmings, C., 'Affective Solidarity: Feminist Reflexivity and political transformation' *Feminist Theory* [2012] 13(2) 147-161.



dependant, open debate between citizens and governments can identify and address care problems collaboratively. Fineman notes that vulnerable groups are often labelled and marginalized, and I discuss this concern in particular relation to people subject to ASBOs.<sup>7</sup> Lastly I examine critiques of Fineman from the viewpoint of women of colour which argue that we cannot assume all women have the same lived or cultural experiences.<sup>8</sup>

In the third chapter I argue that feminism can provide a more productive way to think about adult social care. I identify two cases where adults with needs are subject to significant care provision by their parents.<sup>9</sup> The cases illustrate the assumptions that both local authorities and judges make when parents, particularly mothers, are responsible for caring for adult children. I use these cases and academic arguments to establish that this kind of care is considered to be a private concern,<sup>10</sup> which reduces the responsibility of local authorities to support care while reinforcing gendered expectations about women. The final section compares UK approaches to adult social care provision with those of the Netherlands and Canada.<sup>11</sup> I discuss how far feminism has influenced these approaches and whether it has produced change and better solutions. I analyse whether public discourse has been effective in changing

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<sup>7</sup> De Verteueil, G., May, J. and von Mahs, J., 'Complexity not collapse, recasting the geographies of homelessness in a punitive age' *Progress in Human Geography* [2009] 33(5): 646-666.

<sup>8</sup> Crenshaw, K. W., *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (University of Chicago Legal Forum 1989) 139-67. Reprinted in *The Politics of Law: A Progressive Critique*, 195-217. Second edition, edited by David Kairys (Pantheon 1990).

<sup>9</sup> *R (On the application of JM and NT)* [2011] EWHC 2911 (Admin) and *R (On the application of KM) (by his mother and litigation friend JM) (FC) (Appellant) v Cambridgeshire County Council (Respondent)* [2012] UKSC 23.

<sup>10</sup> Clements, L., *Disability, Dignity and the Cri de Couer* *European Human Rights Law Review* [2011] 6 675-685.

<sup>11</sup> Sevenhuijsen, S., 'The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy' *Feminist Theory* [2003] August 4:179.; Bacchi, C., *Mainstreaming Politics Gendering Practices and Feminist Theory* (Cambridge University Press 2012).

the way care is considered and practiced and whether there has been a reimagining of gendered roles. Although I acknowledge that the cost of care is an important factor, this thesis does not address the ways and extent to which it should be considered in developing care policies.<sup>12</sup> My argument is simply that a utilitarian approach to cost should not be the only consideration in developing a policy on social care.

The fourth chapter returns to the UK and discusses risk.<sup>13</sup> I suggest that utilitarianism leads to a heightened awareness of risk and argue that feminism could offer a more nuanced approach. I consider the way local authorities evaluate risk and note where utilitarian arguments cannot be invoked to implement a care plan, paternalism will be adopted leading to restrictions on the liberty of the vulnerable adult. I evaluate the way that informed risk is applied to those that lack mental capacity and how views of local authorities, carers and family members can dominate the interests of the cared for.<sup>14</sup> I discuss the influence of paternalism through a consideration of risk and where problems arise in connection with individuals who lack capacity. I do not discuss paternalism as a theory in and of itself but, rather, as an approach that is adopted by councils when utilitarian rationalism is inappropriate.

I evaluate the way in which care plans are legal technologies which have significant influence on individual lives.<sup>15</sup> I discuss the position of social workers who may have

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<sup>12</sup> There are ways to address the issue of cost. For example, in the Netherlands the social cost of care is raised in the context of life planning and investment of the present generation for the older. Moreover, Fineman's ideas about developing resilience could lead to fewer economic demands on the state.

<sup>13</sup> Beck, U., *Risk Society: Towards a New Modernity* (Sage Publications 1992) and Giddens, A., *Runaway World: How Globalisation is Reshaping Our Lives* (Routledge: New York 1999).

<sup>14</sup> Marchant, S., *Risky Business – A Joseph Rowntree Scoping Paper: Rights, Responsibilities, Risk and Regulation* (Joseph Rowntree Foundation 2011).

<sup>15</sup> Carr (n1) 204-205.

a relationship with the individual as well as being critically aware of restricted state resources. I return to the case of *McDonald* as a means to analyse risk and resource availability in the eyes of the courts and local authorities. I use other cases to discuss the way in which family members of individuals without capacity have been constructed by local authorities as posing a risk to them, particularly when a local authority is trying to provide what it sees as safe care.<sup>16</sup> Family members were framed as risky because they either resisted a reduction in local authority support or were seen to be preventing the successful implementation of a care plan. The last case I discuss considers an individual with fluctuating capacity who opposed the paternalistic proposals the local authority wished to implement.<sup>17</sup> When each of these cases came before the court the judges repositioned the individual at the centre of the care plan and resisted local authority paternalism.

In the final chapter I argue that care technology has been increasingly used as a response to a shortage of carers and restricted resources. In viewing technology as one of the solutions to the problems of care, I argue that the concerns associated with it have become an emerging problem in themselves. I consider two particular care technologies, hoists and surveillance equipment. I consider the use of hoists through case law which has involved serious injury or death.<sup>18</sup> These cases are not examined in the courts as a failure of good care but instead as breaches of health and safety law. I consider the use of surveillance using both analogous situations and academic

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<sup>16</sup> *A London Local Authority v JH* [2011] EWHC 2420 (Fam) and *Local Authority X v MM (by her litigation friend the Official Solicitor) KM* [2007] EWHC 2003 (Fam).

<sup>17</sup> *Re KK; CC v KK*, (2012) EWHC 2136 (COP).

<sup>18</sup> For example; *Care home operator fined £100,000 for hoist death* [www.mackworth-healthcare.com/care-home-operator-fined-100000-for-hoist-death/2013](http://www.mackworth-healthcare.com/care-home-operator-fined-100000-for-hoist-death/2013) (January 11th 2013).

works.<sup>19</sup> I focus on the pros and cons of using tagging for those with dementia who often lack capacity to consent to surveillance. I consider the influence utilitarianism has had in relation to the use of care technology, arguing that fails to treat care as a responsive practice. In turn this treats dementia patients as subjects of care rather than considering benefits for them as individuals.<sup>20</sup>

I discuss the way dementia care has developed with a focus on eliminating risk, meaning that we fail to work at understanding how to control and manage the vulnerable adult's behaviour. I analyse who benefits from care technology and the sometimes conflicting viewpoints of carers, family members and local authorities.<sup>21</sup> I argue feminism may be a more productive way to apply care technology and discuss the importance of the human touch in care. I use case law to articulate the importance of human responsiveness in care.<sup>22</sup> Finally I argue against the temptation to reduce care staff in favour of technology and evaluate whether care technology improves care or whether it simply enables numbers of care staff to be reduced.<sup>23</sup> I argue that patient interest should always be prioritised. I discuss how the utilitarian approach has led to increased care technology because of economic factors and has resulted in detrimental effects on care provision. I argue that care staff will also suffer from overuse of care technology because they will not be able to build and benefit from reciprocal relationships with those they care for.

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<sup>19</sup> Hughes, J.C., and Louw, S.J., 'Electronic tagging of people with dementia who wander' *British Medical Journal* [2002] (October) 19; 325 (7369) 847.

<sup>20</sup> O'Neill, D., 'Should patients with dementia who wonder be electronically tagged? No.', *British Medical Journal* [2013] 346 f3 606,607.

<sup>21</sup> Niemeijer, A., *Surveilling autonomy, securing care – Exploring good care with surveillance technology in residential care for vulnerable people* (VU University Press, Amsterdam 2015).

<sup>22</sup> *R (on the application of A) v East Sussex County Council* (No.2) 6 CCL Rep 194.

<sup>23</sup> Astell, A.J., 'Technology and personhood in dementia care' *Quality in Ageing* [2006] 7, 15-25.

## **Chapter One - Utilitarianism and the contemporary welfare state**

### **1. Introduction**

In this chapter I examine the ways utilitarianism has influenced welfare policy within the UK's liberal democratic state. Although utilitarianism had considerable advantages when it was introduced in the nineteenth century, it has reached the limits of its usefulness. Utilitarianism has contributed to production of a paradigmatic legal subject, overlooking individual needs and tends towards creation of policy that is not attuned to the needs of vulnerable individuals.

The chapter begins by explaining the emergence of utilitarianism in the United Kingdom. I focus on the contribution of John Stuart Mill. Mill moved away from the approach formulated by his predecessors (John Austin, Jeremy Bentham and John Mill) which was founded upon notion of moral values focusing instead on maximisation of pleasure for the majority and advantages associated with that principle.<sup>24</sup> I show how this shift led to formation of the paradigmatic legal subject which is self-supporting, male and economically valuable. I will illustrate why utilitarianism as a reformist theory is considered and identified as a consequentialist approach which is inappropriate to care.<sup>25</sup>

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<sup>24</sup> West, H.R (eds). *The Blackwell Guide to Mill's Utilitarianism* (Blackwell Publishing 2006) 27.

<sup>25</sup> West (n24) defines consequentialism as acts deemed right or wrong based on their end result.

In the next part I examine how far utilitarianism continues to influence the contemporary welfare state. Utilitarianism places significant weight on importance of welfare maximisation of the majority, which can be linked to the original intentions of the welfare state. I analyse how the combination of utilitarianism and welfare state have resulted in the growth in bureaucracy, leading to a system which routinely fails to prioritise individual need and instead rations state resources. I consider how far this approach has forced individuals to compete for limited resources.

The following section focuses on critiques of utilitarianism. I argue that broad-brush policies are inadequate mechanisms to allocate care resources including carers, money and practical equipment to support care needs. Utilitarian policies fail to acknowledge the reality of the human condition and the need for nuance. I rely on Rosen's criticism of Mill's theory as implying a static view of society which restricts opportunities for discussion about change.<sup>26</sup> If debate is stifled it can lead to injustice being overlooked and allows inequities to continue. Additionally I argue that if the paradigm group is male, responsible and active in the workforce, those individuals will take preference over everybody else.<sup>27</sup>

The third part of the chapter considers gender and male bias. I use Bryson's work to identify why utilitarianism is problematic in this regard.<sup>28</sup> I evaluate Conaghan's arguments about how utilitarianism has influenced judicial thinking.<sup>29</sup> I evaluate how law tends to focus on discrete groups in the public realm. I argue that burdens placed

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<sup>26</sup> Rosen, F., *Classical Utilitarianism from Hume to Mill* (Routledge Ltd., 2003).

<sup>27</sup> The utilitarian approach is based on the importance of males. I explain that in more depth throughout the chapter.

<sup>28</sup> Bryson, V., *Feminist Debates – Issues of theory and political practice* (Macmillan Press Ltd, 1999).

<sup>29</sup> Conaghan, J., *Law and Gender* (Oxford University Press 2013).

on people by utilitarianism are unreasonable as utilitarianism fails to recognise individuality in a way that means many people involved in care practice are overlooked. The failure to ignore caring responsibilities results from a deficiency to adequately acknowledge the private realm. I argue that the utilitarian approach is based on the idea that adult, educated males are the most important people in society.

Finally I draw on the case of *McDonald* to evaluate judicial thinking about adult social care. I argue that jurisprudence focuses on utilitarian values of resources and outcomes and produced an unsatisfactory approach for the individual. I argue that the majority judgment effectively led to individual needs and wishes being overlooked.

## 2. The theory of utilitarianism

Bentham, a leading utilitarian philosopher, expounded the idea that if we behaved morally we would avoid hurting others.<sup>30</sup> He attributed considerable importance to happiness, believing that basic pleasures were as important as sophisticated ones. Bentham was criticised for that evaluation<sup>31</sup> and further chided for equating the pleasures of humans with animals, believing their experiences to be more or less equal.<sup>32</sup> Mill developed and refined Bentham's approach, moving away from ideas connected to moral notions. He suggested, in contrast to Bentham, that some pleasures were more valuable than others.<sup>33</sup> In particular, Mill valued intellectual

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<sup>30</sup> West (n24) 28.

<sup>31</sup> Ibid 28.

<sup>32</sup> West (n24) 38.

<sup>33</sup> Ibid 124.

pleasure as opposed to basic sensual pleasure.<sup>34</sup> In contrast with Bentham, Mill distinguished between humans and animals believing that intellectual pleasures were different from those animals might experience, including happiness.

Mill highlighted the importance that utilitarianism places on the value of happiness to everyone.<sup>35</sup> Universal happiness is a desirable end result for the majority, not merely a means to an end. The foundation of utilitarianism as a way in which to structure duties, virtues and rights cannot be underestimated. These values acquire their worth from their contribution to general happiness.<sup>36</sup> Mill's focus concerned moulding people into balanced and conscientious individuals.<sup>37</sup> He believed this would result in individuals behaving in ways which would enhance wider society's happiness instinctively.<sup>38</sup> Mill emphasised the importance of happiness maximisation for all as he thought this would prevent people being purely directed by self-interest.<sup>39</sup> Yet Mill did not advocate self-sacrifice as a matter of course, simply as a means to increase happiness as a goal for everyone.<sup>40</sup> He argued that if negative consequences could be foreseen, most would avoid engaging in selfish behaviour.<sup>41</sup> Nevertheless Mill was not confident that individuals would act independently for the benefit of society, establishing himself as a rule utilitarian.<sup>42</sup>

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<sup>34</sup> West (n24) 117.

<sup>35</sup> Rosen (n26) 286. He discusses 'Enlightenment' in reference to eighteenth century European thought.

<sup>36</sup> Mill (n2) 7.

<sup>37</sup> Capaldi, N., *John Stuart Mill: A Biography* (Cambridge University Press 2004).

<sup>38</sup> Hoag, R. W., Happiness and Freedom: Recent work on John Stuart Mill *Philosophy and Public Affairs* [1986] Vol.15, No.2 (Spring) 188-199.

<sup>39</sup> West (n24) 3.

<sup>40</sup> Hoag (n38) 192.

<sup>41</sup> *Ibid* 3.

<sup>42</sup> Mill advocated a system of rules which would regulate certain situations. West (n24) 3.



Mill's belief was that an act can be viewed as positive if it leads to good for everybody.<sup>43</sup> As a rule utilitarian Mill believed people would not act in pursuit of general happiness unless they felt obliged to.<sup>44</sup> He supported the development of a moral code which would cover particular circumstances, strongly advocating a system of sanctions for not following utility principles.<sup>45</sup> Mill did not believe that there should be room to make an individual evaluation of potential consequences each and every time.<sup>46</sup> The result of that approach is significant because it justified development of universal policies which may not be appropriate for everyone. Nevertheless Mill took a broad approach, looking beyond the individual and at their wider environment. In taking this expansive viewpoint, Mill considered what effects environment could have on people and how behaviour was influenced.<sup>47</sup> His considerations recognise that we do not operate as solitary actors but instead as part of a wider group.<sup>48</sup> He recognised that behaviour was part of a bigger debate about society, its structures and what most of us would deem acceptable.<sup>49</sup>

Mill valued society's strength of conscience whether it had foundations in childhood teaching or through disapproval from fellow man or God.<sup>50</sup> He believed that the apex moral sanction would be individual subjective feeling while arguing that morality was acquired, not innate.<sup>51</sup> Therefore principles of moral value and potential happiness would need to be taught to children. Mill's view is open to criticism because values

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<sup>43</sup> In contrast, act utilitarians believe that an act is positive only if it produces a similar degree of happiness as any other act that the individual could have performed at that time.

<sup>44</sup> West (n24) 84.

<sup>45</sup> Ibid 3.

<sup>46</sup> West (n24) 3.

<sup>47</sup> Ibid 59.

<sup>48</sup> West (n24) 87.

<sup>49</sup> Ibid 58-59.

<sup>50</sup> West (n24) 85.

<sup>51</sup> Ibid 86.

and morals vary between societies and cultures and this is a weakness in utility arguments. Notwithstanding, in light of the previous influences of religion, when utilitarianism was introduced it acted as a significant means of reform which I now explore further.

### 2(i) Utilitarianism as a means for reform

Utilitarianism was adopted as an alternative to the previous regime which emphasised religion. Christianity teaches followers that suffering is noble and poor people, passive regarding social conditions, would get to Heaven.<sup>52</sup> Although Mill's framework was rule based, it was flexible and encompassed a wider range of issues.<sup>53</sup> Mill placed trust in utilitarianism, believing that as time progressed, it would become natural for individuals to act as members of larger society.<sup>54</sup> For Mill, political progress would make this increasingly possible, clearing away self-interest<sup>55</sup> and that existing inequalities of legal privilege across social classes and between individuals would be removed.<sup>56</sup> Mill thought that those who found themselves in marginalised positions would be identified and brought back into the fold,<sup>57</sup> which, in turn, would mean that they would ultimately be better placed to offer support to others.

Some commentators, including Wendy Donner, argue Mill's theory was progressive because it was based on ideas of activism and was reformist.<sup>58</sup> She states that the

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<sup>52</sup> This ties in with Donner's argument.

<sup>53</sup> Rosen (n26) 2.

<sup>54</sup> Ibid 87.

<sup>55</sup> West (n24) 88.

<sup>56</sup> Ibid 88.

<sup>57</sup> West (n24) 87.

<sup>58</sup> Ibid 117.

foundation for Mill's theory of value is its recognition of the existence of suffering and knowledge of suffering is critical to advancement of ethical life.<sup>59</sup> Donner claims Mill's approach expands the idea that utility operates as the primary assumption of moral standards,<sup>60</sup> arguing that Mill suggested value was part of a system of recognition of psychological processes built on consciousness.<sup>61</sup>

Mill's approach implies that consciousness develops over time and his means of measuring value and what is constituted as good depended on the judgements of "competent agents".<sup>62</sup> However, for Mills these "competent agents" were educated, adult males, with the result that his work carried a masculine bias.<sup>63</sup> Mill's system of measurement depended on the judgements of those men to make conclusions.<sup>64</sup>

As a result, Mill's understandings were based on evidence provided by others yet limited to a localised section of society.<sup>65</sup> Nevertheless Donner supports Mill's theory of value as one which allows for differences of opinion.<sup>66</sup> As society changes we should welcome fields of thought that permit and foresee diversity among "educated and trained agents" as beneficial.<sup>67</sup> Donner identifies that Mill has been criticised by 'value pluralists' who argue that happiness is not the only factor we should value.<sup>68</sup> Mill counteracts that by agreeing that pleasure cannot be measured as an abstract

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<sup>59</sup> West (n24) 117.

<sup>60</sup> Ibid 118.

<sup>61</sup> West (n24) 120.

<sup>62</sup> Ibid 120.

<sup>63</sup> West (n24) 128-129. It is critical to remember that in Mill's lifetime (1806-73) comparatively few women or poor people received the education that rich males did.

<sup>64</sup> Ibid 124.

<sup>65</sup> Mill's "competent agents" were educated, adult males.

<sup>66</sup> West (n24) 124.

<sup>67</sup> Ibid 124.

<sup>68</sup> Value pluralism refers to acknowledgement that value systems differ according to where we live and distinct rules can be developed by those in power as a result.

notion.<sup>69</sup> Value is not attached because of the amount we possess but instead the way it makes lives valuable. Mill believed that socialised, educated individuals were more able to achieve satisfaction in their lives and could contribute effectively to wider society.<sup>70</sup> He advocated that not only abiding by society's accepted rules is valuable but also the actions we choose to take.<sup>71</sup>

On Donner's analysis, utilitarianism was progressive and could respond to societal changes.<sup>72</sup> Utilitarianism was built upon foundations of ideas about civil liberties and influenced by the Enlightenment.<sup>73</sup> It increased the growth of markets where people could trade and interact more freely.<sup>74</sup> Utilitarianism as promoted by Mill led to a more flexible structure of rules being developed. The aim of adopting this set of rules was to enhance the concept of liberty, increasing happiness of individuals.<sup>75</sup>

Additionally the utilitarian state placed weight placed on whether individuals felt that established rules and laws were appropriate.<sup>76</sup> Utilitarianism was valuable as it offered individuals the opportunity to express dissatisfaction through voting which had not previously been available.<sup>77</sup> However, at the time Mill wrote comparatively few people were able to vote,<sup>78</sup> and, thus, reform of law in the utilitarian system was in the hands of the minority – men with property. As well as excluding many people, utilitarianism

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<sup>69</sup> West (n24) 125.

<sup>70</sup> Ibid 129.

<sup>71</sup> West (n24) 129.

<sup>72</sup> Ibid 5.

<sup>73</sup> Rosen (n26) 286.

<sup>74</sup> West (n24) 27.

<sup>75</sup> Rosen (n26) 291.

<sup>76</sup> West (n24) 97, 98.

<sup>77</sup> Rosen (n26) 288.

<sup>78</sup> Restricted to adult, landowning males and comprised of under 3% of the population in England and Wales.

[http://www.nationalarchives.gov.uk/pathways/citizenship/struggle\\_democracy/getting\\_vote.htm](http://www.nationalarchives.gov.uk/pathways/citizenship/struggle_democracy/getting_vote.htm)

Accessed January 3<sup>rd</sup> 2016.

has contributed significantly to the formation of the exemplar citizen in the liberal state. The problems associated with the construction of this individual will be explored in the next section.

## 2(ii). The influence of utilitarianism on the British state

Utilitarianism's persuasive influence on the UK can be seen most clearly in the formation of the liberal paradigm subject. The paradigm subject can be traced to the evolution of the 'ideal' citizen in the eighteenth and nineteenth centuries. During this period, the archetypal individual was framed as male, self-supporting and independent.<sup>79</sup> As a result, people who fall outside this framework, including those needing support, became viewed as exceptions to the norm. The primary function of the model citizen was active engagement in the labour market and responsibility. Therefore this person was identified as a localised, disembodied and rational being, linked to the autonomous, juridical individual of liberal legalism.<sup>80</sup> The development of this legal subject can be connected to increasing structures of control and discipline emerging at that time.<sup>81</sup>

These legal subjects who work, with no requirement for state support, have clear economic benefits. Utilitarianism has ignored the biological reality of being human and needs resulting from that, instead favouring pursuit of economic directives.<sup>82</sup> The

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<sup>79</sup> Camic, C., 'The Utilitarians Revisited' *American Journal of Sociology* [1979] Vol.85, No.3 (November) 519, 516-550. Accessed December 18<sup>th</sup> 2015.

<sup>80</sup> Grant, R.W., 'Passion and Interest Revisited: the psychological foundations of economics and politics' *Public Choice – "Homo Economicus and Homo Politicus"* [2008] 137 (3/4), 451-61.

<sup>81</sup> Foucault, M., *Discipline and Punish: The Birth of Prison* (Translated by A. Sheridan). (Penguin, London 1975). Pdf available at:

<https://zulfahmed.files.wordpress.com/2013/12/disciplineandpunish.pdf>

<sup>82</sup> That argument has been widely discussed by feminists and will be explored further in the second and third chapters.

resulting invisibility of individual embodiment has been connected with the disparity in growing corporate embodiment.<sup>83</sup> As businesses grow, increased importance is placed on self-interest in the marketplace.<sup>84</sup> Priority has been attached to ownership of property and growth of business.<sup>85</sup> The utilitarian state led to developments in the economic market enabling people to trade more easily.<sup>86</sup> The marketplace has taken precedence over individuals who have instead become the focus of attention in the welfare state.

### 3. Utilitarian influence on contemporary welfare

For modern utilitarians, the focus of the theory rests on achieving welfare maximisation for the majority. Yet this focus is open to criticism because it presupposes that individuals make choices that deny self-interest in favour of the wider group.<sup>87</sup> Although altruism is commendable, in reality the majority would not consistently make this kind of calculation, indeed it would be challenging to do so.<sup>88</sup> We can see that this type of utilitarian approach might mean that the most vulnerable make do with less. This approach is at odds with the original ethos of the welfare state, which was to provide support for those in need and was viewed as part of broader societal responsibility.<sup>89</sup>

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<sup>83</sup> Discussed in more depth in Chapter Two.

<sup>84</sup> The increased marketization of care is discussed further in the following chapter.

<sup>85</sup> Picciotto, S., 'The Internationalisation of the State' *Capital and Class* [1991] Vol.15, No.1 43-63.

<sup>86</sup> West (n24) 27.

<sup>87</sup> Rosen (n26) 292.

<sup>88</sup> *Ibid* 292.

<sup>89</sup> Sir William Beveridge *Social Insurance and Allied Services* (1942)

[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/19\\_07\\_05\\_beveridge.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/19_07_05_beveridge.pdf) Accessed January 26<sup>th</sup> 2016.

The utilitarian system can lead to a culture of individual responsibility and blame when people appear to fail to engage in accepted behaviours.<sup>90</sup> ‘Failure’ can take many forms, including illness, homeless and unemployment. Frederick Rosen argues that classic utilitarians would not support a state based on such an unequivocal maxim.<sup>91</sup> He means that utilitarians would be loath to accept such a black and white ideal. The doctrine of not causing harm to other members of society does not necessarily lead to the conclusion that individuals should behave in a manner which will enhance the happiness of others.<sup>92</sup> The ethical burden on individuals to consistently behave in a way which increases the happiness of others is onerous.<sup>93</sup> It begs the question whether we can know what will bring about happiness in others and how we might begin to evaluate what others might consider valuable.<sup>94</sup> Living life according to ethical standards might be viewed as something which is not contentious but that is based on assumptions that people share similar values.

Rosen argues that where classic utilitarians focused on society as a homogenous group, law is developed narrowly, aimed at particular, identified sections.<sup>95</sup> He further argues that only behaviour which is considered to be a detrimental “social manifestation” is recognised.<sup>96</sup> If he is correct, then the idea that only rule breaking behaviour in the public arena is important is established. Rosen’s arguments support my claim that actions in the public sphere are prioritised over those that occur in private, including care. The utilitarian approach has led to the public arena being

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<sup>90</sup> Discussed in the following chapter.

<sup>91</sup> Rosen (n26) 292.

<sup>92</sup> Ibid 293.

<sup>93</sup> Rosen (n26) 292.

<sup>94</sup> Ibid 292.

<sup>95</sup> Rosen (n26) 293.

<sup>96</sup> Ibid 293.

regarded as more important, leading to tensions in the welfare state, particularly in relation to stretched resources. Nonetheless, the welfare state has grown rapidly in the last few decades, partly as a result of economic crises in the 1990s and 2008.<sup>97</sup> At the same time more people have become dependent on the welfare state, bureaucracy has increased accordingly.<sup>98</sup> Utilitarianism has been a driving force behind this expansion, rationing resources and encouraging local authorities to prioritise individual needs respectively.

Although there has been much discussion in recent years about difficulties caused by governments imposing austerity measures, austerity is not a new phenomenon. During the period Mill was writing, the Poor Laws were operating. These laws established workhouses where those needing support could go.<sup>99</sup> The poor had been stigmatised as lazy and being supported by the tax payer. As an alternative they were admitted into workhouses where conditions were harsh, separating families and working hours were long.<sup>100</sup> The workhouses were widely criticised, including by political campaigner Richard Oastler who labelled them “Prisons for the Poor”.<sup>101</sup> In the 1930s, Ramsey MacDonald’s cabinet was faced with a country moving away from nineteenth century Poor Laws while being faced with a significant economic deficit.<sup>102</sup> Even the introduction of the welfare state in the UK in the 1940s occurred at a time when post war rationing was in force.<sup>103</sup>

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<sup>97</sup> Kuhnle, S., *The Survival of the European Welfare State* (Routledge 2000) 3, 4.

<sup>98</sup> Carr (n1) 209.

<sup>99</sup> The Settlement Act was not repealed until 1948 and some sections of the Poor Law Act 1601 until 1967.

<sup>100</sup> Longmate, N., *The Workhouse: A Social History* (Pimlico 2003) 13, 14.

<sup>101</sup> The Victorian Web [www.victorianweb.org/history/poorlaw/oastler.html](http://www.victorianweb.org/history/poorlaw/oastler.html)

<sup>102</sup> Farnsworth, K., and Irving, Z., *Social Policy in Times of Austerity – Global Economic Crisis and the new politics of welfare* (Policy Press 2015) 46-49.

<sup>103</sup> Rationing ended in 1953.



A prominent utilitarian with strong views on bureaucracy was Sidney Webb, a key thinker in the formation of the welfare state. He argued societies would be ideally based on notions of social duty and co-operation.<sup>104</sup> Webb believed those in positions of advantage should live frugally in order to support those who had less.<sup>105</sup> He viewed capitalism as inadequate in terms of addressing increases in production, arguing poor people would gain more happiness from less money than the rich.<sup>106</sup> Webb considered that capitalism was even more deficient in relation to improving welfare.<sup>107</sup> He considered that founders of social policy, who he saw as an elite, would prosper in increasingly bureaucratic systems. Bevir argues that progressive liberals see the welfare state as founded in utilitarian liberal principles born from open-minded ideas about reform of social frameworks.<sup>108</sup> On Webb's analysis, he claimed a specific group of bureaucrats were directing policies which were incapable of appropriately addressing welfare problems and increasingly overlooking individuals. He was suggesting bureaucrats were not aware of individuals' real needs.

Carr has argued that in fact, law has been instrumental in the rising levels of bureaucracy between care recipients and the state since the end of the Poor Laws.<sup>109</sup> There has been increased regulation in service provision and the National Health Service and Community Care Act 1990 changed local authority roles in care services while marketization expanded.<sup>110</sup> Initially, local authorities commissioned services but shifts in legislation have meant that care recipients have been progressively

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<sup>104</sup> Webb, S., *Utilitarianism, Positivism, and Social Democracy* peer reviewed by Bevir, M., *Journal of Modern History* [2002] 74 217-252, 5. <http://www.journals.uchicago.edu/cgi-bin/resolve?id=doi:10.1086/343407&erFrom=6468057476852114189Guest>

<sup>105</sup> *Ibid* 17.

<sup>106</sup> Webb (n105) 22.

<sup>107</sup> *Ibid* 22.

<sup>108</sup> Bevir, M., *The Logic of the History of Ideas* (Cambridge University Press 1999).

<sup>109</sup> Carr (n1) 209.

<sup>110</sup> *Ibid* 210.

encouraged to buy services themselves.<sup>111</sup> As a result, there has been a growth in numbers of private care agencies.<sup>112</sup> Stoesz sees this increase in marketisation as a product of bureaucrats guiding limited resources to profit making sections of society.<sup>113</sup> Criticism has suggested this change provides evidence the welfare state is being incrementally dismantled.<sup>114</sup> I am not suggesting that all bureaucracies lead to marketisation and focus on economy, I simply seek to establish this in connection with western democracies.<sup>115</sup> Stoesz states that bureaucrats have increasingly cultivated the welfare state according to rationality, efficiency and costs.<sup>116</sup> However Kuhnle notes that European welfare states grew significantly between the 1960s and 1980s.<sup>117</sup> Cuts in public spending increased in the 1990s, following significant decreases in the number of people employed in the public sector under Margaret Thatcher in the 1980s.<sup>118</sup> Church bureaucracy pre utilitarianism has been exchanged for welfare bureaucracy as a result of the welfare state's connection with resources. There has been criticism by politicians of the "bureaucratic, inefficient and costly welfare state".<sup>119</sup> Therefore the state's role in welfare provision has not always been seen as positive and individuals have been overlooked while bureaucracy has thrived.<sup>120</sup> Instead, those with needs are steered towards their families and voluntary organisations.<sup>121</sup>

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<sup>111</sup> Through the Community Care (Direct Payments) Act 1996.

<sup>112</sup> Pavolini, E., and Ranci, C., 'Restructuring the welfare state: reforms in long-term care in Western European countries' *Journal of European Social Policy* [2008] Vol.18, No. 3, 246-259, 247.

<sup>113</sup> Stoesz, D., 'A Wake for the Welfare State: Social Welfare and the Neoconservative Challenge' *Social Service Review* [1981] 55.3 398-411.

<sup>114</sup> Stoesz (n113) 400.

<sup>115</sup> I will identify in later chapters that this affects Europe generally too.

<sup>116</sup> Stoesz (n113) 401.

<sup>117</sup> Kuhnle (n98) 3.

<sup>118</sup> *Ibid* 4.

<sup>119</sup> Kuhnle (n98) 9.

<sup>120</sup> Stoesz (113) 401.

<sup>121</sup> *Ibid* 401.

Complementary to this argument, bureaucrats generally favour frameworks of welfare based on regulations and procedures which those outside the system find challenging to comprehend.<sup>122</sup> As a result, this makes decisions made by local authorities difficult to challenge.<sup>123</sup> Stoesz argues that a move away from bureaucracy to market driven services would give service users more opportunities to choose providers and competition would drive down costs.<sup>124</sup> I view this as problematic as it suggests service users would have a free rein and the ability to compare providers, conferring potentially unwanted responsibility on service users to contract with providers. Stoesz recognises that while bureaucratic power might be limited by market expansion, broader problems in society will not be effectively addressed.<sup>125</sup>

A further critique of overly bureaucratic systems is their purpose to achieve specified objectives.<sup>126</sup> As a result it is possible that the aim of bureaucrats will be significantly different from those subject to their decisions. We can see this contention in social care case law, particularly in *McDonald* and *Savva*.<sup>127</sup> In both cases, resources were limiting care packages for each service user. Prendergast identifies a key problem with bureaucracy, noting it is assumed to be effective and appropriate until someone makes a complaint.<sup>128</sup> If we accept utilitarianism as a consequentialist approach, we can view the eventual complaint as an example of an inability to foresee consequences. Having

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<sup>122</sup> Stoesz (n113) 402.

<sup>123</sup> Ibid 402. Stoesz warns against monopolies in care, either in respect of professionals or service providers.

<sup>124</sup> Stoesz (n113) 403-404.

<sup>125</sup> Ibid 404.

<sup>126</sup> Prendergast, C. 'The Motivation and Bias of Bureaucrats' *The American Economic Review* [2007] Vol.97, No.1 180-197.

<sup>127</sup> *McDonald* (n3) and *R (Savva) v Kensington and Chelsea* [2010] EWCA Civ 1209.

<sup>128</sup> Prendergast (n123) 186.

considered dilemmas caused by bureaucracy in relation to social care, I now explore some general critiques of utilitarianism.

#### 4. Critiques of Utilitarianism

As established earlier, utilitarianism is based on ideas of promoting happiness maximisation. However defining happiness is problematic. I noted that even among utilitarian thinkers there are critical differences, particularly between Bentham and Mill.<sup>129</sup> Nonetheless, the utilitarian approach to happiness is a key problem as it treats people as homogenous, overlooking those with different priorities or needs. If certain individual's needs are being sacrificed as a result, we need to actively recognise and acknowledge that before it can be challenged. Undoubtedly this approach highlights obvious differences between objective and subjective happiness.<sup>130</sup> Rosen has argued that utilitarians placed greater value on objective theories as opposed to the subjectivity of their opponents.<sup>131</sup> He sees this as problematic because most people do not experience pain and pleasure in an objective, rational manner.<sup>132</sup>

Rosen's view stands in contention to Mill. Mill believed that our wish to be a unified society meant that an individual's social identification would be so logical that he could not see himself as anything other than part of a group.<sup>133</sup> Mill argued that society could only function successfully if the interests of all were to be equally respected.<sup>134</sup> His view can be critiqued because utilitarianism, as a consequentialist approach, focuses

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<sup>129</sup> West (n24) 120.

<sup>130</sup> Ibid 106.

<sup>131</sup> Rosen (n26) 288.

<sup>132</sup> Ibid 288.

<sup>133</sup> Unfortunately utilitarianism has always favoured adult males.

<sup>134</sup> West (n24) 87.

on outcomes without trying to estimate what they could be in advance.<sup>135</sup> Thus, actions will be approved if the consequences they have are viewed as good or positive.<sup>136</sup> As a result of the failure to anticipate poor outcomes, policies are put in place which may have detrimental effects on some people. As a policy basis, by the time flaws and problems are recognised, they have already had a substantial negative impact. For the purposes of this work, a particularly strong criticism of utilitarianism is that it favours particular groups of people over others.

#### 4(i). Utilitarianism and gender

Another critique of Mill's utilitarianism is its basis on "competent agents" who were educated, adult males.<sup>137</sup> During Mill's lifetime (1806-73) comparatively few females were in education in the same way as males. Nonetheless Mill himself was a keen campaigner for women, supporting suffrage. His work in this area could be said to present an objection to socially accepted structures based on class, gender and social expectations.<sup>138</sup> In contrast, Valerie Bryson argues that utilitarianism is male biased and foundations of masculine norms mean women's experiences have been pushed to the boundaries of legal considerations.<sup>139</sup>

There has been an emphasis placed on male ideas in which there has been little or no place for women. The gendered male view is based on ideas of individualism and rights based considerations as opposed to that of responsibility.<sup>140</sup> Mill's utilitarianism

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<sup>135</sup> West (n24) 117.

<sup>136</sup> Ibid 118.

<sup>137</sup> West (n24) 120, 128-129.

<sup>138</sup> Ibid 48.

<sup>139</sup> Bryson (n28) 81.

<sup>140</sup> Ibid 76.

can be seen to support the notion that women are inferior to men in thought and intellect.<sup>141</sup> He believed women were not sufficiently mature to develop reasoning in the same way as men. Bryson cites feminist activism since the 1960s as having gained significant changes for women.<sup>142</sup> She notes these changes have not been shared by all women and that experiences of many black and working class white women have been rendered invisible.<sup>143</sup> Advancement for women has not been consistent and we need clearer understandings of ways in which women have been subordinated before true equality can be achieved.<sup>144</sup> The majority of liberal theorists, including Mill, did not believe that rights held by men could be provided to women. Bryson notes these theorists felt that in order to be treated as equal to men, women would have to “speak like men”.<sup>145</sup>

Feminists oppose this approach, arguing that any supposed inferiority was due to societal structures rather than as a result of gender.<sup>146</sup> Liberalism places weight on male values of rationality, independence and disembodied individuals.<sup>147</sup> Understandings based on male bias therefore ignore values traditionally associated with women and overlooks work done by women in the private arena. Judicial approaches founded upon male bias continue to inform law and operate adversely in connection with women’s interests. Law has historically been influenced by men in the utilitarian state and continues today.<sup>148</sup> As a result, Bryson argues this leads to restricted viewpoints on the part of judges, overlooking lived experiences of women.

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<sup>141</sup> Bryson (n28) 81.

<sup>142</sup> Ibid 1-3.

<sup>143</sup> Bryson (n28) 33.

<sup>144</sup> Ibid 82.

<sup>145</sup> Bryson (n28) 91-92.

<sup>146</sup> Ibid 83.

<sup>147</sup> Bryson (n28) 12.

<sup>148</sup> Ibid 72.

These arguments are supported by figures from the Centre for Advancement of Women in Politics.<sup>149</sup> Their statistics show that in 2013 comparatively few judges were female. Bryson sees this as problematic because their backgrounds and experiences may contribute to increased marginalisation of women.<sup>150</sup> She argues that individuals who are “socially and economically disadvantaged” will particularly bear the brunt of this demographic.<sup>151</sup>

The male bias in law can be traced to a negligence case in 1933.<sup>152</sup> Here the ‘reasonable man’ test was established. It was intended to define a level of reasonableness that the ordinary man, famously on the Clapham omnibus, might concur with. There was no question at the time what the reasonable person, never mind the reasonable woman might think. Therefore this suggests male bias is implicit in the notion of the objective standard. The argument that law is built upon male bias is supported by Joanne Conaghan who states that in the past, women have been prevented from taking an active part in jurisprudence.<sup>153</sup> Gender tends to be consistently overlooked unless the case specifically concerns it and can be seen in relation to same-sex marriage.<sup>154</sup> Conaghan contends that this is significant because ideally law should reflect “social reality” and in practice fails to do so.<sup>155</sup> Instead law is not only representative of “social arrangements” but plays a key role in establishing and reinforcing norms.<sup>156</sup> Conaghan argues that feminist legal theory has not made

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<sup>149</sup> [www.qub.ac.uk/cawp/UKhtmls/judges.htm](http://www.qub.ac.uk/cawp/UKhtmls/judges.htm) Accessed January 26<sup>th</sup> 2016.

<sup>150</sup> Bryson argues that they are usually educated at public school, followed by University at either Oxford or Cambridge. (n28) 73.

<sup>151</sup> Ibid 73.

<sup>152</sup> *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205.

<sup>153</sup> Conaghan (n29) 186.

<sup>154</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).

<sup>155</sup> Conaghan (n29) 185.

<sup>156</sup> Ibid 194.

significant impacts in the analysis of Judges yet.<sup>157</sup> Nonetheless, Roger Cotterell argues feminism has made considerable inroads into targeted areas including employment and criminal law.<sup>158</sup> Furthermore, feminists have focused on particular areas connected with women where differences with men are actively recognised.<sup>159</sup>

In acknowledgement of the male bias evident in much case law, Cotterell adds that law has reflected the “blindness” of the social seen in normative legal theory.<sup>160</sup> He states this is a problem because it evaluates women against the acknowledged standards of men.<sup>161</sup> Utilitarianism is responsible for setting a male-based standard that has become established as normal. Arguments that gender differences are socially constructed has long been a feminist claim.<sup>162</sup> Basing values on masculine norms, patriarchy is reinforced perniciously and women are pushed further out in legal consideration.<sup>163</sup> Supporting my argument that utilitarianism was the foundation for preference towards males, Cotterell advocates a look back at historical and social influences to see how this developed.<sup>164</sup> In relation to the utilitarian state, we can see that normative foundations presented have been consistently male.

The view of men as rights bearers has led to law based on winners and losers in Cotterell’s view. He questions whether law could be altered so that is no longer focused on that premise.<sup>165</sup> He would prefer to see judges trying to find a more

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<sup>157</sup> Conaghan (n29) 167.

<sup>158</sup> For example, equal pay and the law concerning marital rape.

<sup>159</sup> Cotterell, R., *The Politics of Jurisprudence – A Critical Introduction to Legal Philosophy* (2nd edn, Oxford University Press 2003) 216.

<sup>160</sup> Cotterell (n159) 216.

<sup>161</sup> Ibid 216.

<sup>162</sup> That view is supported in the next chapter, particularly by Carol Bacchi.

<sup>163</sup> Cotterell (n159) 217.

<sup>164</sup> Ibid 217.

<sup>165</sup> Cotterell (n159) 220.



“inclusive” solution.<sup>166</sup> Cotterell’s argument is valuable to this work because he believes feminism has the ability to confront ideas about norms in law.<sup>167</sup> He contends feminism can play a critical role in moving away from notions based on rights.<sup>168</sup> In arguing that feminism is better positioned to recognise nuances in legal practice, Cotterell sees it as insisting that feminist theory is recognised in legal discourse.<sup>169</sup> He states that if feminist legal theory continues to be overlooked, law is illustrating its present inadequacy in terms of analysis.<sup>170</sup>

## 5. Judicial thinking in the utilitarian state

Much research on judicial thinking focuses on the criminal sphere, so in order to illustrate my argument I have focused on a social care case and explain why I believe male bias is prominent. In a paper based on criminal law and sentencing, Cassia Spohn considers that utilitarian judges focus on outcomes.<sup>171</sup> Evaluating how social care might be affected by utilitarian values of maximisation of benefits, Raphael Cohen-Almagor argues constrained financial issues focus on whom is deemed worthy to receive state resources.<sup>172</sup> He notes that significant attention is paid to what ideal situations would be and real pressures caused by financial restraints. Cohen-Almagor recognises that distribution of tight resources has to be seen as equitable and find balance between individual and society’s greater needs.<sup>173</sup>

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<sup>166</sup> Cotterell (n159) 220.

<sup>167</sup> Ibid 220.

<sup>168</sup> Cotterell (n159) 220.

<sup>169</sup> Ibid 225.

<sup>170</sup> Cotterell (n159) 225.

<sup>171</sup> Spohn, C., *How Do Judges Decide? The Search for Fairness and Justice in Punishment* (2nd edn, SAGE Publications, Inc. 2009).

<sup>172</sup> Cohen-Almagor, R.D., ‘A Critique of Callahan’s Utilitarian Approach to Resource Allocation in Health Care Issues’ *Law and Medicine* [2012] Vol.17, No 3 (Spring) 1-25

[www.hull.ac.uk/rca/docs/articles/allocation-resources.pdf](http://www.hull.ac.uk/rca/docs/articles/allocation-resources.pdf)

<sup>173</sup> Cohen-Almagor (n172) 5.

The utilitarian state's approach has been exacerbated by people living longer with increasingly complex needs.<sup>174</sup> As Cohen-Almagor acknowledges, budgets have not risen accordingly and this has led to older people being sacrificed.<sup>175</sup> He states that utilitarian preference for those who contribute economically to society is an example of "gross utilitarianism" and overlooks moral considerations concerning those deserving care.<sup>176</sup> We see a utilitarian approach placing heavy emphasis on allocation of resources in *McDonald*.<sup>177</sup>

In *McDonald*, a woman with a neurogenic bladder and mobility difficulties was faced with losing her night -time carer who enabled her to use the toilet, because of financial restrictions. Lord Brown (giving the leading judgment) expressed sympathy for Ms McDonald but simultaneously highlighted savings of £22,000 to the local authority if the carer was replaced by incontinence pads.<sup>178</sup> Lord Brown's next consideration of resources occurs in paragraph 9, relying on the decision in *Barry* which established a local authority's right to consider resources in social care decisions.<sup>179</sup> The emphasis on available finances indicate a strong utilitarian impulse to place society's concerns before individual needs. It connects firmly with Cohen-Almagor's argument about sacrificing individuals because of general interests. Spohn's view of utilitarian judges focusing on outcomes is illustrated by Brown LJ's statement in reference to FACS guidance<sup>180</sup>: "Councils should ensure that...within a council area, individuals in similar

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<sup>174</sup> Cohen-Almagor (n172) 13.

<sup>175</sup> Ibid 14.

<sup>176</sup> Cohen-Almagor (n172) 17-18.

<sup>177</sup> *McDonald* (n3).

<sup>178</sup> The contentions around this will be discussed in the final chapter.

<sup>179</sup> *R v Gloucestershire County Council Ex P Barry* [1997] AC 584.

<sup>180</sup> FACS was the Fair Access to Care Services policy which specified eligibility criteria for social care before the Care Act 2014.

circumstances receive services capable of achieving broadly similar outcomes”.<sup>181</sup> Nonetheless, Brown LJ did note extensive paperwork which reflected Ms McDonald’s considerable distress at the proposed course of action.<sup>182</sup>

In relation to Ms McDonald’s claim under s21 of the Disability Discrimination Act 1995 Brown LJ dismissed Counsel’s argument, considering the local authority’s actions to be “a proportionate means of achieving a legitimate aim”.<sup>183</sup> Instead of being a breach of statutory duty as McDonald was arguing, the local authority was fulfilling its duty and she would benefit as a result.<sup>184</sup> The suggestion was that Ms McDonald would remain safe in bed, avoiding increased risk of moving from her bed at night, while the local authority could save money and meet its duty. In reaching this conclusion, it appears Brown LJ was placing weight on both the outcome of his decision – Ms McDonald being able to urinate without leaving her bed - and resources regarding the savings for the local authority. Brown LJ’s judgment was supported by the majority judges, Lady Hale dissenting.

Lord Dyson returned to the discussion of resources citing the local authority Service Manager.<sup>185</sup> Dyson LJ noted Ms McDonald had first been made aware of resource implications in 2007. The local authority had agreed to fund night time care at that stage on a short term basis. The suggestion was that the local authority was willing to meet Ms McDonald halfway but there was never intention for this to last indefinitely. Dyson LJ states that repeated reassessments were conducted, maintaining the local

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<sup>181</sup> (n3) [9] (Brown LJ).

<sup>182</sup> (n3) [11-12] (Brown LJ).

<sup>183</sup> (n3) [21-22] (Brown LJ).

<sup>184</sup> (n3) [21-22] (Brown LJ).

<sup>185</sup> (n3) [46] (Dyson LJ).

authority position that it could not afford permanent night carers.<sup>186</sup> Emphasis on resources in the face of Ms McDonald's need arguments took precedence throughout judicial discussion. Ms McDonald's needs had not changed during the time period despite being reinterpreted by the local authority since 2007.<sup>187</sup> Yet this reinterpretation of need occurred specifically as a means to justify reducing her care costs.

The majority judges' approach in *McDonald* is utilitarian. In a utilitarian state, spending less money on individuals means that 'extra' money can be redistributed. In this case I believe, in connection with arguments presented by both Spohn and Cohen-Almagor, that outcomes and resources led majority judicial thinking. It is arguable that in fact, the outcome in *McDonald* was intended to address some needs but not in the way the individual wanted. Furthermore the way in which needs were met was influenced by constrained resources and resulted in the individual's wishes being overlooked. It is my contention that in social care cases, utilitarianism is inappropriate.

## 6. Conclusion

This chapter has argued that utilitarian theory has influenced liberal state policy. This approach was considered progressive in the eighteenth and nineteenth centuries because it offered a system based on maximisation of the happiness of the majority. However, I argue that today utilitarianism fails to adequately consider the needs of

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<sup>186</sup> (n3) [46-49] (Dyson LJ).

<sup>187</sup> (n3) [53] (Dyson LJ).

individuals and this is problematic in care. Utilitarianism led to development of blanket policies which do not recognise nuances associated with care practice.

The construction of the paradigm liberal individual is built upon Mill's idea of male, conscientious actors. Liberal subjects are expected to be active in the workforce and individually responsible. Model citizens operate in the public sphere while activity in the private is overlooked. Accordingly this subject is disembodied in the sense that his value is connected to economic productivity, rather than biological reality. Utilitarianism is further critiqued as a static approach which restricts discourse. In areas like care, which are by nature diverse and fluctuating, a static approach is problematic because it is not sufficiently attentive to change. Discussion should be open, flexible and acknowledge the situations of those involved in care.

Significantly, utilitarianism is based on normative male standards meaning the interests of women are consistently neglected. I have touched on how feminism can challenge utilitarian frameworks and the way feminist arguments have identified how certain aspects of women's lives have changed in recent decades. There has been a utilitarian view that women need to aspire to male structural expectations. Anyone who cannot meet the accepted standard of the paradigm individual is seen to be inferior and problematic. Therefore anyone who operates significantly in private arenas are overlooked. Conaghan argues that gender is ignored unless it is a key component of the case. Cotterell claims that feminism can present an effective challenge to male bias, standards and expectations.

The utilitarian, male based approach extends to jurisprudence. I have identified a case where I believe there has been a focus on utilitarian values of resources and outcomes. In *McDonald*, judicial rationality was applied to both factors allowing the individual's wishes to be overlooked. Here the outcome was twofold – to save the local authority money while meeting individual need to an extent. In finding the local authority's stance to be satisfactory, the judgment reinforced the idea that social care can be led by budgetary considerations. In the next chapter I argue that feminism has the potential to prove a more progressive and appropriate approach to meet the challenges of social care.

## **Chapter Two – Feminism as an alternative to utilitarianism**

### **1. Introduction**

In my last chapter I demonstrated that the utilitarian, male-based approach which has influenced judicial thinking has been ineffective in responding to predicaments in social welfare, particularly those within the field of adult social care. In this chapter, I suggest that feminist theory can present a more progressive approach in re-evaluating care and policy frameworks. My argument develops the previous chapter by presenting feminism as both a critique of and an alternative to utilitarianism. Utilitarianism's focus on aggregate maximisation of pleasure fails to recognise individual needs and human embodiment discussed in chapter one.

I begin by arguing that adult social care is a feminist issue because women continue to be disproportionately affected by caring responsibilities, through both structural expectations of women and differential health outcomes. In considering the meaning of care, I move beyond the dictionary definition, which describes it as providing what is required to maintain health and welfare, since I regard care as relational.<sup>188</sup> Care can occur informally, between family and friends or through paid carers providing a service. There has been considerable work on relationality and care, including the ethics of care and vulnerability theories which will be discussed below.

The first section of this chapter presents my claim that care is a feminist issue. I argue that although expectations of women in the workforce have changed, they have not

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<sup>188</sup> <http://www.oxforddictionaries.com/definition/english/care?q=CARE>

altered significantly with regards to care provision.<sup>189</sup> I discuss the importance of responsibility for care, its impact on ageing women and its contribution to the adverse health they suffer. Poor health in older women has been attributed in significant part to their caring responsibilities.<sup>190</sup>

I identify two feminist frameworks for examining the state's approach to care, the ethics of care and vulnerability theory, which I supplement with other feminist literature. I consider the ethics of care as developed by Gilligan, which has become prominent in care literature.<sup>191</sup> I use Gilligan's work to highlight how areas traditionally connected with women constantly fail to be acknowledged appropriately in male-dominated discourse. I then evaluate how women are increasingly pushed from the workforce towards informal care because of shortages in resources. I examine how care is often assumed to be a private concern as opposed to a public one. The consequence of this assumption is that care is ignored in wider public debate unless something goes wrong. I support my ethics of care argument by considering the views of Berenice Fisher and Joan Tronto who argue that the role of men in care is often overlooked, which reinforces the assumption that men cannot care. Instead they argue, as do I, that men should be enabled to care.<sup>192</sup>

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<sup>189</sup> Cooper, R., *Low-paid Care Work, Bargaining, and Employee Voice in Australia*, Chapter 3 in Bogg, A. and Novitz, T (eds) *Voices at Work* (Harvard University Press 2014).

<sup>190</sup> DiGiacomo, M., Davidson, P.M., Zecchin, R., Lamb, K and Daly, J., 'Caring for Others, but Not Themselves: Implications for Health Care Interventions in Women with Cardiovascular Disease' *Nursing Research and Practice*, [2011] Volume 2011, Article ID 376020. [www.hindawi.com/journals/nrp/2011/376020/](http://www.hindawi.com/journals/nrp/2011/376020/) Accessed November 7<sup>th</sup> 2015.

<sup>191</sup> Gilligan (n4).

<sup>192</sup> Fisher, B. and Tronto, J., *Toward a Feminist Theory of Caring in Circles of Care: Work and Identity in Women's Lives*, Abel, E.K, and Nelson, M.K., (eds) (State University of New York Press 1990) 36.



Following the ethics of care, I draw on work by Bacchi to illustrate how policy consistently reinforces problematic expectations of gender.<sup>193</sup> I focus on Bacchi's discussion of how the Netherlands has made a concerted effort to reconsider structural expectations in order to change attitudes to care. The Dutch approach involves moving away from established male norms and blanket policies which formed the basis of the utilitarian system. As an alternative, I evaluate how Beasley and Bacchi's work on "Social Flesh" could lead to better understandings of embodiment.<sup>194</sup> Their work identifies the need for understanding interdependence and a universal approach to care. I explore some critiques of the ethics of care, particularly arguments which concern women's perceptions of their role in society.<sup>195</sup>

In the chapter's final section I consider vulnerability theory as advanced by Fineman.<sup>196</sup> Fineman advocates acknowledgement of universal vulnerability in order to transform care. She argues that once vulnerability has been recognised, we must develop resilience.<sup>197</sup> Resilience involves creating resources on which individuals can rely at times of greater need. Fineman discusses resilience in connection with dependency. She acknowledges dependency will change throughout our lives, arguing that wider debate involving the state should be encouraged to push care forward as a universal concern. Dependency can be defined as something all humans share to varying degrees throughout life. In turn, it depends on having a level of

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<sup>193</sup> Bacchi, C., *Mainstreaming Politics Gendering Practices and Feminist Theory* (Cambridge University Press 2012).

<sup>194</sup> Beasley, C. and Bacchi, C., 'Envisaging a new politics for an ethical future: Beyond trust, care and generosity – towards an ethic of 'social flesh' [2007] *Feminist Theory*, December, Vol. 8, 3:279-298. Embodiment means recognition that both men and women are inherently biological. Previous thinking has associated men with the mind and women as entrapped by biological functions.

<sup>195</sup> Touching on arguments which move away from the essentialist basis which Gilligan's work has been critiqued as.

<sup>196</sup> Fineman and Gear (n5).

<sup>197</sup> *Ibid* 22.

reliance, trust and confidence, in someone else. Dependency is viewed by Fineman as being either inevitable or derivative and both “developmental and biological in nature”.<sup>198</sup> Fineman extends the discussion of dependency by recognising that it is not limited to humans and emphasises that institutions and the state can be vulnerable too.<sup>199</sup> Realisation of this vulnerability is critical to open discourse and reflects how the state can be responsive to citizens’ needs.

The role of the state is discussed according to Fineman’s vision of developing a responsive state and active citizens. The responsive state involves enabling citizens to draw attention to their concerns, particularly those concerns that, like care, are considered to be private. A responsive state enhances the ability of its citizens to develop resilience and act as a support in times of crisis. These arguments lead me to discuss the needs of specific groups of people. I evaluate Fineman’s arguments surrounding groups who are deemed vulnerable based on a few shared characteristics. She contends that the current system places importance on responsibility and those that do not conform are viewed as having failed.<sup>200</sup> As an example of a vulnerable population, I consider the example of individuals subject to Anti-Social Behaviour Orders (ASBOs). A focus on this group is appropriate because it tends to be made up of vulnerable people subject to different care needs and they are subject to increased regulation and surveillance.<sup>201</sup> Fineman argues that perceived

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<sup>198</sup> Fineman (n5) 18.

<sup>199</sup> Ibid 25-26.

<sup>200</sup> Other academics have also pointed out that contemporary citizens have increasingly been responsabilized. See Clarke, J., ‘New Labour’s citizens: activated, empowered, responsabilized, abandoned?’ *Critical Social Policy* [2005] vol.25, no.4, 447-463 and Levitas, R., ‘There may be ‘trouble’ ahead: what we know about those 120,000 ‘troubled’ families’ PSE UK Policy Working Paper [2012] No.3 (February) <http://www.poverty.ac.uk/policy-response-working-paper-families-social-justice-life-chances-children-parenting-uk-government> Accessed February 2<sup>nd</sup> 2016.

<sup>201</sup> Surveillance will be discussed in later chapters.

failure results from negative perceptions of these groups and could be avoided if a universal and supportive approach was adopted.

Finally I examine criticisms of Fineman's theory, specifically from the viewpoint of women of colour. Kimberle Crenshaw claims that many feminist theories fail to adequately consider the position of women of colour.<sup>202</sup> This criticism is shared by Gayatri Spivak, who states that often women's voices will only be considered if they conform to Western dialogues.<sup>203</sup> Crenshaw and Spivak's criticisms highlight the need for groups whose interests are not appropriately addressed to be explicitly considered. However, Fineman argues against using identity characteristics such as race in relation to equality arguments because it can place identified groups in contention with each other and could result in individuals who are not connected to a group being ignored.<sup>204</sup> Although Fineman recognises that it would be inappropriate to overlook the issues faced by women of colour, overlooking the significance of identity characteristics could operate as a limitation to the effectiveness of the theory if those women feel excluded from its discussions.<sup>205</sup>

## 2. Why care is a feminist issue

In the first chapter I discussed the evolution of utilitarianism in the United Kingdom. I acknowledged that it presented an opportunity to move away from the previous strict

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<sup>202</sup> Crenshaw (n8) 195-217.

<sup>203</sup> Spivak, G.C., Can the Subaltern Speak? 271-313 in Lloyd, D., *Representation's Coup* Interventions: International Journal of Postcolonial Studies [2014] Vol. 16, Issue 1 Taylor and Francis 1-29 <http://dx.doi.org/10.1080/1369801X.2012.726444>

<sup>204</sup> Fineman (n5) 15.

<sup>205</sup> Ibid 15 – see her footnote.

teachings of the Church and as such it was a progressive step in creating a liberal state. However I identified flaws, particularly its tendency to adopt policies in favour of the majority, overlooking needs of individuals. In addition I recognised that utilitarianism limited its focus to economically productive adult males, thereby failing to address issues affecting most of the population. I argue that this approach has had a significant effect on the lives of women in relation to expectations.

The modern liberal state has increasingly placed importance on women being actively engaged in the paid workforce, which has coincided with a growth in feminism and women seeking work outside the home.<sup>206</sup> Nevertheless women's transition into the paid workforce has not taken place in accordance with a reduction in domestic responsibilities.<sup>207</sup> Women have taken on extra responsibilities associated with paid work, but the role of men with regard to domestic and care labour has not shifted in the same way.<sup>208</sup> Although more men are now engaged in care, particularly in the over 65 age group, women are still expected to carry the primary obligations of family needs.<sup>209</sup> The increased obligations associated with paid work on top of caring responsibilities has led to what Martha Nussbaum described as a "double day" – women come home to traditional duties of care after days at work.<sup>210</sup>

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<sup>206</sup> Lewis, J., Gender and the Development of Welfare Regimes, *Journal of European Social Policy* [1992] Vol 2, No. 3 (August) 159-173.

<sup>207</sup> Ibid 161.

<sup>208</sup> Lewis (206) 162.

<sup>209</sup> NHS News [www.nhs.uk/news/2013/05May/Pages/numbers-unpaid-carers-young-carers-increase.aspx](http://www.nhs.uk/news/2013/05May/Pages/numbers-unpaid-carers-young-carers-increase.aspx) Accessed June 6<sup>th</sup> 2015. This changes in the over 65 age group where more men than women provide care.

<sup>210</sup> Nussbaum, M.C., *Creating Capabilities, The Human Development Approach* (Harvard University Press 2013) 37.

The double commitment resulting from dual roles in paid and unpaid work is problematic from a feminist viewpoint because women are often undervalued in the paid workplace. Lydia Hayes states that gender has a pervasive influence in paid and unpaid work simply because women can find it difficult to be heard at work.<sup>211</sup> She argues that although the Equal Pay Act 1970 intended to ensure men and women were paid appropriately, the Act did not apply to all women in the workforce.<sup>212</sup> The system works by comparing women's pay to that of men who were employed in the same kind of work. In care, where workers were predominantly female, there were not the same opportunities to raise pay.<sup>213</sup> As a result many women who are highly skilled and experienced remain undervalued and poorly paid, simply because they do not work in a suitably comparable environment.<sup>214</sup> So while the Equal Pay Act did help some women, not all women's work was re-evaluated.<sup>215</sup>

Cooper suggests that care workers (particularly those in residential homes or who undertake home visits) who remain undervalued are not only vulnerable but also 'silent'.<sup>216</sup> If Cooper is correct, this is problematic because it suggests that care workers lack the means to convey dissatisfaction about the way they are valued and I consider that we must acknowledge care workers' agency. The problem is significant when we consider that 82% of people employed in caring services are female.<sup>217</sup> Among female graduates, 27% work in jobs such as care, teaching assistants or in

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<sup>211</sup> Hayes, L., 'Women's Voice' and equal pay in Bogg, A. and Novitz, T (eds) *Voices at Work* (Harvard University Press 2014)35.

<sup>212</sup> This Act has now been repealed by the Equality Act 2010.

<sup>213</sup> Hayes (n211) 38.

<sup>214</sup> Ibid 40.

<sup>215</sup> Hayes (n21) 40.

<sup>216</sup> Cooper (n189) 55.

<sup>217</sup> *Full Report – Women in the labour market*, Office of National Statistics (25<sup>th</sup> September 2013) 11. [www.ons.gov.uk/ons/dcp171776\\_328352.pdf](http://www.ons.gov.uk/ons/dcp171776_328352.pdf) Accessed November 13<sup>th</sup> 2015. The most common occupation for women was women was nursing but caring occupations are not defined further than that.

administrative roles (compared to 13% of men).<sup>218</sup> Furthermore, female graduates are more likely to be employed in lower skilled jobs than their male counterparts.<sup>219</sup> Those figures reinforce the idea that care needs to be made more attractive as a job to men. There has been acknowledgement that more men need to be recruited into the caring profession.<sup>220</sup>

However there are potential problems with attracting men into employment with significant problems with underpayment and high proportions of zero hour contracts.<sup>221</sup> Cooper points out that lack of stability combined with limited opportunities for training and career development results in carers being restricted to low-paid employment throughout life.<sup>222</sup> Cooper identifies various feminist scholars as linking this feminisation of care with unpaid work carried out in the private domain by female family members. She especially emphasises Meagher who says that “Because their skills are “naturalised” as feminine attributes typically exercised in the public domain, care workers, the vast majority of whom are female, receive lower pay than their skills and task warrant”.<sup>223</sup> Meagher’s view links to feminist arguments in the ethics of care which I discuss later.

Another concern in relation to care is the effect of being a carer on women’s health. DiGiacomo et al identified that women are doubly likely to assume care responsibilities for children, older relatives and the physically ill than men.<sup>224</sup> They claim, as

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<sup>218</sup> *Full Report – Women in the Labour Market* (n217) 15.

<sup>219</sup> *Ibid* 14, 15.

<sup>220</sup> Jane Ashcroft ‘Social care employers need to recruit more men’ *The Guardian* (March 4<sup>th</sup> 2014). <http://www.theguardian.com/social-care-network/2014/mar/04/social-care-employers-recruit-more-men>

<sup>221</sup> Hayes (n211) 1, 2.

<sup>222</sup> Cooper (n189) 57.

<sup>223</sup> Meagher, G., ‘What Can We Expect From Paid Carers?’ *Politics and Society* [2006] 37(1) 33.

<sup>224</sup> DiGiacomo et al (n190) 11, 12.

Nussbaum did, that this is usually in addition to employment obligations.<sup>225</sup> In an article based on cardio-vascular problems in older women, they discuss long term effects on older women's health. They argue that care roles, often seen as positive, are in fact compromised by social and economic issues. As a result, women find it difficult to attend to their own health needs and can make them more likely to be ill as they grow older.<sup>226</sup>

DiGiacomo et al argue that the resources required by the demanding roles undertaken by women are increased with each one.<sup>227</sup> They cite work by Edwards et al which highlights that caregivers have recorded significantly higher levels of stress and depression than those that do not provide care.<sup>228</sup> Cummins et al have also recognised this factor.<sup>229</sup> Age UK have shown that life expectancy for both genders is increasing (for women in the UK it is 83 and 79.3 for men).<sup>230</sup> As a result, the responsibility for care is likely, as the older population grows larger, to fall on a relatively small number of women. In a feminist context these statistics are problematic because they reinforce ideas about care obligations in relation to women.<sup>231</sup> The above illustrates how women are especially disadvantaged by care in different contexts. Despite the significant amount of women involved in and affected by demands of care, the voices of women are not being heard effectively in discussions about care. The value of recognising

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<sup>225</sup> DiGiacomo et al (n190) 11, 12.

<sup>226</sup> Ibid 12.

<sup>227</sup> DiGiacomo et al (n190) 12.

<sup>228</sup> Edwards, B., Higgins, D., Gray, M., Zmijewski, N. and Kingston, M., 'The nature and impact of caring for family members with a disability in Australia' Australian Institute of Family Studies [2008] Melbourne, Australia.

<sup>229</sup> Cummins, R., Hughes, J., Tomy, A., Gibson, A., Woerner, J. and Lai, L., 'The Wellbeing of Australians: Carer Health and Wellbeing' [2008] Deakin University and Australian Unity Limited, Melbourne, Australia.

<sup>230</sup> *Later Life in the United Kingdom*, Age UK (February 2015). [www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later\\_Life\\_UK\\_factsheet.pdf?dtrk=true](http://www.ageuk.org.uk/Documents/EN-GB/Factsheets/Later_Life_UK_factsheet.pdf?dtrk=true) Accessed March 24<sup>th</sup> 2015.

<sup>231</sup> As discussed by Cooper above.

women's voices is an argument put forward by several feminist theorists in the ethics of care.

### 3. The contribution of the ethics of care to feminist dialogues

The ethics of care is a feminist theory which emerged in the twentieth century, which claims that most policies and practices overlook areas traditionally connected with women, such as care. Gilligan was building on foundational work of feminist writers including Wollstonecraft and Stanton.<sup>232</sup> She critiqued the approaches of writers like Piaget and Kohlberg who viewed women as morally inferior to men.<sup>233</sup> Gilligan viewed their approaches as based on masculine interests and as a result, ignored the voices of women. Instead her theory emphasised the importance of emotional knowledge as required in caring. Gilligan argued more weight should be attributed to female voices as opposed to the focus on male. In female dominated areas like care, this led to women being completely side lined.<sup>234</sup> In developing the ethics of care, Gilligan and others wanted to move away from male dominated discourses.<sup>235</sup> It was critical in relation to the sphere of care because of the way it impacts directly on women's lives and the extent it affects them. Gilligan argued that women should not be limited to dialogues of care while men were concerned with ideas about rights and justice. The ethics of care are useful to this work because it highlights the importance and value of

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<sup>232</sup> Wollstonecraft's best known work is *A Vindication of the Rights of Woman with Strictures on Moral and Political Subjects* (Joseph Johnson 1792) while Elizabeth Cady Stanton wrote *The Woman's Bible* (Reprinted by Pacific Publishing Studio 2010).

<sup>233</sup> See Duska, R.F., and Whelan, M., *Moral Development: Guide to Piaget and Kohlberg* (Paulist Press 1975) for an analysis of Kohlberg's view.

<sup>234</sup> Abel, E.K., and Nelson, M.K., *Circles of Care: Work and Identity in Women's Lives* (State University of New York Press 1990) 4.

<sup>235</sup> Noddings, N., *Caring, a feminine approach to ethics and moral education* (University of California Press 1984).



care to the whole of society. The ethics of care has been developed further but analysis is limited in this work due to constraints of space.

Abel and Nelson argue that emotional work, such as care, is relegated to second place in comparison with “instrumental” work.<sup>236</sup> They cite reductions in public spending and a growing older population as reasons why care is being pushed back towards the family. They argue that as we live longer, women will spend more of their lives providing care for older relations than for their children.<sup>237</sup> Abel and Nelson state that over 70% of those providing care to older people are wives and daughters so informal care relies on intimate connections.<sup>238</sup> They note that care in these situations relies on everyday practice as opposed to formal training and it is a fluctuating position.<sup>239</sup> Their work highlights caregivers’ aptitude to adapt to different needs, often rapidly. The practical demand for nuanced care could be one of the reasons that so many women give up full-time work in order to provide care.<sup>240</sup>

Fisher and Tronto have written extensively about the ethics of care, commenting that often care as an activity is not the focus of discussion.<sup>241</sup> Instead they argue much commentary focuses on notions of men as rational and autonomous and women as caring. They view care as an obligation and a right as opposed to something we choose.<sup>242</sup> Care is viewed as an activity so integral to everyday life that it occurs unconsciously. Fisher and Tronto see the practice of care as “a species activity that

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<sup>236</sup> Abel and Nelson (n234) 4.

<sup>237</sup> Ibid 4.

<sup>238</sup> Abel and Nelson (n234) 6.

<sup>239</sup> Ibid 5.

<sup>240</sup> *Key facts about carers*, Carers Trust [www.carers.org/key-facts-about-carers](http://www.carers.org/key-facts-about-carers) 2012 Accessed November 14th 2015.

<sup>241</sup> Fisher and Tronto (n192) 36.

<sup>242</sup> Ibid 39.

includes everything that we do to maintain, continue, and repair our “world” so that we can live in it as well as possible”.<sup>243</sup> They claim women do not possess a particular natural aptitude to care. Their view supports my argument that although men do engage in care, they are not enabled to in the same way as women. To achieve a universal approach to care which encourages and supports active practice of men, we must recognise phases of care and the way care operates in the marketplace and informally.

Tronto has identified four interconnected phases of care.<sup>244</sup> These are caring about, taking care of, caregiving and care receiving. Tronto views each as critical to good care practice but not restricted to specific relationships. Fisher and Tronto state these can involve individuals or groups but that each caring relationship will differ depending on needs.<sup>245</sup> They identify that care is reliant on factors including “ability, time, material resources, knowledge and skill”.<sup>246</sup> They argue that if care fails as a result of any of these factors being compromised, it will be the fault of the wider social context which initially generated them.<sup>247</sup> Their argument is useful because if care is viewed as an informal, insular activity within the family, it will be overlooked by the state. Considering the significant contribution care makes to the economy, this appears to be a serious misjudgement.<sup>248</sup>

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<sup>243</sup> Fisher and Tronto (n192) 40.

<sup>244</sup> Tronto, J., *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, Chapman and Hall Inc., 1993).

<sup>245</sup> Fisher and Tronto (n192) 41.

<sup>246</sup> Ibid 41.

<sup>247</sup> Fisher and Tronto (n19) 41.

<sup>248</sup> Carers Trust (n240) estimates the contribution to be in the region of £119bn annually.

Fisher and Tronto claim that the public/private divide supported by the capitalist economy seems to entrench gendered divisions in itself.<sup>249</sup> They see the areas of the home and local community, marketplace and bureaucracy as being intertwined and touching care. They view women's roles within the family as being affected by status, their requirement for outside resources to support care and unequal relations with men as limiting women's control over their lives.<sup>250</sup> Fisher and Tronto emphasise a need for common standards, enabling communities to become a source of mutual support.<sup>251</sup> They compare this with the marketplace where men are expected to engage in waged labour. They state that if women are inclined to care within the family they can become isolated.<sup>252</sup> Fisher and Tronto consider that relying on paid carers does not involve the same level of trust as family care.<sup>253</sup> Providing care in the private sphere means women cannot always enter the marketplace as paid workers. If they do, they continue to be responsible for organising paid care in their absence.<sup>254</sup> The marketplace is unsuited to care because it needs quick results and care is a long term process.<sup>255</sup> The market also places importance on individual contractual relationships which may not be appropriate in care settings.<sup>256</sup> Fisher and Tronto consider bureaucracy as problematic in care because of its inherent hierarchal nature.<sup>257</sup> Care should be based on equal relationships, mutual trust and reciprocity promoted by the ethics of care. Alternatively, profit making market principles will determine what bureaucracies choose to care about.<sup>258</sup> As the first chapter illustrated, this is an

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<sup>249</sup> Fisher and Tronto (n192) 47, 48.

<sup>250</sup> Ibid 46.

<sup>251</sup> Fisher and Tronto (n192) 46.

<sup>252</sup> Ibid 47.

<sup>253</sup> Fisher and Tronto (n192) 47.

<sup>254</sup> Ibid 47.

<sup>255</sup> Fisher and Tronto (n192) 48.

<sup>256</sup> Ibid 48.

<sup>257</sup> Fisher and Tronto (n192) 48.

<sup>258</sup> Ibid 48.

inappropriate basis for care as it ignores the needs of individuals. It includes both caregivers and care recipients. I now consider some of the critiques of the ethics of care.

### 3(i). Critiques of the ethics of care

One of the critiques surrounding the ethics of care is the idea of having one model of 'woman' at its core. Drakapoulou<sup>259</sup> has criticised the ethic of care argument put forward by Gilligan in *A Different Voice*.<sup>260</sup> Drakapoulou argued there is no single ideal woman that can be representative and gendered beliefs about what constitutes woman are dominated by male norms. Many feminists have argued against using politics of identity and move towards examining how affect can be utilised in challenging ingrained norms.<sup>261</sup> Hemmings has built on Probyn's concept of 'feminist reflexivity' by viewing it from the alternative aspect of affect.<sup>262</sup> Hemmings argues that basis for change in terms of gendered expectations means that we need to understand there are contrasts between what is meant by 'womanhood' and what is meant by 'feminism'.<sup>263</sup>

For Hemmings affect means being aware of pervading ideas in relation to gender and she argues this has been overlooked as a persuasive basis for change. She claims feminist arguments have instead been more subjective, focusing on marginality or

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<sup>259</sup> Drakapoulou, M. (2009). The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship. In Conaghan, J. ed. *Feminist Legal Studies*. (Routledge 2009) 199-266, 200.

<sup>260</sup> Although Gilligan moved away from this argument herself in her later work 'Hearing the Difference: Theorizing Connection', *Hypatia*, Bloomington [1995] (Spring) Vol. 10, Issue 2, pp. 120.

<sup>261</sup> Probyn, E., '*Sexing the Self: Gendered Positions in Cultural Studies*', (Routledge, London, 1993).

<sup>262</sup> As discussed in the introduction of her work.

<sup>263</sup> Hemmings (n6) 148.

identity.<sup>264</sup> Hemmings' view contrasts with the ethics of care as she sees arguments based on those factors as too limited to be useful.<sup>265</sup> The ethics of care alternatively identifies those that fall outside accepted norms and those that have roles imposed on them as a result of societal structures. Hemmings advocates an approach focusing on emotional concepts as opposed to people.<sup>266</sup>

As an alternative to grouping individuals identified as women, carers or the cared for, issues such as anger, dissatisfaction or need for contact should take priority.<sup>267</sup> Hemmings is arguing that feminist theory usually focuses on more subjective concerns rather than objective ones.<sup>268</sup> In reference to the ethics of care, this seems to be appropriate. Nonetheless, the idea of viewing a section of the population as having a distinct set of needs instead of as a homogenous class can have advantages. We can see this in care because each person has individual needs and requirements which might need to be addressed in a more imaginative way than others. Labelling those with care needs in this general manner is problematic because it fails to address nuances which come to be understood through development of strong, understanding relationships.<sup>269</sup> Nonetheless Hemmings feels that feminist solidarity can be effective because it recognises the 'other'.<sup>270</sup> The 'other' appears to be situated outside central debate, with the result that instead of being actively involved, they end up being 'done to'. Feminist theory can place them in a central location where they become the acknowledged subject.

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<sup>264</sup> Hemmings (n6) 149.

<sup>265</sup> Ibid 147.

<sup>266</sup> Hemmings (n6) 148.

<sup>267</sup> Ibid 148.

<sup>268</sup> Hemmings (n6) 148.

<sup>269</sup> Groups deemed to have 'failed' will be discussed in respect of vulnerability theory later in this chapter.

<sup>270</sup> Hemmings (n6) 151. The 'other' refers to those who do not fit within traditionally accepted norms of femininity or masculinity.

As a foundation for effective transformation in feminism, Hemmings states that focusing on identities leads to those identities being placed in contention with one another.<sup>271</sup> As discussed in chapter one, the liberal state places value on individualism while pushing people to compete for restricted resources. As a result, even amongst marginalised groups there emerge a structure of power relationships and debates about whose needs should be paramount.<sup>272</sup> Therefore weight is placed on whose voice can be heard the loudest. Paradoxically, this often depends on identification with a specific group.<sup>273</sup> In contrast, Hemmings argues that affect should be situated centrally so it can present a more critical approach to the manner in which we live.<sup>274</sup> Furthermore she emphasises the importance of embodiment as nuanced and individual, arguing this should inform policy making. Instead we are defined by the ways we actually manage to live notwithstanding that sometimes we are making the best of a less than perfect situation.<sup>275</sup>

Our self-perception may also differ from how we are viewed by wider society.<sup>276</sup> Gendered groupings have informed societal structures and expectations. Factors including race, religion and economic background are often overlooked and even less often, understood. Feminism can have a significant role to play because it acknowledges that people not seen as valuable are neglected in various areas. I argue this recognition is critical to care because feminism has the power to recognise the needs and pressures of those within the care system. Once the problems of care have

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<sup>271</sup> Hemmings (n6) 153.

<sup>272</sup> Ibid 153.

<sup>273</sup> Hemmings (n6) 155.

<sup>274</sup> Ibid 158.

<sup>275</sup> Hemmings (n6) 148.

<sup>276</sup> Ibid 149.

been identified, people can be considered on a more individual basis.<sup>277</sup> Feminism is critical because it realises the importance of relationships in care and reciprocity.

Hemmings argues that approaches like the ethics of care prioritise empathy and argues this is not a positive way to build on affective links between particular groups.<sup>278</sup>

In contrast Koehn states that empathy is a critical component in care because it is a basic prerequisite of a caring relationship.<sup>279</sup> Empathy allows us to consider what others might be experiencing and to interpret that as knowledge for ourselves. Although this may not always be accurate (for we can never truly know how someone else is feeling) it can offer us a useful insight into care practice. Empathy, to me, means recognising embodiment at a fundamental human level, reacting in a relational manner and using that to facilitate change. By recognising what is not working effectively, we can put ourselves in the position of others and evaluate what we can do to change things. Nevertheless Hemmings warns against failing to recognise the importance of issues including class and race in feminist discourse and what we purport to know about people.<sup>280</sup>

Using empathy to evoke change is problematic for Hemmings because she believes it is accepted as being capable of solving distinctions between people.<sup>281</sup> Instead she feels affect is more effective as a group incentive for change while revealing a lack of connection among groups of people. Hemmings is critical that feminists sometimes seem to accept that empathy will be welcome in reciprocal relationships like those in

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<sup>277</sup> Koehn, D., *Rethinking Feminist Ethics: Care, Trust and Empathy* (Psychology Press 1998).

<sup>278</sup> Hemmings (n6) 151.

<sup>279</sup> Koehn (n277) 59.

<sup>280</sup> Hemmings (n6) 152. She feels this applies particularly to white, middle class feminists.

<sup>281</sup> Ibid 152.

care.<sup>282</sup> If that is correct, it could be particularly critical in care discourse because of the danger of adopting a paternalistic attitude.<sup>283</sup> As a result it could be argued that empathy could add to the notion of power relationships and reinforce a hierarchy in care situations.<sup>284</sup> Additionally this view of empathy only appears to be seen through the eyes of the carer, not the cared for.<sup>285</sup> Despite Hemmings reservations about the effect of empathy, care is centred on relationships and reciprocity. If a person engaged in providing care cannot empathise with the person they are caring for, potentially they will not be fully engaged in caring for that individual.

Notwithstanding, Hemmings argues that to produce affective solidarity, women would need to be aware of the unfairness of their situation and insist on transformation of societal structures.<sup>286</sup> Although this could be a persuasive argument it must be recognised that not all women will question these structures, let alone believe they can change them.<sup>287</sup> If we accept that, it suggests that for some women, the patriarchy is so inherent that they do not recognise it for what it is – a means of subordination.<sup>288</sup> What would be useful is an argument that we need to raise the awareness of women in the first place. The first challenge could be based on the apparent understanding that women should care and so they inevitably do. We need to consider structural understandings and expectations associated with gender. I will now consider how gender might be re-evaluated in respect of the vulnerability approach.

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<sup>282</sup> Hemmings (n6) 152.

<sup>283</sup> This will be discussed further in chapters four and five.

<sup>284</sup> Hemmings (n6) 153.

<sup>285</sup> Ibid 154.

<sup>286</sup> Hemmings (n6) 154.

<sup>287</sup> Hemmings notes that awareness does not necessarily transfer into political action (at 154).

<sup>288</sup> Bowlby, S., Gregory, S. and McKie, L., 'Doing "home": Patriarchy, caring and space' *Women's Studies International Forum* [1997] Volume 20, Issue 3 343-350.



#### 4. Responding to problems of gender in care through the theory of vulnerability

Although the ethics of care has made significant contributions to discussions about care, I argue that care would benefit from an approach that can encompass both genders. I move now towards considering what the difficulties are in the construction and perpetuation of gender roles and how they can be challenged through the vulnerability approach.

I argue that gendered expectations are problematic in care because they reinforce assumptions about women. Discussions about gender differences have helped to continue deference in favour of male norms. That view is supported by Bacchi who regards policy as generating ideas of gender and so reinforcing what it is to be male or female.<sup>289</sup> She complains that pervading ideas about gender in neo-liberalism actually subvert the quest for equality.<sup>290</sup> Bacchi notes that in the 1980s non-governmental organisations (NGOs) made a clear move away from issues which focused on women. Instead they began to use the word 'gender' in an attempt to eradicate the marginal situation of women which was being ignored.<sup>291</sup> Perhaps this suggests that gender has become used in a way which further neglects issues which primarily concern women.

Additionally feminists have been faced with the challenge of trying to institute change into already existing institutions as opposed to developing new foundations.<sup>292</sup> Bacchi notes the family can be considered an institution in itself and any change would have

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<sup>289</sup> Bacchi (n193) 18.

<sup>290</sup> Ibid 18.

<sup>291</sup> Bacchi (n193) 22.

<sup>292</sup> Ibid 23.

to fit with societal assumptions about families.<sup>293</sup> Furthermore this extends to expectations about gender roles within that framework. In considering countries which are making concerted efforts to challenge traditional gendered structures, she focuses her attention on the Netherlands. The Netherlands is engaged in building a new framework which has been developed with three questions in mind: “Where are the structurally unequal power relations between women and men to be found? How do they function and how are they to be evaluated?”<sup>294</sup> In Bacchi’s view, the answers must be more than expecting women to readjust their behaviour and expectations to fit masculine norms to be effective. To enable transformation of a system built around norms, men will have to make alterations to their lifestyles and expectations.<sup>295</sup> We need to ask ourselves questions about the way we live and how organisations operate. The fact that we concentrate on individuals and acting autonomously in the utilitarian system is a problem for care because it means that we continually fail to accept our dependence on people around us.

In looking for new ways forward we must avoid blanket approaches which have caused so much harm to vulnerable people in the past and present.<sup>296</sup> Feminists have long seen the law as built upon the masculine norms as developed in the utilitarian system.<sup>297</sup> Conaghan argues that law overlooks biological and social facts which occur beyond its confines.<sup>298</sup> In care this is problematic because of the data identified earlier, namely the disproportionate effect on women, through need and expectation. Conaghan argues that in order to change the current situation, law needs to assume

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<sup>293</sup> Bacchi (n193) 23.

<sup>294</sup> Ibid 24.

<sup>295</sup> Bacchi (n193) 27.

<sup>296</sup> Ibid 31.

<sup>297</sup> Conaghan (n29) 3.

<sup>298</sup> Ibid 15.

a broader societal approach.<sup>299</sup> She argues this will bring gendered issues to the fore where they can be considered in a more candid way.

As a means of transformation to gendered constructions and care, Beasley and Bacchi discuss the idea of 'social flesh'.<sup>300</sup> Theirs is a new model which is based on mutual reliance and "social space, infrastructure and resources".<sup>301</sup> They express concern about the neo-liberalist idea of the disembodied "atomistic" individual who functions autonomously in his or her own bubble.<sup>302</sup> Beasley and Bacchi instead propose a system of mutual qualities in order to aid progress in future. 'Social flesh' is a recognition of embodiment and stands in contention with current neo-liberal views.<sup>303</sup> Their argument is for development of a system of social support which moves away from focusing on the supposed shortfalls of needy people. Currently the success or failure of the liberal state is measured on how successful (or not) its citizens are.<sup>304</sup>

Beasley and Bacchi express a desire to progress beyond the limitations of care ethics to neo-liberalism. They argue that emphasis should be placed on the "embodied co-existence" which has a socio-political aspect.<sup>305</sup> 'Social flesh' invokes a clear acknowledgement of interdependence amongst people. It moves away from the disparity of the neo-liberal state which distinguishes between active, strong citizens and those seen as weak and with needs. 'Social flesh' is intended to incorporate all individuals, not just those deemed vulnerable.<sup>306</sup> It is intended to offer an alternative

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<sup>299</sup> Conaghan (n29) 24, 25.

<sup>300</sup> Beasley and Bacchi (n194) 279, 298.

<sup>301</sup> Ibid 279.

<sup>302</sup> Beasley and Bacchi (n194) 280.

<sup>303</sup> Ibid 280.

<sup>304</sup> Beasley and Bacchi (n194) 283.

<sup>305</sup> Ibid 285.

<sup>306</sup> Beasley and Bacchi (n194) 286.

to the masculine norms of the liberal state while avoiding enforcement of prescriptive measures. The next section discusses vulnerability theory developed by Fineman and the reasons I believe it could play a significant role in transforming care, including ideas about gender.

### 5. The universal basis of vulnerability and the development of resilience

Fineman's theory challenges liberal individualism by suggesting that what all humans have in common is that we are vulnerable.<sup>307</sup> Her emphasis on shared vulnerability suggests that we all need the support of others and infrastructure to permit us to live our lives in the way we choose. To achieve progress, Fineman argues that individuals must be enabled to develop a level of resilience, and she defines resilience in terms of mutual responsibility and acceptance of vulnerability.<sup>308</sup> Fineman's idea of resilience recognises the need for support for human beings to come from the state, institutions and individuals. If we fail to recognise human beings as possessing inherent vulnerability, it becomes harder to formulate supportive policies for times of need.

Fineman is not simply arguing for the state to provide adequate resources for care. She would prefer the development of individual resilience. Resilience focuses on individuals with needs and understands that we all have different levels of resilience which will change throughout our lives. Resilience will depend on the resources that are available to us and the way we access them. In emphasising the importance of resilience, Fineman is asking us to reconsider what is meant by dependency.<sup>309</sup> She

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<sup>307</sup> Fineman (n5) 13.

<sup>308</sup> Ibid (n5) 18.

<sup>309</sup> Fineman (n5) 18.

argues for a refined idea of dependency which should not be hidden in the confines of the family. She wants the state to recognise dependency as something which should concern it at a primary level. As a result, care for dependent relatives would become a wider concern and greater opportunities for open discussion about how to solve care problems would be cultivated.

Gear, further explaining Fineman's theory, argues there are many factors affecting individuals over which they have no control.<sup>310</sup> She highlights the need to develop resilience to enable people to withstand difficulties when they arise. Gear also recognises the vulnerability of institutions, the fragility of which institutions was highlighted by the economic crash of 2008. She interprets the theory of vulnerability as persuasive because it has the potential to produce lively discourse and critiques in its aim to build a foundation for a social order built on equality and justice.<sup>311</sup>

The arguments presented by Fineman and Gear emphasise the importance of having governments that actively listen to citizens who have the opportunity to speak out about their concerns. Increased dialogue between individuals, groups and the state would lead to development of Fineman's idea of a responsive state. A responsive state would be useful in care because it would reflect relationships of trust and the fluctuating needs of society.

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<sup>310</sup> Gear, A., *Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject in Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. (Ashgate Publishing Ltd., 2013).

<sup>311</sup> Ibid 43.

### 5(i) The role of the responsive state

A key point of Fineman's theory is the role of institutions in the uneven distribution of resources. She emphasises that institutions must not be allowed to give privileges to certain groups while leaving others at a disadvantage.<sup>312</sup> Fineman argues that this is where the state should be most responsive. It should endeavour to respond appropriately to acknowledged vulnerability and recognise it as a result of being an involved, active state. The state should provide individuals with necessary resources to encourage resilience but when things go wrong it should be ready to act as a support. Fineman's approach can be seen in contrast with the utilitarian state which only intervenes in times of crisis.<sup>313</sup> She does not endorse implementation of punitive sanctions for those that have not been able to manage. Fineman's view contrasts with the utilitarian system, which views care of family members as a choice.<sup>314</sup> In regarding care as an option as opposed to an expectation, the state effectively restricts itself from becoming involved. One of the most positive facets of having a responsive state is that it suggests active participation of citizens. It is a system which can respond proactively to concerns identified by people and can make changes as these come to light. As a result the state could operate more effectively than searching for solutions reactively.

Heightened state responsiveness could be appropriate for problems in care. The state would recognise that policies and resources it can provide have a direct impact on

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<sup>312</sup> Nussbaum (n210) 15.

<sup>313</sup> For example, following the failure of Southern Cross in 2011.

<sup>314</sup> Coyle, S., *Vulnerability and the Liberal Order* in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate Publishing Limited, 2013).

lives of individuals.<sup>315</sup> If the state largely ignores the issues surrounding care or views it as a problem, this can have far-reaching effects on how care is considered by wider society. The state has significant power and in constructing care as a private concern it undermines the impact it can have on those involved. In delegating care to the private realm, the state is at risk of failing to understand the demands and nuances of care. As a result it fails to scrutinise care effectively and can struggle to offer adequate regulation. Development of resilience would be pivotal to operation of a responsive state.<sup>316</sup> It could lead to individuals with responsibilities of care becoming more equipped to cope. Adoption of the approach would be advantageous to the state and its institutions because they would be less likely to be badly affected in times of adversity. Fineman's formulation of the vulnerable subject is helpful with respect to care because it reflects human attributes of those involved in its practice. Fineman's approach reflects humanity and embodiment and it is crucial to recognise these when vulnerability becomes more intense.

#### 5(ii) Vulnerability and ideas of 'failure'

In considering groups of people whose interests are not appropriately addressed, Fineman turns her attention to "vulnerable populations".<sup>317</sup> She identifies the individuals in these groups as being viewed to have failed in a system that promotes autonomy and personal responsibility. Clarke supports this idea, arguing that people have become rights carriers. Central to ideas about rights is an acceptance that we are responsible for ourselves and our self-sufficiency.<sup>318</sup> Therefore if we do not fit into

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<sup>315</sup> Fineman (n5) 24.

<sup>316</sup> Ibid 25.

<sup>317</sup> Fineman (n5) 16.

<sup>318</sup> Clarke (n200) 451.

the model of the paradigm liberal subject we are deemed to have failed.<sup>319</sup> Those that are seen as belonging to vulnerable groups are regarded as a problem and stigmatised for their perceived failure. We can see this from the perspective of government which expects its citizens to be ready to engage in paid work or the view of wider society. Policy response has been in the way of spreading technological surveillance and regulation. For example, in the UK in recent years we have seen the introduction of ASBOs.<sup>320</sup>

One of the measures that an ASBO can enforce is preventing people from visiting their town centre.<sup>321</sup> ASBOs have often been justified in connection with drinking alcohol in public places and has come under criticism from De Verteueil et al.<sup>322</sup> Their study (among others) illustrated how ASBOs, Public Drinking Exclusion Zones and Town Centre Partnerships have been used against homeless people. Each of these punitive measures moves them away from town centres, rendering them invisible. There is an argument that this merely moves the issue elsewhere and allows society at large to overlook them. Unfortunately there have not been many attempts to tackle the source of the problem – groups of people living in poverty, who may have been failed by the education system and have few prospects of employment. Instead they have been pushed into a space where they can be ignored.

A Home Office review of the subjects of ASBOs in 2002 produced some alarming results, which support De Verteueil et al's arguments. The Home Office report found that in 60% of cases where a person received an ASBO there were mitigating factors,

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<sup>319</sup> As identified in chapter one, this is a person active in the paid workforce.

<sup>320</sup> Introduced by s1 Crime and Disorder Act 1988. Hereafter these will be referred to as ASBOs.

<sup>321</sup> *R v Wakeling (Darren)* [2010] EWCA Crim 252.

<sup>322</sup> De Verteueil (n7) 646-648.



including mental health problems, addiction issues or learning disabilities.<sup>323</sup> These data reveal that some highly vulnerable groups are affected by ASBOs who may struggle to modify their behaviour to socially accepted standards for various reasons. Furthermore, a 2007 BIBIC report claims that ASBOs have often been delivered without due mental health assessments.<sup>324</sup> The BIBIC report states that there is a wide disparity as to the weight mental health problems are given in each case. It is clear these groups could be labelled as vulnerable but the reaction to them in respect of ASBOs seems to be misjudged.

Fineman argues that categorising these kinds of groups as vulnerable is “misleading, inaccurate and pernicious”.<sup>325</sup> She states that basing these groups on the few characteristics they actually have in common renders any differences invisible. For Fineman, attributing these labels does not recognise the individual nuances which exist between people. As a result of labelling, individual needs are lost and it is inevitable those needs will not be recognised or addressed. Even worse, according to Fineman, viewing certain groups as vulnerable suggests the rest of us are not. The failure to recognise the vulnerability of all human beings is a critical deficiency of the liberal state, which has led to developments of policy and attitudes, both social and institutional, that we should be as responsible and self-sufficient as possible. Clarke states that the citizen has been abandoned because the state is now dominated by the market.<sup>326</sup> He argues that the economy now directs social policy in a clear move

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<sup>323</sup> Home Office Research Study 236, *A Review of Anti-Social Behaviour Orders* (2002) 17. <https://lemosandcrane.co.uk/resources/hors236.pdf> Accessed September 4th 2015.

<sup>324</sup> ‘Bibic Research on ASBOs and Young People with Learning Difficulties and Mental Health Problems’ BIBIC [2007] Cited in: ‘Anti-social behaviour and disability – the response of social landlords’ Hunter, C., Hodge, N., Nixon, J. and Parr, S. *People, Place and Policy* [2007] Volume 1 – Issue 3 (November) 17. <https://extra.shu.ac.uk/ppp-online/anti-social-behaviour-and-disability-the-response-of-social-landlords/> Accessed September 4th 2015.

<sup>325</sup> Fineman (n5) 16.

<sup>326</sup> Clarke (n200) 452.

away from the welfare state initiated following the Second World War. As a result, economic focus has led the state to effectively push away from family and domestic considerations.<sup>327</sup>

Although Clarke was writing about New Labour policies, the idea of increasing abandonment by the state can be extended to the Coalition's 'Big Society' ethos.<sup>328</sup> The Coalition's mission statement "We are all in this together" was based on encouraging communities to work collaboratively and increase power at a local level.<sup>329</sup> One of the aims of this policy was to provide groups with powers so they could "save local facilities and services threatened with closure, and give communities the right to bid to take over local state-run services".<sup>330</sup> These kinds of policies appear to mark a shrinking of the state in terms of responsibility and a desire for people to assume them instead.

The emphasis on this voluntary role was arguably most highlighted by the fact that involvement of this kind would become part of staff assessments for those employed by the civil service.<sup>331</sup> In line with goals of the liberal state they launched the National Citizen Service. The scheme was aimed at teenagers who would be supported in developing techniques to become "active and responsible citizens".<sup>332</sup> On one hand, this could tie in with Fineman's valuable idea about developing resilience and community support. Yet the policy promotes this as in direct connection with the

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<sup>327</sup> Clarke (n200) 455.

<sup>328</sup> *Building the Big Society*, Policy Document, 18<sup>th</sup> May 2010  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78979/building-big-society-0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78979/building-big-society-0.pdf) Accessed September 8<sup>th</sup> 2015.

<sup>329</sup> Ibid 1.

<sup>330</sup> *Building the Big Society* (n328) 1.

<sup>331</sup> Ibid 2.

<sup>332</sup> *Building the Big Society* (n328) 2.

abandonment of the state in line with Clarke's view.<sup>333</sup> Although the importance of building strong and supportive communities is generally viewed as favourable, it is questionable as to whether this aim should be because of state withdrawal. Fineman's theory is useful to discussions around care discussed in this chapter. Nevertheless it has not been universally endorsed and some critiques have developed concerning the proposed move away from identity characteristics.

### 5(iii) Critiques of Fineman's theory

Despite the fact that the theory of vulnerability seems to be persuasive in arguments for transformation of care, it has attracted criticism. For example, the move away from arguments of intersectionality is contentious.<sup>334</sup> Fineman's theory and her reliance on the state could be viewed as being insensitive to issues including race. The problem lies with the idea that some white modern liberal feminists do not fully understand the difficulties associated with racial identification. For instance, Crenshaw has emphasised that women of colour are underrepresented in feminist discourse.<sup>335</sup> She states there is a lack of acknowledgment of the way women of colour are treated differently to white women and how this affects their lives. Underrepresentation is a significant issue both legally and politically and is exacerbated when you belong to a group which identifies as an ethnic minority. In *Can the Subaltern Speak?* Spivak argues that non-Europeans are only considered to become important when they follow Western scripts.<sup>336</sup> She goes on to argue that "subalterns", meaning those who are

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<sup>333</sup> The aim of this scheme is to offer 15-17 year olds a variety of experiences in order that they can contribute directly to their local communities, in particular through a designated social action project.

<sup>334</sup> Anthias, F., 'Thinking through the lens of translocational positionality: an intersectionality frame for understanding identity and belonging' [2008] *Translocations*, Volume 4, Issue 1 6-9.

<sup>335</sup> Crenshaw (n8) 139.

<sup>336</sup> Spivak (n202) 14, 20.

disenfranchised, do not speak the vocabulary that is heard and given weight in the corridors of power. Spivak argues that the problem of raising the concern of underrepresentation lies with academics. She states that those who do not have power should not be deemed solely responsible for fighting for it. If we recognise women as a disenfranchised group then Spivak's argument follows that men also need to be fighting for change.

Spivak argues that if the idea of 'woman' is constructed as being problematic in itself, then poor, black women will suffer more. Spivak is suggesting those women will have to struggle harder, not necessarily for equality with men but for equality with other women. She continues by stating that often the only voices not heard in connection with certain practices are the actual women concerned.<sup>337</sup> In contrast to Fineman's view it could be argued that associations such as the black civil rights movement had force precisely because of their clear mutual identity. It is generally accepted that the voice of a group can be heard much louder than the voice of an individual. Fineman's theory will need to address the issues of race and position of women of colour in order to be persuasive to critical race theorists. It is not enough to overlook the difficulties this group of women face and perhaps this is where vulnerability theory needs further insight. I argue that vulnerability theory still provides a good basis for moving forward as an alternative to utilitarianism as a universal approach. As a theory it encompasses human beings regardless of gender and provides the cornerstone of a supportive state. As such it could offer the most effective footing for promoting appropriate care.

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<sup>337</sup> Spivak specifically discusses the practice of Suti in relation to voiceless women.

## Conclusion

In this chapter I have contrasted the model of the modern liberal subject with feminist theories that emphasise the relational and vulnerable nature of human beings. My argument is that feminist approaches are progressive as they promote human embodiment as a foundation of care. In contrast, the utilitarian state fails to recognise people who have needs. Although there have been significant changes in the marketplace in the last fifty years with women entering into paid employment, men have not taken up a corresponding burden of unpaid care work. Societal expectations still result in women being disproportionately subject to care responsibilities. If we further consider that women generally live longer than men but not necessarily in a healthy way, it can be seen that women are also more likely to be subject to a need for care.

The ethics of care highlighted why this was problematic for women as it effectively restricts their involvement in society and the marketplace. The theory also emphasises the need for trust in fluctuating care situations. It recognises that care cannot be assumed to happen through choice, nor is it a natural role that only women can fulfil. Instead we need to re-evaluate the role of men too. The purpose of this chapter is not to exclude or negate the importance of men in care but instead to encourage and enable them to care more.

For this reason I have reiterated the critical need for transformation in how we think about and deliver care. In doing so we have to consider the value of care in both family and public spheres. I argue that Fineman's theory of vulnerability would be persuasive

in enabling change although I claim that it should be more sensitive to issues of race. I do not seek to reject the liberal state entirely but instead to reformulate it. In encouraging recognition of universal, not gender specific, vulnerability we can create a more equal platform for reimagining care. At the same time the state needs to acknowledge the importance of good care and become more responsive to needs and concerns of citizens. The gradual shrinking of the state has served to reinforce care as a low value, private concern. Active citizens and responsive states can re-establish care as a matter for us all to address. In doing so, care can be transformed into something which not only affects everyone but something we can all take responsibility for. In the next chapter I evaluate several feminist arguments which present challenges to the current care framework. I consider arguments about how other countries with similar problems have attempted to solve these.

## **Chapter Three – Feminism and adult social care**

### **1. Introduction**

In this chapter I further develop my argument that feminism provides a productive and progressive alternative to utilitarianism in relation to the way we think about the problems related to the provision of social care. I argue that advances in terms of who provides care have been stalled for too long by structural expectations.<sup>338</sup> I build upon arguments in the previous chapter by providing further empirical evidence showing that women are disproportionately affected by care. I draw on academic feminist arguments which support my critique of gendered roles.<sup>339</sup> I scrutinise how far feminist arguments have been successful in achieving a level of equality and ask why this has not been extended to care. My argument develops the theme of the last chapter by exploring case law from feminist perspectives which underline judicial assumptions that women will provide care.<sup>340</sup> The cases support my argument that society continues to place women in positions of care despite their increased activity in the labour market.

I develop my contention that feminism provides the best opportunity for changing how social care is delivered. The chapter begins with an examination of feminist viewpoints which identify the unequal demands of care on women through both academic argument and case law. The middle section of the chapter enlarges on my discussion

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<sup>338</sup> Gendered expectations as discussed in chapter two.

<sup>339</sup> Clements (n10) 675-685.

<sup>340</sup> *R (On the application of JM and NT) and R (On the application of KM)* (n9).

of the importance of the ethics of care in the second chapter and its necessary foundations for understandings of care.<sup>341</sup> I use several feminist debates to develop my critique of the male basis of the utilitarian, liberal state.<sup>342</sup> The final section of this chapter considers how countries with similar problems in care have approached them.<sup>343</sup> I investigate whether their methods can be considered feminist.

## 2. Adult social care: a feminist concern

In the UK, 66% of people claiming Attendance Allowance are women as are 78% claiming Carers Allowance.<sup>344</sup> That statistic shows that women are more prone than men to require formalised care and Carr states that “aging and caring are gendered in ways that are more nuanced and compelling than the simple fact that women live longer than men”.<sup>345</sup> Carr suggests that while women are more likely to need care due to living longer, this is an overly simplistic assumption when it comes to women’s roles in care.<sup>346</sup>

In Chapter 2, I explained that care is a feminist concern because it disproportionately affects women. Social care is also a feminist concern because of the impact it has on women in the expectation they will provide informal care. I now provide some further

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<sup>341</sup> Again I particularly focus on the approach developed by Gilligan, introduced in Chapter Two.

<sup>342</sup> Including work by both Hothschild and Tronto (see footnotes 364 and 244 respectively).

<sup>343</sup> I introduced this discussion with reference to Bacchi’s work in the previous chapter.

<sup>344</sup> *First Release – Department of Work and Pensions Quarterly Statistical Summary* (August 2014) 22, 23.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/382254/stats\\_summary\\_aug14\\_final\\_V2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382254/stats_summary_aug14_final_V2.pdf) Accessed October 2<sup>nd</sup> 2015. Attendance Allowance is payable for those with mental or physical disabilities over the age of 65 who need help with their personal care.

<sup>345</sup> Clements (n10) 681.

<sup>346</sup> *Ibid* 681.



statistical data to support my argument as to the extent of care requirements in the UK. Age UK have recently found that 371,700 people over 65 were given community based care during 2013 and 2014.<sup>347</sup> Another 405,000 people over 65 were in residential homes in the same time period.<sup>348</sup> For the purposes of this work, the most significant finding is that 900,000 over 65 with care needs are not being offered any kind of formal support at all.<sup>349</sup> This finding suggests that if people have care needs, these needs are being provided for informally by family and friends. I argue that care is still considered to be informal in nature for the most part, becoming visible only when the state has to get involved, either through provision of resources or services.

Women, as a result of societal expectations, have been at the forefront of care for children and older relatives. The fact that women are increasingly engaged in the paid workforce has not reduced that assumption.<sup>350</sup> A further problem is that although paid work occurs in the public sphere, attracting a quantifiable value, informal care is seen as a private and free. Carr has identified this separation between the public and private as false.<sup>351</sup> She states that “instead there is a spectrum of care provision which has emerged in response to policies of de-institutionalisation combined with the retraction and refocusing of welfare”.<sup>352</sup> Carr’s argument is supported by Daly and Lewis who contend that social care is situated at the very crossroads of this alleged divide.<sup>353</sup>

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<sup>347</sup> *Later Life in the UK* (n230) 14.

<sup>348</sup> *Ibid* 18.

<sup>349</sup> *Later Life in the UK* (n23) 14.

<sup>350</sup> Nussbaum (n210) 37.

<sup>351</sup> Carr, H., *Alternative Futures v NCSC: A Feminist Critique*, Conference Paper to the European Network of Housing Research Rotterdam, 2007 at

[http://www.enhr2007rotterdam.nl/documents/W18\\_paper\\_Carr.pdf](http://www.enhr2007rotterdam.nl/documents/W18_paper_Carr.pdf) cited by Luke Clements in ‘Disability, Dignity and the Cri de Coeur’ *European Human Rights Law Review* [2011] 675-685.

<sup>352</sup> Carr (n351) – from a conference speech, quoted at 678 of Clements’ article.

<sup>353</sup> Daly, M and Lewis, J., ‘The concept of social care and the analysis of contemporary welfare states’ *British Journal of Sociology* [2003] Volume 51, Issue 2 282.

Clements argues that continued societal expectations that women will perform the bulk of care are based on domination of women as a powerless group.<sup>354</sup> Those expectations have been absorbed by the courts, as can be seen in *R (on the application of JM and NT) v Isle of Wight Council*<sup>355</sup> and in *R (on the application of KM) v Cambridgeshire County Council*.<sup>356</sup> In both cases, parents who were in their sixties expressed concern at the potential lack of support for their adult disabled sons since they were already finding it difficult to continue providing care. In both cases, local authorities had taken into account the considerable care contributed by the parents to their child. However, these assessments were not formulated with a view to the long term but based on what was happening at the time. Thus, both sets of parents could not be sure what their respective children might be entitled to in the future when they were no longer able to cope.

It was recognised by the Judge in *KM* that local authorities will consider how much care family and friends can provide in assessing care support.<sup>357</sup> After the mother told an assessment officer that she did not feasibly think she could continue to provide care at the same level, the officer recorded family support as ‘none’. Wilson LJ stated that “No other evidence in the proceedings suggests that the mother has refused to continue to play any role in the care of the appellant – living, as he does, within her home; on the contrary, see para 32 below. It is hard to avoid concern about the motives of the mother in having made such representations”.<sup>358</sup> Lord Wilson appears to

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<sup>354</sup> Clements (n10) 683.

<sup>355</sup> [2011] EWHC 2911 (Admin).

<sup>356</sup> [2012] UKSC 23.

<sup>357</sup> (n355) [19] (Lord Wilson).

<sup>358</sup> (n355) [29] (Lord Wilson).

suggest that a mother providing care is a natural assumption, indeed his tone of suspicion regarding her motives reflects a lack of understanding of the pressures of care. It seems to indicate that the courts are unwilling to assess the impact of this expectation on women. The confidence with which local authorities and courts expect women to continue care is problematic because the value of care is consistently overlooked. Notwithstanding the lack of monetary value attributable to informal care, those with family support are not as likely to attract state resources. It is reasonable to suppose that in the above cases, an assessment for long term needs might only occur when family support had broken down significantly.<sup>359</sup>

Care has long been viewed as particular to women and a singular defining time in their lives.<sup>360</sup> In placing the assumption of responsibility for care at the door of women, their marginalisation has been reinforced. Care is expected to function as a result of family relationships and all that goes with those relationships, both emotional and physical. There has been a growth in the number of women engaged in paid work yet much of that still involves caring roles.<sup>361</sup> Simultaneously there have been a number of social changes meaning that families have moved further apart and fewer women are able to take on full-time care.<sup>362</sup> Subsequently this may be due to either a wish not to undertake this responsibility or simply an inability to because of other commitments.<sup>363</sup>

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<sup>359</sup> That can be linked to backward looking focus of the utilitarian approach as it waits for a crisis to occur before it will take action.

<sup>360</sup> Daly and Lewis (n353) 283.

<sup>361</sup> Ibid 284. These include teaching, nursing and childminding.

<sup>362</sup> Bettio, F., Simonazzi, A. and Villa, P., 'Change in care regimes and female migration: the 'care drain' in the Mediterranean' *Journal of European Social Policy* [2006] 16(3) 271-285.

<sup>363</sup> For example, paid work, childcare, illness or a reluctance to undertake personal care for a family member.

Nonetheless this appears to be a Europe wide problem and not simply limited to the UK.<sup>364</sup>

In a response to the shortage of women able to provide care, states have progressively redefined what they provide in the way of services. In the UK there has been a welfare approach to care since the introduction of the National Assistance Act 1948 which provided state support for those in need.<sup>365</sup> However, this approach has proved to be more expensive than is palatable for governments and not sensitive enough to individual needs.<sup>366</sup> Accordingly, as the liberal state has changed and resources have become strained, welfare support has been restricted.<sup>367</sup> There has been a push towards individualisation and provision of budgets to enable individuals to buy their own services.<sup>368</sup> Where state provision of care has been reduced, I suggest that there will be an increasing reliance on family and friends to provide caring services. Private sector care has increased, particularly in the UK, as a result of a shortage of people able to provide informal care.<sup>369</sup> Unfortunately there has not been a corresponding improvement in wages and conditions for those employed in care organisations.<sup>370</sup>

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<sup>364</sup> Hothschild, A. R., 'The Culture of Politics: Traditional, Post-Modern, Cold-Modern and Warm-Modern Ideals of Care' *Social Politics* [1995] 2(3) 331-45. Discussed later in this chapter.

<sup>365</sup> There were several acts introduced around this time including support for housing, the NHS and education.

<sup>366</sup> Adema, W., and Ladaique, M., *How Expensive is the Welfare State? Gross and Net Indicators in the OECD Social Expenditure Database (SOCX)* OECD Social, Employment and Migration Working Papers, No.92 (OECD Publishing 2009) 1-98.

<sup>367</sup> Barry (n179). The case allowed local authorities to consider the implications on their resources when developing care packages for individuals.

<sup>368</sup> Series, L. and Clements, L., 'Putting the cart before the horse, resource allocation systems and community care' *Journal of Social Welfare and Family Law* [2013] 35:2, 207-226.

<sup>369</sup> Daly and Lewis (n353) 291.

<sup>370</sup> Lewis J, and Glennerster, H., *Implementing the New Community Care* (Buckingham: Open University Press 1996).

One consequence of increased marketisation of care services but continuing low incomes was the Conservative government's proposal to introduce a National Living Wage in March 2015's budget.<sup>371</sup> The significant increase in hourly rate was seen as a threat to care businesses. It is possible that they may in future employ staff under temporary contracts and under 25 year olds who are not entitled to the national living wage, in order to avoid wage increase implications. The initiative could prove to become an obstacle in care because it will not attract long term commitment from workers. A significant amount of experience will also be lost where older members of staff leave. As a means of stressing what I argue is critical to care, I now return to a discussion of the ethics of care. I build on what I introduced in the last chapter, which established the basic principles of the approach, developing a more nuanced understanding of why I argue that the ethics of care should be the critical foundation of good and appropriate care.

### 3. The ethics of care: why it is important as a basis for care

In the last chapter I introduced the basic principle of Gilligan's ethics of care theory. Gilligan's work is useful for this work because it recognises that care is mainly performed by women and regarded as informal because it occurs within the family.<sup>372</sup> The ethics of care is also connected to the discussion in the next section relating to approaches to care in other countries. The case law discussed above illustrates an argument raised by the ethics of care – that care is easily overlooked by the state until

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<sup>371</sup> *National Living Wage will 'damage care homes'*, BBC News, August 20<sup>th</sup> 2015.

<http://www.bbc.co.uk/news/health-33986252>

<sup>372</sup> Gilligan (n4) 8.

outside support is required.<sup>373</sup> Until families performing functions of care raise awareness of their situation, they remain invisible and the assumption is that these carers and care recipients are coping well. I suggest that the reciprocal framework of the ethics of care should be placed at the centre of social, political and legal considerations. In this way the importance of care could be appropriately recognised and addressed.

Tronto has long emphasised the reciprocal nature of care, stressing that care is not a *one way process*, nor is it something that is *done* to a person.<sup>374</sup> Care is inherently personal and unique in every situation and is built upon developing good relationships. Reciprocity is one of the reasons that the broad brush approach of utilitarian policies is unsuited to caring. The ethics of care offers a more intuitive way in which care can be carried out which reacts more appropriately to the nuances of human needs. Tronto stated that she wanted care to be recognisably valued by society because it is something we all depend on throughout our lives.<sup>375</sup> She argues that feminism can challenge accepted structures and attitudes, developing a system of care based on respect and what is just. I argue that this means that care, both formal and informal, should be recognised as valuable by society and that it should no longer be considered as something which solely involves women as care givers. Tronto recognises that women have been consistently presented as the gender which is capable of caring the most which limits the way care is evaluated more widely.<sup>376</sup> For Tronto, the ethic of

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<sup>373</sup> For example, if an individual or carer applies for benefits in order to support their care.

<sup>374</sup> Tronto (n244)110.

<sup>375</sup> There is a potential connection here with Fineman's theory of vulnerability in that it remains with us throughout our lives.

<sup>376</sup> Tronto (n244) 111.

care works most effectively as a way of broadening considerations around the needs of everyone, not just those fit into normative ideals.<sup>377</sup>

Care has been the subject of debate among many feminist writers, including those that have expressed concern about the way (particularly informal) care has changed as a result of demographic changes.<sup>378</sup> Given the increased demands on women to engage in paid work, Tronto has argued that care has come to be seen as more of a burden as women's time has become perceptibly limited.<sup>379</sup> Tronto's view is perhaps indicative of informal care being viewed as less of a choice than an unreasonable expectation in modern life. If that conclusion is correct then it suggests that the way care is thought about should be addressed urgently because it will be increasingly seen as a constraint for women. In Daniel Engster's view "Caring is best practiced in particular relationships where caregivers can be attentive, responsive, and respectful to those needing care".<sup>380</sup> If we examine the contrast between Tronto's changing view of care and Engster's model for best practice, we can see that the way care is considered needs to be re-evaluated. Taking the principles established by the ethics of care as a framework, I argue that it is possible that care can be reimagined as something valuable which can fully involve men as well as women who want to care. In questioning how this could be implemented in the UK I evaluate how problems associated with both care and its gendered implications have been approached outside Britain.

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<sup>377</sup> In this way the ethics of care appears to be moving towards a universal approach in the same way as Fineman's vulnerability theory.

<sup>378</sup> Cooper, D., *Everyday Utopias – the conceptual life of promising spaces* (Duke University Press 2014) 113.

<sup>379</sup> Tronto, J., 'Time's Place' *Feminist Theory* [2003] Vol.4, 2 119-138, 124.

<sup>380</sup> Engster, D., *The Heart of Justice: Care Ethics and Political Theory* (Oxford University Press 2007) 55.

#### 4. A comparative analysis of care in other countries

In order to explore the possibilities feminism offers for the repositioning of care as a central social and political concern I now consider reforms in other countries with similar problems to the UK. The difficulties presented by changing care requirements, particularly in welfare based states, have been identified in terms of social, financial and demographic diversity.<sup>381</sup> Common problems in care have not been restricted to one or two countries but are part of a wider dilemma.<sup>382</sup> In the Netherlands, discourse around care in relation to reorganisation of health and social welfare has been introduced into policy areas.<sup>383</sup> Emphasis has come through reconsideration of public resources and discontent with public services.<sup>384</sup> Daly and Lewis attribute the main problem in care provision everywhere as being the reduction in available family support.<sup>385</sup> They claim women's lives have changed and either through need to work or a wish not to care, they are simply not able to care in the way they used to.<sup>386</sup>

As a result, countries have increasingly become aware of the demographic and social changes affecting care and the impact they are having. The Dutch government have been relocating care politically since the 1990s.<sup>387</sup> Sevenhuijsen cites both Bovens<sup>388</sup> and Witteveen<sup>389</sup> as claiming that the shrinking of the state as an entity has led to

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<sup>381</sup> Daly and Lewis (n353) 283.

<sup>382</sup> Ibid 288.

<sup>383</sup> Sevenhuijsen (n11) 179.

<sup>384</sup> Daly and Lewis (n353) 289.

<sup>385</sup> Sevenhuijsen (n11) 289.

<sup>386</sup> Daly and Lewis (n353) 289.

<sup>387</sup> Sevenhuijsen (n11) 180.

<sup>388</sup> Bovens, M., *'De verplaatsing van de politiek. Een agenda voor democratische vernieuwing'*, (Amsterdam: Wardi Beckman Stichting, 1995).

<sup>389</sup> Witteveen, W., *'De denkbeeldige staat. Voorstellingen van democratische vernieuwing'*, (Amsterdam: Amsterdam University Press, 2000).



conflict being removed from the state to more localised arenas including head offices and courts.<sup>390</sup> In turn this means that while state power and accountability is reduced, the power of these institutions is correspondingly increased and it can be difficult to hold these organisations to account.<sup>391</sup> As Sevenhuijsen highlights, Bovens and Witteveen believe the answer lies in an alternative kind of governance that focuses on accessibility, transparency and approachability.<sup>392</sup> Following that approach could then lead to a more active role for citizens because they might recognise inequalities more easily and play a persuasive part in remedying that situation.<sup>393</sup> Nevertheless in order to enable citizens to help bring about these changes, governments need to be open and responsive.

Sevenhuijsen argues that by encouraging governments to account for their decisions in a transparent manner, this creates a situation in which people and policy makers can work together to bring about positive change.<sup>394</sup> It is hoped this type of reciprocal discourse would lead to meaningful interaction. Her view suggests an approach akin to the ethic of care as it acknowledges interdependency.<sup>395</sup> The discourse promoted by the ethics of care leads to a recognition of care as relational, supportive and advantageous to society as a whole.<sup>396</sup> The ethic of care wants to move away from an individualist approach and individual blame connected to the liberal state, and order to ensure that importance of individuals being able to participate in their own care is

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<sup>390</sup> Witteveen (n389) 13.

<sup>391</sup> Sevenhuijsen (n11) 180.

<sup>392</sup> Ibid 180.

<sup>393</sup> There appears to be connections here which could include Hemmings affective solidarity argument and Fineman's idea of active citizens and the responsive state.

<sup>394</sup> Sevenhuijsen (n11) 180.

<sup>395</sup> Ibid 182.

<sup>396</sup> Sevenhuijsen (n11) 182-185.

recognised by the state.<sup>397</sup> As Sevenhuijsen argues, the individuals involved in care can only develop their own capabilities once their individual regard has been perceived and valued.<sup>398</sup>

Bacchi compares the approach to social care in the Netherlands with that in Canada.<sup>399</sup> Although she critiques the Dutch model because it begins with the idea there are arbitrary power relationships between the sexes, she believes that the Netherlands offer more of an opportunity for modification than Canada.<sup>400</sup> Her view is that Canada still differentiates between the sexes as opposed to “gender relations”.<sup>401</sup> She states the Dutch approach is superior because it allows for queries to be asked about ways gendered expectations have been created.<sup>402</sup> Nevertheless Bacchi criticises the Netherlands as refusing to overtly recognise that “gender relations” are not inherent in policy decisions.<sup>403</sup>

Bacchi’s argument supports mine as she critiques the initiatives of the World Bank and EU Commission which aimed to increase the involvement of women in paid work while failing to consider care commitments.<sup>404</sup> She argues these policies support males in particular careers to engage in caring for children but overlooks the way women are rooted in either low paid work or no work at all.<sup>405</sup> Bacchi notes that this means that the Dutch expect lone (female) parents of children over 5 years old to work.<sup>406</sup>

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<sup>397</sup> Sevenhuijsen (n11) 183.

<sup>398</sup> Ibid 183.

<sup>399</sup> Bacchi (n193) 17. Bacchi’s argument was introduced in chapter two.

<sup>400</sup> Ibid 21.

<sup>401</sup> Bacchi (n193) 25.

<sup>402</sup> Ibid 25.

<sup>403</sup> Bacchi (n193) 26.

<sup>404</sup> Ibid 29.

<sup>405</sup> Bacchi (n193) 26.

<sup>406</sup> Ibid 29.

Unfortunately this drive has not been supported by improved provision of childcare.<sup>407</sup> In response Bacchi has developed what she calls “Deep Evaluation” which presents ways in which to consider long term and wider effects of policy than ever before.<sup>408</sup> In a similar idea to active citizenship, she wants to encourage broader discussions about policies and include those who wish to become involved.<sup>409</sup> Although Bacchi argues in favour of equality and awareness that men are also concerned about care, she warns against adopting “one size fits all” policies which have failed in the past.<sup>410</sup> Her argument is significant in care because those policies tend to label people and push them into groups, including gendered ones.

Considerations of gender are significant to care because of the unequal expectations placed on men and women. Sevenhuijsen argues that although men are taking an increasing role in care, this has not occurred at a comparable rate to women joining the workforce.<sup>411</sup> To counteract the expectation that women should work as well as care, the Dutch government have developed a more gender neutral approach allowing women to combine paid work and care.<sup>412</sup> Sevenhuijsen views these policies as understanding what people actually want and how they live. She attributes this to an ethic of care approach built upon ideas of vulnerability, dependency and trust.<sup>413</sup> Despite her claim that the Dutch approach was influenced by the ethics of care, Sevenhuijsen claims there remains an emphasis on family providing care in the Netherlands. She argues policies should be developed with the ever changing and

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<sup>407</sup> Bacchi (n193) 29.

<sup>408</sup> Ibid 30.

<sup>409</sup> Bacchi (n193) 31.

<sup>410</sup> Ibid 31.

<sup>411</sup> Sevenhuijsen (n11) 181.

<sup>412</sup> Ibid 193.

<sup>413</sup> Sevenhuijsen (n11) 185.

diverse nature of care in mind and support informal care.<sup>414</sup> State recognition of that kind would be a step forward as it suggests the state would actively recognise the existence and benefits of familial care. There should be weight placed on enabling individuals to choose whether they undertake this care and if they do, how society can support that.<sup>415</sup>

## 5. Conclusion

The intention of this chapter has been to further establish the ethics of care as the central point of deliberations about the future of care in the UK. I noted various contentions associated with this including the way informal care is formulated as a private concern and therefore not an area which concerns the state. As a result informal care is only noticed when a request for support for state resources is made. In turn this is viewed as undesirable in view of restricted state revenue, both practically and financially. Simultaneously there is an increasing commercial market for care, including home care as well as residential homes. Although these can be seen to meet need to an extent, they are still mainly staffed by women. In seeking to find a challenge to the female focused nature of care I identified the ethics of care as a means of considering care provision and practice in a different way.

The ethics of care is valuable because it is the most widely known feminist care theory. It has advantages when considering care because it highlights the importance of care as a relationship of trust and reciprocity. In order to provide good care, carers and the

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<sup>414</sup> Sevenhuijsen (n11) 189.

<sup>415</sup> Ibid 189.

cared for should be enabled to build a relationship based on these factors. The ethics of care is critical to the development of care because it can provide a framework identifying what is important in care practice. The ethics of care is persuasive in adult social care because of its focus on human needs and not resources. It recognises the changes in expectations of women in terms of paid work while the confidence that women will continue to be primarily responsible for care has not altered accordingly. In reinforcing ideas that female obligations are private, female voices are silenced, as recognised by Gilligan. In bringing the family arena into the public domain there is more possibility that we might address the inequalities these assumptions lead to. Nonetheless the challenges associated with contemporary care and how society will address these is not limited solely to the UK.

The problem that fewer women are available to care in light of a growing older population has not been adequately addressed. Notwithstanding, it has been recognised as a Europe wide challenge and some other countries have taken steps to try and tackle this. The Netherlands began to alter the situation in the 1980s and policies have been adopted accordingly. They appear to have taken a gender neutral approach and developed policies which recognise the contribution of men to care. The Dutch have formulated schemes which enable paid work to be flexible and adaptive to providing care at home. Sevenhuijsen argues there has been an ethics of care approach developed in the Netherlands but notes that primary responsibility for care is still assumed to be undertaken by family members. Although there is limited evidence at present, these systems appear to work more effectively than the current UK model. Nevertheless there continue to be significant problems and these need further examination.

If we are going to develop progressive feminist policies in care, I argue that it is imperative that everyone involved in that process should be considered equally. Men should be encouraged to get more involved in care practice but not simply because women would rather not. If we are going to enjoy true gender neutral care, both women and men should have the choice about paid work and/or care. What we need to develop are policies which can adapt to the changing requirements of people's lives. Policies which support enablement to care could enhance care practice as women would not view it as an expectation simply by virtue of their gender. Men might be more willing to undertake caring responsibilities and have talks with their employers as to how that can happen. I argue that feminism can offer an analytical tool with which to tackle new and emerging problems of care. In the next chapter I will explore legal technologies in care.

## **Chapter Four – Judicial thinking and social care**

### Introduction

In chapter one I identified how judicial reasoning targets outcomes and resources as part of the broader calculus of the utilitarian state. In this chapter I build on that analysis by extending it to include a discussion of risk and the tensions concerning risk between local authorities over care planning and the courts in their review of those plans. My focus is on care plans required under the Care Act 2014 and I suggest that they become legal technology as a by-product of utilitarian thinking. Care plans are compiled by local authorities and they repeatedly focus on tight resources and avoidance of risk. I examine these issues in the context of case law and discuss how local authorities manage the allocation of resources via the care plan and then how judges respond to challenges to care plans. In considering case law I evaluate how local authorities have framed the alleged risk posed by family members as a means to follow particular courses of action. Although my argument is that both courts and local authorities thinking are informed by utilitarianism, my analysis of the case law reveals critical differences between in their approaches.

The beginning of the chapter discusses the role of risk in modern society. I evaluate arguments put forward by social scientists such as Ulrich Beck<sup>416</sup> and Anthony Giddens<sup>417</sup> who argue that risk is ever changing. I scrutinise the way risk is discussed

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<sup>416</sup> Beck (n13).

<sup>417</sup> Giddens (n13).

in relation to care and consider how valuable the development of informed risk might be as a way of involving the service user more directly in their own care.<sup>418</sup> I analyse how, if at all, informed risk might apply to those that lack capacity. I argue that when assessing individual risk against blanket utilitarian policies, local authorities adopt a paternalistic approach that displaces utilitarian values. I analyse how courts consider notions of risk and how they resist paternalistic alternatives to utilitarianism.<sup>419</sup> Paternalism is problematic in care because the wishes of social workers, families and carers then take precedence over those of the care recipients such that the individual at the centre of care is overlooked.<sup>420</sup>

The middle section of this chapter discusses the role of care plans in the case of *McDonald* in connection with both local authority and courts' attitudes to resource allocation.<sup>421</sup> I consider how in *McDonald* risk was promoted as a means of justifying a care plan which the individual argued ignored her wishes and dignity.<sup>422</sup> I critique the utilitarian focus that the majority judges applied in this judgment, highlighting the importance they placed on risk, resources and the eventual outcome.

The final section of the chapter focuses on judicial thinking where the care recipient lacks legal capacity. The cases illustrate that those individuals without capacity are often significantly affected by the contrasting wishes of those involved in their care.<sup>423</sup>

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<sup>418</sup> Marchant (n14).

<sup>419</sup> There is a comparative analysis of utilitarianism and utilitarianism in terms of practical technology in the next chapter.

<sup>420</sup> Discussed further in the next chapter.

<sup>421</sup> *McDonald* (n3).

<sup>422</sup> *McDonald* concerned an individual who challenged her care plan after the local authority reinterpreted her needs as incontinence rather than mobility in order to reduce her care package and save money.

<sup>423</sup> The identified cases have been found through Westlaw legal database using search terms including the words 'care homes, residential care and mental capacity.'



Further to my discussion of risk, I identify cases where the local authority has deemed a particular relative to pose a level of risk to the individual. My argument is that, in fact, local authorities are keen to implement care plans and can react inappropriately if the care plan is opposed by family members. As a result courts are left to analyse discourse around risk in relation to potential outcomes and re-establish the central position of the individual.

I develop the last chapter's theme by recognising there are considerable and varied problems in adult social care which are currently not appropriately addressed. I have argued a feminist approach would assist in building a better care framework and support that by illustrating how utilitarian values are inappropriate to care implementation. I highlight the reasons why I claim that both utilitarianism and paternalism are inadequate approaches to care and how legal technology needs a more sympathetic application. Instead I present the argument that feminist legal thinking would be a more appropriate approach to improve care.

## 2. Understandings of risk in modern societies

There is a misconception that risk is a relatively new consideration resulting from development of modern societies.<sup>424</sup> Beck, a leading theorist of risk in the liberal state, argued that it is modernisation itself which has heightened awareness of risk.<sup>425</sup> Theorists do not claim there was no risk in the past merely that different types have

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<sup>424</sup> Beck, U., *World at Risk* (Polity Press, 2009) 24-25.

<sup>425</sup> *Ibid* 25-26.

emerged as a result of increased industrialisation.<sup>426</sup> Beck's view was built on an idea that risk has always existed but has altered alongside changes in modernisation. Beck argued that 'manufactured risks', as pinpointed by Giddens in his 1999 work, produced by human beings are in fact more harmful than natural risks such as hurricanes, floods etc.<sup>427</sup> Adult social care has not been immune from increasing concerns with risk promoted by new technologies.<sup>428</sup> The case law supports Beck's argument that risk changes with not only with technological progress but also because of changing human understandings of risk. I consider it valuable to try and reduce risk in care to a negligible level but do not claim that all risk should be avoided. I recognise that wholesale elimination of risk would not be normal or desirable in the majority of situations, especially if we accept that risk is a routine part of life.

Beck argued that notions of risk are borrowed from the expansion of technology and desire to exercise individual choice.<sup>429</sup> He enlarged on his previous work which noted that traditional structures of society had been modified and there was added importance placed on individual agents.<sup>430</sup> We can identify the responsibility placed on individuals through changes in care policies which promote individualisation but simultaneously placed restrictions on choice through resources, including Direct Payment schemes. Beck sees equality as being compromised by risk because of growing demand for self-determination which is balanced by dependence and need for the benefits of safe relationships.<sup>431</sup> Beck states that if men fail to act to strengthen equality in line with their intentions, structural inequality will be reinforced through that

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<sup>426</sup> Beck (n13) 19.

<sup>427</sup> Giddens (n13) 44.

<sup>428</sup> Care technologies will be further discussed in the next chapter.

<sup>429</sup> Beck (n424) 25.

<sup>430</sup> Ibid 3.

<sup>431</sup> Beck (n424) 3.

lack of action.<sup>432</sup> There has been a recognition in care in respect of autonomy but this has been circumvented to an extent by a desire to promote safety. The emphasis the liberal state places on individual autonomy has particular consequences for those in receipt of social care in terms of risk arguments.

Giddens, another prominent risk theorist, considers risk to be integral to both “probability and uncertainty”.<sup>433</sup> He points out that where a result is absolutely certain, there is no risk. He identifies a need to distinguish between deliberate risk taking and exposure to inadvertent risk. Deliberate risk taking could be viewed as a more autonomous decision than being exposed to risk by others or being unaware of the risk. In consequentialist theories, including utilitarianism, the value of taking risks is ultimately decided on the outcome. Therefore if a result turns out to be bad, then on reflection the risk would be considered to be a bad choice. If the end result was positive, the risk would be deemed to be acceptable. From a utilitarian perspective only risks with unsatisfactory results would be viewed as detrimental.

The elimination of risk has been problematic in care because it has led to policies that fail to place weight on individuality. What might be considered to be good for some may be detrimental to others. The utilitarian maxim of the benefit for the majority fails in connection with care because it neglects to evaluate complex needs. The maximisation of happiness for the majority in utilitarianism would consider that risks associated with a particular technology or condition in care could lead to benefits for most and would be applied to all. If this approach caused unforeseen or unpredictable

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<sup>432</sup>Beck (n13) 104.

<sup>433</sup> Giddens (n13) 40.

consequences to a few this would be overlooked because of its advantages for others. In care, where the potential results might be particularly deleterious, this blanket method is arguably a significant risk in itself. Nevertheless the courts have had an interesting approach concerning risks in care.

### 2(i) How risk has been considered by the courts

In the past courts have taken a realistic and pragmatic approach to the idea of risk. In his dissenting judgement in a 1919 espionage case, *Abrams v United States*, Holmes J stated that, “all life is an experiment”.<sup>434</sup> He recognised that life carries risks and that we should embrace some of these rather than endeavour to prevent them. Every day we manage commonplace hazards such as crossing the road or driving a car and accept them almost without thought. . Holmes J noted that “every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge”.<sup>435</sup> His statement acknowledges that some level of risk is inherent to human life and that we have to accept that we cannot always predict end results. He seemed to be arguing that eliminating risk was not only impossible, but undesirable.

In the UK courts have tried to find a realistic balance in considering levels of risk in care. A similar attitude can be seen in the 1954 negligence case of *Watt v Hertfordshire County Council*.<sup>436</sup> Here Denning LJ stated “It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk”

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<sup>434</sup> *Abrams v United States* 250 US 616.

<sup>435</sup> (n434) [360] (Abrams LJ).

<sup>436</sup> *Watt v Hertfordshire County Council* 1 WLR. *Watt* was a Court of Appeal negligence case.

and “against the end to be achieved”.<sup>437</sup> The case centred on a fireman on his way to rescue a woman trapped under a vehicle. The fireman had to carry a heavy jack in the fire engine but when it braked suddenly, Watt, another fire fighter was injured when the jack fell on him. Denning LJ took care to remind the court they should keep the intended result in mind when trying to balance other considerations. If we accept that we cannot eliminate all risk then we have the potential to create a legal care framework which concentrates on which risks we deem to be acceptable. For risks society does not deem to be reasonable, open discourse would be encouraged in order to develop an effective plan for individual cases. Both cases consider risk as an inevitable and normal part of life. Each considered what risks would generally be considered to be acceptable to society in general. It is critical that views of all those involved in care are evaluated carefully but particularly the individuals subject to care provision.

## 2(ii) Establishing what is a reasonable risk in care

As discussed in chapter one, increasing importance has been placed on issues including autonomy, rights and individualisation in care by the liberal state. Yet this sits awkwardly with the growing culture of trying to eliminate risk whenever possible.<sup>438</sup> The impact of risk elimination can mean that autonomy of care recipients can be discounted by the risk averse considerations of others. I consider this approach to be paternalistic because although it may be advantageous to carers, families and local authorities, it restricts the ability of the individual from making their own choices. Although it can be tempting for care providers to adopt paternalistic approaches

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<sup>437</sup> (n475) [838] (Denning LJ).

<sup>438</sup> Marchant (n14) 4.

towards care of the vulnerable, this does not lead to good care. Marchant advocates the idea of accepting what he sees as “reasonable risks” in care as opposed to simply attempting to eliminate them all.<sup>439</sup>

Marchant recognises that carers can be in a very difficult position.<sup>440</sup> In permitting some level of risk taking they have to gauge potential outcomes. In chapter one I established that utilitarian judges focus on outcomes and I argue that they will consider risk in light of the potential outcome of their judgment. Carers need to decide on an appropriate time to stop an activity if it develops into too much of a risk. For instance, it may be that a dementia patient can wander for a certain distance but this would be curtailed if there was a busy road or stream nearby. We can see that carers are treading a fine line when evaluating risks, particularly around those that lack capacity.<sup>441</sup> In terms of resources, having one to one individual care is expensive. In addition, any care which the state provides can result in legal and financial penalties when something goes wrong.<sup>442</sup> As will be seen from the case law later in this chapter, local authorities have to be highly aware of risks in care and how to limit these through provision of resources and reduction in state involvement in care.

There has been a contentious move by government away from accepting the state’s role in managing the risks and responsibilities of social care. The NHS and Community Care Act 1990 was the first legislation to shift responsibility for adult social care to local authority social care departments. The premise of that Act has been most recently

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<sup>439</sup> Marchant (n14) 6.

<sup>440</sup> Ibid 6.

<sup>441</sup> Marchant (n14) 19.

<sup>442</sup> Several cases will be discussed in the following chapter.

restated by the Conservative and Liberal Coalition government in its 2010 White Paper.<sup>443</sup> The White Paper espoused a “radical approach” which built on the idea of community infrastructure and support.<sup>444</sup> It placed an emphasis on encouraging resilience and responsiveness among the population, thus reducing state liability in social care. However this shift towards greater individual responsibility for care begs the question as to whether we can expect a general standard of provision. Marchant argues local authorities will slide more towards paternalistic approaches that restrict those carers and care recipients who want to take more risks.<sup>445</sup> In effect, he is suggesting increased adoption of a blanket approach towards what are deemed to be acceptable risks. What is viewed as acceptable will be decided by local authorities who are under pressure in relation to safety within limited resources. Restricting risk allows the local authority to reduce risks taken by the cared for, thereby diminishing autonomy.

There is a suspicion that we now concentrate on preventing something potentially serious happening instead of considering what could be positive about taking risks.<sup>446</sup> To counteract this approach, Marchant develops the notion of informed risks.<sup>447</sup> He suggests that we should accept that we all have a right to take risks whether subject to care or not.<sup>448</sup> His approach is positive from the view that it would allow care recipients to take some considered risks. Although this is a way of exercising

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<sup>443</sup> *Healthy Lives, Healthy People: Our strategy for Public Health in England*. Government White Paper 2010. <https://www.gov.uk/government/publications/healthy-lives-healthy-people-our-strategy-for-public-health-in-england>

<sup>444</sup> Ibid 9.

<sup>445</sup> Marchant (n14) 11.

<sup>446</sup> McLoughlin, K., *Regulation and risk in social work: the General Social Care Council and the Social Care Register in context*, *British Journal of Social Work* [2007] Vol 37, No.7, 1263-1277.

<sup>447</sup> Marchant (n14) 19.

<sup>448</sup> Ibid 19.

autonomy it is harder to envisage in relation to those that do not have capacity.<sup>449</sup> It would be reasonably difficult, if not impossible in some cases, to ascertain how far individuals understood the risk they were taking. I view this as a limitation in Marchant's argument and it again raises the importance of re-evaluating care of those without capacity.

There is a powerful impetus in care practice to minimise levels of risk which particularly impacts those without capacity as they are subject to carers and families' wishes. It is also possible that anxieties about litigation influence behaviour.<sup>450</sup> There exists a strong antipathy to different kinds of risk in care settings, suggesting a compelling desire to protect people as completely as possible. Risk can be invoked as a persuasive argument in order to attempt to prevent unwanted outcomes or as means to enhance safety. Giddens stated that "Society is increasingly preoccupied with the future (and also with safety), which generates the notion of risk".<sup>451</sup> Although utilitarian judicial thinking focuses on outcomes, ideas about potential risk can be viewed as based on fear of consequences of risk taking.

Giddens' argument acknowledges that society has changed in its perceptions and ideas about risk while highlighting our desire to stay safe. His claim is pertinent in relation to those we deem as in need or vulnerable. Our ideas of risk are calculated on what we know and the likelihood of possible outcomes based on that knowledge. However, considerations based on outcomes do not fully support the uncertainty of

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<sup>449</sup> Marchant (n14) 19.

<sup>450</sup> Ibid 4.

<sup>451</sup> Giddens (n13) 3.



life or fluctuations of human embodiment. In care, an approach based on generalised outcomes is problematic because a person with one set of requirements or characteristics will not experience exactly the same results as another. A resulting lack of predictability is what elevates discourses around risk to levels of considerable concern. These worries are evident in care plans, documents which set out assessed, eligible needs and the manner in which the local authority plans to meet them. The process of developing care plans involves service users and carers as an attempt to control risk on the basis of primary prevention within a particular resource envelope. However it is not possible to rule out all uncertainty as to the ultimate result.

### 2 (iii) Care plans as legal technology

Care plans are legally required by sections 9 and 10 of the Care Act 2014.<sup>452</sup> The Care Act stipulates that care plans determine need and whether individuals meet local authority criteria regarding whether those needs will be met.<sup>453</sup> They carry legal weight, identifying appropriate care technologies and apparatus for service users.<sup>454</sup> Care plans depend on social worker's expertise and their relationship with the service user. Local authority social workers are aware of pressure to meet needs within constrained budgets. Care plans reflect often unique complex needs, having significant consequences when implemented. Furthermore, legislation stipulates that while preparing the care plan, the local authority has to include both the individual and the carer.<sup>455</sup> The onus is on local authorities to take reasonable steps to reach an

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<sup>452</sup> The Care Act came into force in April 2015. It modernises and consolidates several previous Acts.

<sup>453</sup> Care Act 2014 s1(1),

<sup>454</sup> Carr (n1) 216. Care plans set out how assessed eligible needs will be met. They detail which needs the local authority is going to meet and how that will be done.

<sup>455</sup> Ibid s1 (3).

understanding with individuals and carers about how needs will be met, requiring a degree of co-operation and understanding between local authorities, service users and carers.<sup>456</sup>

Care plans touch on various aspects of a care recipient's life and are reviewed regularly.<sup>457</sup> Carr notes that David Engel has pinpointed the intimate levels of personal detail and information they carry in respect of the individual they pertain to.<sup>458</sup> Care plans rely on social workers' perception of often complicated levels of need and their conclusions apply not only at the time of the assessment but also into the future.<sup>459</sup> If we accept, as I argued in the first chapter, that law reinforces social norms, legally valid care plans can be understood as reflecting normal assumptions.<sup>460</sup> When a local authority care plan is challenged the manner in which judges understand the plans is critical. There can be significant differences between the provisions local authorities are willing to make and the desires of the service user. If judges accept care plans as buttresses of expected care provision, individuals will find it difficult to persuade them otherwise.

There can be conflicts between resources and need, and these conflicts potentially increase once the wishes of individual care recipients and their families are considered. As identified in the case law below, the care recipients who are subjects of the care plan might be framed in a certain way in order to allow the local authority

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<sup>456</sup> Care Act s1 (5).

<sup>457</sup> NHS Choices - *Care and Support Plans* [www.nhs.uk/Conditions/social-care-and-support-guide/Pages/care-plans.aspx](http://www.nhs.uk/Conditions/social-care-and-support-guide/Pages/care-plans.aspx) . Accessed October 16<sup>th</sup> 2015.

<sup>458</sup> *Origin Myths: Narratives of Authority, Resistance, Disability and Law*, 27 Law and Society Review [1993] 785.

<sup>459</sup> Carr (n1) 216.

<sup>460</sup> As discussed in chapter one.

to develop and implement its plan. Care plans reflect expectations of local authorities and in doing so, conform to utilitarian resource maximisation for the majority, resource based decision outcomes and compulsions to eliminate risk.

### 3. Local authority expectations and resources

*McDonald*, discussed in chapter one, illustrates how judicial decision making operationalises a utilitarian calculus of outcomes, resources and risk in the context of care plans. The decision has been described as a “triumph of black letter law” by Clements, who viewed the decision as law taking priority over individuals.<sup>461</sup> Ms McDonald challenged her care plan, which reinterpreted her mobility needs as incontinence in order to reduce the cost of care. The court’s majority judgment (Lady Hale dissented) allowed Kensington and Chelsea to furnish Ms McDonald with incontinence pads instead of providing a night carer to help Ms McDonald access her commode at night. The local authority used the care plan to reinterpret mobility problems as incontinence which was linked in court to outcomes, resources and risk for both the local authority and Mrs McDonald.<sup>462</sup> As a technology in themselves, incontinence pads would appear to be an inappropriate device with which to address mobility problems.<sup>463</sup> Although incontinence pads are more cost effective than an all-night carer, Ms McDonald argued these were an affront to her dignity. Instead, the care plan allowed for a carer to arrive at Ms McDonald’s flat each morning to help her wash.<sup>464</sup>

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<sup>461</sup> Clements (n10) 675.

<sup>462</sup> (n3) [1] (Brown LJ).

<sup>463</sup> Carr (n1) 216.

<sup>464</sup> (n3) [11] (Brown LJ).

There was a financial motive as the saving for the local authority would amount to £22,000 per annum.<sup>465</sup> Therefore the alternative technology suggested in the care plan was highly cost effective. The assessment used to produce the care plan introduced the idea of risk and was based on enabling Ms McDonald to urinate safely at night.<sup>466</sup> The local authority recognised there were risks associated with her getting out of bed during the night. In replacing a carer with pads the risks could be reduced to a negligible amount but at the cost of Ms McDonald's dignity and autonomy.<sup>467</sup> The outcome suggests there is considerable weight placed on the way needs are defined in care plans. Brown LJ held that the reviews following the 2008 care plan did not mean that the local authority should have to continue the same package stating "there can be no objection...to the respondents identifying and meeting the appellants' night-time needs in the manner proposed".<sup>468</sup> As a result, this kind of rationale can have a considerable impact on individuals at the heart of care. It can be argued the majority judges had limited their resource outcome deliberations to the local authority's perspective. The influence of utilitarianism can be seen through reducing cost and using arguments of risk to prevent Ms McDonald leaving her bed. Although the outcome was positive for the state, it was far from adequate for the individual. *McDonald* highlights how utilitarianism fails those subject to care and Carr states that the vulnerable adult is then formulated as "a welfare subject rather than a rights-bearing citizen".<sup>469</sup> As an individual with needs, the utilitarian system overlooks discourse involving rights, instead framing that person as reliant on state support.

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<sup>465</sup> (n3) [11] (Brown LJ).

<sup>466</sup> (n3) [11] (Brown LJ).

<sup>467</sup> Carr (n1) 213.

<sup>468</sup> (n3) [15] (Brown LJ).

<sup>469</sup> Carr (n1) 209.

The local authority's arguments around risk and safety were persuasive to the majority judges in *McDonald*.<sup>470</sup> If we accept incontinence pads and sheeting as a technology, they were used to enhance safety while overlooking Ms McDonald's desire for a night carer. There appeared to be a contrast between how the court viewed concepts of safety and the fact she felt safer with assistance from a carer. Although it was not in force at the time, the Care Act now places statutory emphasis on the wishes of the individual.<sup>471</sup> How this emphasis will operate in practice in terms of conflict between individuals and local authorities remains to be seen.<sup>472</sup> Ms McDonald was placed in a position where she became subject to the rationalisation of others including the local authority and court. The care plan was instrumental in framing her this way because of the assessment produced by the local authority. As a legal technology, the care plan was compelling in court but proved detrimental to the choices and dignity of Ms McDonald. There have been concerns raised about the warehousing of elderly care by the voluntary sector.<sup>473</sup> Warehousing refers to the problems identified in this work concerning the growing elderly population, lack of available carers and the way care is provided on a general level. The case of *McDonald* is an example of the utilitarian value of majority maximisation at the expense of individuals. Although the focus of this work rejects utilitarian principles in care, utilitarian discourse seems to step aside and be replaced by paternalism in cases where individuals lack capacity. My argument is

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<sup>470</sup> (n3) [39] (Kerr LJ).

<sup>471</sup> S1 (3).

<sup>472</sup> Ms McDonald's case was unsuccessful in the European Court of Human Rights in 2014 but it held that local authorities should consider dignity when implementing care plans. Case 4241/12 *McDonald v. The United Kingdom* [2014] ECHR

<sup>473</sup> Cornwell, J., *The care of frail older people with complex needs: time for a revolution* The King's Fund, The Sir Roger Bannister Health Summit, Leeds Castle [2012] 9.

[http://www.kingsfund.org.uk/sites/files/kf/field/field\\_publication\\_file/the-care-of-frail-older-people-with-complex-needs-mar-2012.pdf](http://www.kingsfund.org.uk/sites/files/kf/field/field_publication_file/the-care-of-frail-older-people-with-complex-needs-mar-2012.pdf)

that this is equally problematic. In light of this concern, I turn now to cases where risk has been identified by local authorities in terms of relationships of those lacking capacity.

#### 4. Risky relationships and perceptions of local authorities and the courts level

In *McDonald* the court supported the local authority's care plan on grounds of safety and resources despite Ms McDonald (who had capacity) expressing quite distinct wishes. Here I consider cases where individuals who lacks capacity are in relationships that local authorities interprets as risky. In *A London Local Authority v JH* the husband of the individual who was the subject of the care plan, was deemed to be detrimental to his wife's care.<sup>474</sup> The question before the court was whether Mrs H had capacity to decide where she wanted to live.<sup>475</sup> Despite her previously expressed desire to remain at home, the local authority wanted her to live in a residential home.<sup>476</sup> The local authority not only believed that Mrs H would be safer in residential care, such an arrangement would result in savings to its budget. Her husband wanted her to live at home and had been providing care for her complex needs for a long time.<sup>477</sup> The local authority did accept his care had been good but following Mrs H's second stroke, they decided to reduce the care package.<sup>478</sup> At the same time the local authority offered Mr H just three hours of respite against the twenty four hours each week he requested to meet his own health needs if Mrs H did remain at home with him.

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<sup>474</sup> (n16).

<sup>475</sup> (n16) [3] (Eldergill DJ).

<sup>476</sup> (n16) [Local Authority's submissions Exhibit 1].

<sup>477</sup> (n16) [10(9)] (Eldergill DJ).

<sup>478</sup> (n16) [7(3-5)] (Eldergill DJ).

The local authority invoked the language of risk in order to support its assessment and its decision to place her in residential care. Mr H was framed as being uncooperative because he resisted the local authority decision.<sup>479</sup> As a result, the local authority claimed it was too risky for Mrs H to return home to him.<sup>480</sup> Mr H's care of his wife had always been accepted as good prior to this, suggesting it was because he did not acquiesce to the new package that he had become a risk. The local authority resisted acknowledging that Mr H was likely to be the most appropriate judge of his wife's feelings, instead presenting him as difficult.<sup>481</sup> Mr and Mrs H's desire to remain together as a married couple was seen as unnecessarily obstructive by the local authority. Rather than trying to find an acceptable middle ground, the local authority then sought a deprivation of liberty application for Mrs H. Ultimately this was not viewed to be appropriate by the court.<sup>482</sup> The court's view suggests that implementation of a care plan will not be considered the most important factor when evaluating parties arguments about risk apparently posed by family members.

Adult social care cases involving individuals that lack capacity are heard by the Court of Protection which, in contrast to local authorities, appears to consider family positively.<sup>483</sup> Series, an academic and social care blogger, notes that where an individual or their family member does not concur with a proposed care plan, local authorities will raise concerns. Further she argues that in trying to limit care spending,

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<sup>479</sup> (n16) Local Authority's submissions at 9.

<sup>480</sup> (n16) Exhibit 3.

<sup>481</sup> (n16) Exhibit 4. The Court did not support the local authority argument that it was in Mrs H's best interests not to return home.

<sup>482</sup> (n16) [12] (Eldergill DJ).

<sup>483</sup> Series, L., *Cooperation and Coercion* October 2011  
[thesmallplaces.blogspot.co.uk/2011/10/cooperation-and-coercion.html](http://thesmallplaces.blogspot.co.uk/2011/10/cooperation-and-coercion.html)

individuals will be expected to invite strangers into their homes and fit in with carers' schedules. If we apply a utilitarian viewpoint we can see that costs and time constraints become the over-riding factor in care rather than individuals.

In *JH* the court actively resisted the local authority's construction of risk. Eldergill DJ commented that although the local authority was critical of Mr H's reluctance to compromise, they were not open to adjustment either.<sup>484</sup> Furthermore Eldergill DJ found that while Mr H had been prepared to make some concessions, the local authority had remained resolute. Although Mr H admitted to the court that he was not the easiest person to get along with, the court did not consider him to be a risk.<sup>485</sup> Eldergill DJ placed sizeable weight on the couple's long term relationship and found in their favour in his interim decision.<sup>486</sup> The court's decision highlights the balancing act local authorities must keep in mind when examining the relationships of those lacking capacity and risk. In *JH* it appears that utilitarian resource and outcome considerations were viewed as secondary by the Eldergill DJ in comparison with the couple's relationship. The case is notable because although risk was discussed in terms of Mrs H's health, her husband was constituted by the local authority to pose the greatest risk. The court rejected the local authority's position, instead placing value on the husband's care and knowledge of his wife's longstanding wishes.

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<sup>484</sup> (n16) [14] (Eldergill DJ).

<sup>485</sup> (n16) [10] (Eldergill DJ).

<sup>486</sup> (n16) [14] (Eldergill DJ).



#### 4(i) Risky relationships and their effect on care plans

Another long term relationship had previously been a key focus of the enablement of the care plan in *Local Authority X v MM (by her litigation friend, the Official Solicitor), KM*.<sup>487</sup> MM lacked capacity to litigate, to decide where she could live or manage finances.<sup>488</sup> Although MM's case centred on whether she had capacity to marry or to have a sexual relationship, it is relevant to analysis here from a risk perspective. Although MM and her husband KM had lived together for long periods during their relationship, the local authority believed that they ought to live apart.<sup>489</sup> MM was a vulnerable adult and her relationship with KM had some highly detrimental aspects. There had been an effect on MM's wellbeing in the past as well as occasions of domestic violence. KM himself had mental health problems and coupled with his noticeable influence on MM was deemed to be a significant risk to her.<sup>490</sup>

The case went to court on several occasions and at times MM went missing.<sup>491</sup> MM's absence was attributed to KM and on one occasion, Bodey J ordered that KM must assist the police and local authority in returning MM safely.<sup>492</sup> There were ongoing concerns about contact and KM had been aggressive and abusive towards staff caring for MM in the past.<sup>493</sup> The court restricted contact in order to protect staff.<sup>494</sup> The local authority had reduced contact from twice weekly to two hours a month.<sup>495</sup> MM made it

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<sup>487</sup> *Local Authority X v MM (by her litigation friend, the Official Solicitor) KM* [2007] EWHC 2003 (Fam).

<sup>488</sup> (n487) [25] (Munby LJ).

<sup>489</sup> (n487) [21] (Munby LJ).

<sup>490</sup> (n487) [4] (Munby LJ).

<sup>491</sup> (n487) [5] (Munby LJ).

<sup>492</sup> (n487) [9] (Munby LJ).

<sup>493</sup> (n487) [9] (Munby LJ).

<sup>494</sup> (n487) [13] (Munby LJ).

<sup>495</sup> (n487) [22] (Munby LJ).

clear that she wished to continue a relationship with her husband and viewed this as unacceptable.<sup>496</sup>

Although KM had been a negative influence on MM, the local authority's construction of risk led to punitive sanctions for MM herself. MM's case highlights the difficulties local authorities face when trying to protect vulnerable people from exploitation and abuse. The local authority's responsibility becomes especially difficult when this occurs in the context of personal relationships. The response of the court to these kinds of considerations has to be appropriately sensitive and evaluate the pros and cons in each situation. The Court of Protection's position is unique in deciding issues concerning those without capacity. According to Bartlett the court in *MM* was attempting to move away from the broadening of the original Mental Capacity Act values.<sup>497</sup>

In attempting to consider what risks might be acceptable, courts have tried to strike a balance between local authority concerns and individual rights. In *MM*, Munby LJ asked "What good is it making someone safer if it merely makes them miserable?"<sup>498</sup> Munby's powerful question identifies a resistance to paternalistic principles which endeavour to secure a particular outcome through restriction of risk. In attempting to enforce MM's care plan, the local authority wanted to eliminate what it believed was the main risk in her life. However, given that this risk was her husband, the court rejected paternalistic pathways to reduce MM's contact with him. Bartlett states that

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<sup>496</sup> (n487) [57] (Munby LJ).

<sup>497</sup> Bartlett, P., *Capacity, best interests and sex* Journal of Mental Health Law [2008] 80-87.

<sup>498</sup> (n487) [120] (Munby LJ).

the court specifically highlighted the importance of MM's wishes and feelings.<sup>499</sup> Further, Bartlett acknowledges that the court, at paragraph 116, specifically warned against adoption of paternalism and assumptions that the state could make better care provision than families and carers.<sup>500</sup>

The court reinforces that cases have to be decided on an individual basis. In both *JH* and *MM*, judges attributed considerable weight to long-term relationships. Although the women at the centre of each case lacked capacity, each was seen in the context of a long-term relationship and negative and positive factors were assessed. In *JH*, the husband was able to put forward his arguments to enable Mrs JH to return home. In *MM*, the Official Solicitor ensured the court saw how significant MM regarded her long-term relationship to be to her. The importance of giving vulnerable people a voice in court to argue against local authority decisions is critical. The court's role is particularly important in cases where judges have to consider the position of vulnerable people and especially those without capacity.

#### 4(ii) Analysis of arguments around vulnerability and capacity

Individual care recipients who lack capacity are particularly vulnerable to the wishes and opinions of other people with an interest in their care and this is highlighted when courts are asked to make 'best interests' decisions about their care.<sup>501</sup> The definition

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<sup>499</sup> Bartlett (n497) 86.

<sup>500</sup> Ibid 86.

<sup>501</sup> Defined in the Mental Capacity Act 2005 s4.

of best interests depends on interpretation of potentially differing opinions of individuals and professionals. Bartlett argues that best interests decisions are based on a wide variety of factors and many opinions are canvassed in the course of making them.<sup>502</sup> One possible consequence of this process is that greater weight might be attributed to professional as opposed to lay arguments, leaving courts to strike an appropriate balance.

In many cases local authorities have provided high levels of care, but this level of care is not always enough to enable a person to remain at home. In cases where capacity fluctuates, the role of care and the local authority can be difficult to balance and problematic because care will need to be adapted appropriately and the local authority need to plan for that. In *Re KK; CC v KK*, KK had longstanding complex needs including Parkinson's disease, paralysis on her left side and vascular dementia.<sup>503</sup> The local authority had provided significant levels of care in order to keep her at home as long as possible. KK was deemed to use the care technology provided to her excessively and unnecessarily.<sup>504</sup> KK had been provided with a 'Lifeline' system which allows the service user to alert carers in an emergency, usually through pressing a button on a device worn around the neck. KK had used her Lifeline system over a thousand times in six months.<sup>505</sup> Most of the time she had used it for the purposes of reassurance because she was worried about something.<sup>506</sup> Initially it was decided that moving to a residential home would be in her best interests.<sup>507</sup> She returned home after a spell and again used the Lifeline too often. The pattern continued until the home

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<sup>502</sup> Bartlett (n497) 86.

<sup>503</sup> *Re KK; CC v KK* (n17).

<sup>504</sup> (n17) [4] (Baker LJ).

<sup>505</sup> (n17) [6] (Baker LJ).

<sup>506</sup> (n17) [6] (Baker LJ).

<sup>507</sup> (n17) [5] (Baker LJ).

made an urgent deprivation of liberty application under Schedule 1A of the Mental Capacity Act 2005.<sup>508</sup>

A previous hearing had enabled KK to spend time in her home during the day.<sup>509</sup> The flexibility of this Care Plan was supported by Baker J who warned against adoption of paternalistic practices by local authorities.<sup>510</sup> He stated “There is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective”.<sup>511</sup> Baker LJ appears to warn against local authorities adopting a paternalistic approach as an alternative to a utilitarian outcome led focus based on reducing demand on resources. He acknowledged that while the doctor who conducted the capacity assessment expressed concerns about KK’s “vulnerability, loneliness, isolation and anxiety”, KK had been very clear about her understanding of the risks involved in remaining in her own home.<sup>512</sup> The residential home’s Matron agreed that combining her stay with regular visits to her home was the “ideal care package” for KK.<sup>513</sup>

KK’s legal representative made a similar argument to that in *McDonald* – the cheapest option, in *KK* a care home, can be presented as the safest solution. The appellant claimed that the Doctor’s conclusion had been heavily influenced by the consideration

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<sup>508</sup> (n17) [4] (Baker LJ). Deprivations of liberty have been a contentious area of law and there is not scope within this work to address detailed analysis of them further.

<sup>509</sup> (n17) [9] (Baker LJ).

<sup>510</sup> (n17) [25] (Baker LJ).

<sup>511</sup> (n17) [25] (Baker LJ).

<sup>512</sup> (n17) [32] (Baker LJ).

<sup>513</sup> (n17) [35] (Baker LJ).

of resources. It was contended the Local Authority, in a situation comparable to *JH*, had not offered different care packages other than their preferred option of residential care to *KK*, suggesting, once again, a utilitarian approach based on restricted resources.<sup>514</sup> *KK* gave evidence in court. She complained she did not always find it easy to eat food given to her at home because it was often left at the back of a crowded table.<sup>515</sup> Her Parkinson's disease meant that she found it difficult to lift drinks independently. She objected to her food being mashed up and being expected to eat with a spoon when she could use a fork.<sup>516</sup> *KK* illustrated an awareness of the risk to remaining at her home by stating that she would prefer to die at home as a result of a fall than live anywhere else.<sup>517</sup>

*Baker J* found her evidence compelling.<sup>518</sup> He decided *KK* had a clear comprehension of her needs and condition and the right to be particular about what she ate and drank.<sup>519</sup> She illustrated an appreciation of risk through reluctance to visit her home during wet weather through the heightened risk of slipping.<sup>520</sup> *Baker J* concluded that the professionals involved had placed too much emphasis on their own wishes. The Judge recognised that on at least one occasion *KK* had been subjected to unnecessary stress because she did not want to return to the residential home.<sup>521</sup> On that occasion *KK*'s wishes had been ignored and conflict had ensued. The court

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<sup>514</sup> (n17) [35] (Baker LJ).

<sup>515</sup> (n17) [45] (Baker LJ).

<sup>516</sup> (n17) [45] (Baker LJ).

<sup>517</sup> (n17) [50] (Baker LJ).

<sup>518</sup> (n17) [64] (Baker LJ).

<sup>519</sup> (n17) [64 and 72] (Baker LJ).

<sup>520</sup> (n17) [73] (Baker LJ).

<sup>521</sup> (n17) [99] (Baker LJ).

acknowledged that KK was in an unusual situation in being able to spend time at home every day and she had a greater degree of freedom than most.<sup>522</sup>

The singular position of courts in making decisions about an individual's life torn between the views of the local authority and the wishes of an individual is recognised by Bangham. She argues that while the local authority and the professionals it consulted argued that KK did not have capacity, the court's role was unique because it was able to evaluate all the evidence before it in an unbiased fashion.<sup>523</sup> There is a utilitarian contention in this case involving the risk to KK if she remained in her own home and the savings the local authority could make if she was permanently in a care home. Bangham states that in relying on the evidence of a range of professionals, including social workers and doctors, weight will be attached to different factors.<sup>524</sup> The factors that professionals might deem important such as risk and money, may be seen in a different way by the individual. The court faces the challenge of picking apart these considerations and placing the importance of the individual back at the centre of discourse. Indeed Pack, a local authority lawyer and blogger, argues that best interests are highly subjective.<sup>525</sup> He links the *McDonald* case to the adoption of paternalistic approaches of local authorities as providing a means to follow state agendas. It follows that if this agenda is a utilitarian one, then utilitarian outcomes, resources and risks will inform best interest determinations. In *KK*, professionals had concluded that KK lacked capacity but the court held that those opinions were not

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<sup>522</sup> (n17) [102] (Baker LJ).

<sup>523</sup> Bangham, S., *Family Law Online* [2013] [www.familylaw.co.uk/news\\_and\\_comment/deprivation-of-liberty-cc-v-kk-and-stcc-2012-ewhc-2136-cop-2012-coplr-627#.VzdRjPkrLiu](http://www.familylaw.co.uk/news_and_comment/deprivation-of-liberty-cc-v-kk-and-stcc-2012-ewhc-2136-cop-2012-coplr-627#.VzdRjPkrLiu)

<sup>524</sup> *Ibid.*

<sup>525</sup> Suesspiciousminds *An Englishwoman's home is her castle (unless she is 82)?* [2012] <https://suesspiciousminds.com/tag/kk-v-stcc-2012/>

determinative. Instead the court held KK's oral reasoning to be particularly valuable to its considerations in evaluating KK's levels of understanding.

## 5. Conclusion

The aim of this chapter has been to highlight the value of ever changing risk in care and comparing how that sits with the utilitarian backdrop of resources and outcomes. I argued that it is better to promote a more realistic understanding and acceptance of risk on an individual basis, avoiding blanket assumptions which direct care in an undesirable direction. Formulation of care plans must be realistic and sensitive to needs above resource and untenable risk arguments. In the next chapter I discuss utilitarian approaches to the problem of contemporary care in respect of care technologies. I evaluate the positive and negative aspects of technology and analyse it in comparison to the human touch. I discuss how practical technologies have been used as a utilitarian means to meet the challenge of contemporary care. I suggest that combined pressures of having fewer people able to care has been addressed in part by increased use of technology. I consider this particularly in connection with widely used technology such as hoists, examining both advantages and disadvantages of these for patients and carers. I also consider more elaborate technology including GPS and video surveillance, particularly when they are used to monitor dementia patients. The next chapter provides me with an opportunity to demonstrate my arguments in the context of a particular contemporary problem and the ways in which it has been utilised by the utilitarian state as a solution. I consider the effect of paternalism on those without capacity in terms of physical technology and identify feminist approaches as more conducive to effective care.



## **Chapter Five - The particular problem of contemporary care technology**

### **1. Introduction**

The final chapter contributes to the thesis by examining a contemporary dilemma in the delivery of care services, the problems associated with technological solutions to the provision of care. I argue that evaluations based on utilitarian and paternalistic approaches are inappropriate and consider whether feminist approaches would be more effective. My aim here is to highlight growing use of technology in care and identify reasons why I argue that it can be problematic. The increase in use of technology is partly as a result of recommendations made in care plans (discussed in the previous chapter). I consider how technology can be evaluated as a means of delivering care, examining whether it is dehumanising or empowering. I look at decisions to use technology rather than humans through the application of both utilitarianism and paternalism, arguing neither of these approaches are appropriate as evaluative tools. I argue that currently the ways we use technology to address problems in care are unsatisfactory. As an alternative I consider how feminist approaches, particularly those that value human responsiveness, are more conducive to resolving inevitable dilemmas in the use of care technology.

The chapter begins by recognising increasing use of technology in care and how this affect recipients of care. I focus on two distinct technologies, hoists and surveillance. I analyse the benefits these can bring for those involved in care and consider some of

the associated problems. I use various unreported cases to support my claim that while technology can be valuable in care, it carries various complications which should not be underestimated. When discussing technology I use McShane's arguments to support use of surveillance for those with dementia.<sup>526</sup> I analyse O'Neill's work who argues that great thought should be applied before applying surveillance to those without dementia.<sup>527</sup> I analyse the effects on carers and care recipients, questioning who benefits from increased technology in care. I discuss utilitarian approaches to technology and evaluate how utilitarians balance the good and bad aspects of technology in care and whether these are effective in contemporary care. I apply similar considerations to paternalistic applications to care technology. Both utilitarian and paternalistic approaches to care technology will be understood in the context of dementia patients. In considering how these approaches operate in care, I consider how appropriate they are for those subject to care and what problems may arise as a result.

The final section of this chapter evaluates care technology from a feminist perspective. I argue that applying a feminist approach is a more pertinent way to think about values and problems connected with care technologies. I consider how feminism places importance on the human touch and interactions.<sup>528</sup> I use Bail's argument that widespread technology should not be used without first considering the benefits to patients.<sup>529</sup> I support my argument using Niemeijer's work, who states that to improve

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<sup>526</sup> McShane, R., 'Should people with dementia who wander be electronically tagged? Yes' *British Medical Journal* [2013] 346; f603.

<sup>527</sup> O'Neill (n20) 606, 607.

<sup>528</sup> Astell (n23) 15-25.

<sup>529</sup> Bail, K.D., 'Electronic tagging of people with dementia: devices may be preferable to locked doors' *British Medical Journal* [2003] 326, 281.

care for those with dementia, there need to be deeper understandings of the condition rather than widespread application of surveillance.<sup>530</sup>

### 2(i). The growing use of technology in care

As far back as 1958 Arendt's *Human Condition* considered the rapid development of technology.<sup>531</sup> She suggested that advancement in technology affects our idea of what it is to be human and how our ideas of that might change in the future.<sup>532</sup> Arendt appeared to be aware that technology had potential to have a significant impact on the human body.<sup>533</sup> She appears to suggest that rapidly advancing technology would force people to question our physical limitations.<sup>534</sup> Arendt identified the desire to escape the limitations our bodies impose on us biologically and to embrace scientific developments.<sup>535</sup> Technology could have a critical part to play in alleviating the often complex needs of this group of people. It could also be useful in mitigating some of the difficulties associated with responsibilities of providing care.

### 2(ii). Advantages of using hoists

In recent decades there has been an increase in the use of a variety of technologies in care but these have not been unproblematic. There have been several unreported cases in the media involving the use of hoists which have illustrated the drawbacks of

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<sup>530</sup> Niemeijer (n21).

<sup>531</sup> Arendt, H., *The Human Condition* (University of Chicago Press 1958).

<sup>532</sup> Ibid 263.

<sup>533</sup> Arendt (n531) 261.

<sup>534</sup> Ibid 251.

<sup>535</sup> Arendt (n531) 250-251.

this kind of technology. Hoists are used to help lift and manoeuvre people in and out of chairs, beds and baths. They can be useful and have several advantages over manual lifting.<sup>536</sup> Using hoists reduces the likelihood of physical injuries including back and muscle strains. It can be better for the cared for to be lifted in a hoist as it enables them to be lifted more easily. For example, there is no need to drag them across a bed using a sheet in order to pick them up.<sup>537</sup> The individual is not subject to how far their carers can carry them but instead can be swung up and round in relative safety. Hoists are valuable as a lifting technology but are still reliant on correct technique, training and maintenance.

There are advantages of using technology for carers as long as technology is used properly. In *Thorley v Vicarage Residential Care Home* a carer was hurt lifting a care recipient.<sup>538</sup> Despite being given adequate training to use the hoist, a staff member chose to use a drag lifting method not sanctioned by the home, resulting in her sustaining a back injury. The carer argued that drag lifting had been used repeatedly in the past without consequence but the court refused to allow this as a defence.<sup>539</sup> Drag lifting has been stopped as a means of moving individuals because it can lead to harm, including causing bruising and tears in delicate skin. The carer had not followed the home's policy, instead using a method which increased risk to herself and care recipients. The court refused her compensation claim as she had chosen to use a riskier method not advocated by the care home.

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<sup>536</sup> *Equipment for moving and handling people* page 192

[http://www.acc.co.nz/PRD\\_EXT\\_CSMP/groups/external\\_ip/documents/guide/wpc108939.pdf](http://www.acc.co.nz/PRD_EXT_CSMP/groups/external_ip/documents/guide/wpc108939.pdf)

<sup>537</sup> This practice is known as drag lifting and involves a person being lifted under their arms.

<sup>538</sup> Unreported case, January 2010.

<sup>539</sup> Where a person is pulled up by lifting them under their arms.

### 2(iii). Drawbacks associated with using hoists

There have been several cases where technology has not been used appropriately with catastrophic results.<sup>540</sup> I have identified examples from health and safety law to highlight some issues. The first case carried the headline ‘Care home and its boss fined £337k after 100 year old died falling from hoist’.<sup>541</sup> The report involved a care home in Bedfordshire whose Managing Director pleaded guilty during a Health and Safety investigation to not training nurses properly. Nurses at the home had not received specific training in respect of this particular hoist (despite previous generic hoist training).

The case highlights that changes in technology must be supported by appropriate training and guidance for each new piece of equipment. The patient here suffered from dementia and would often become flustered and unhappy when being moved. On this occasion she had not been strapped in properly and fell five feet from the hoist to the floor. Foster J at Luton Crown Court said that she “died as a result of an avoidable accident”.<sup>542</sup> The judge’s comment focuses on the fact the hoist was not the problem but lack of training.

In a second unreported case, a Bupa care home was fined £100,000 plus £50,000 costs because of an accident involving a hoist.<sup>543</sup> Here a patient fell out of a sling while

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<sup>540</sup> The Care Quality Commission made its first prosecution of a care home in June 2016 <https://www.cqc.org.uk/content/care-provider-prosecuted>

<sup>541</sup> The Daily Telegraph (March 2015).

<sup>542</sup> Daily Telegraph (n541).

<sup>543</sup> *Care home operator fined £100,000 for hoist death* (n18).

a carer bent to pick up the patient's slippers. The second carer was standing behind the hoist and was not able to prevent the fall. The resulting investigation found that required fixings had not been used and staff had not been properly trained to use the hoist. The Health and Safety Inspector stated that "Working in a care home is a specialised job, which involves dealing with vulnerable people. Care homes must ensure that they have the correct training in place for all their employees".<sup>544</sup> Emphasis was placed on the fact that even when technology is in good working order it is imperative that staff can use it appropriately. Technology cannot be used in a vacuum and so the critical connection between human beings and technology should not be underestimated.

As well as the importance of ensuring up to date staff training, technology must be maintained and replaced as it ages. A fifteen year old sling was found to be defective in an unreported case from January 2013.<sup>545</sup> An investigation found in addition to insufficient training, the hoist had not been regularly checked or maintained and was in an unacceptable state. The Health and Safety Inspectorate commented that "With properly maintained equipment, better training and supervision, this incident was easily preventable".<sup>546</sup> The two sisters who owned the home were each fined £50,000 with £20,000 costs. It is noteworthy that each of the above cases were investigated as breaches of Health and Safety legislation as opposed to negligence or under social care law. It is critical to recognise that in each case discussed, failure to provide staff with satisfactory training led to the deaths of patients. It can be seen that while practical

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<sup>544</sup> *Care home operator fined £100,000 for hoist death* (n18).

<sup>545</sup> 'Big fines after hoist death', [www.mackworth-healthcare.com/big-fines-after-hoist-death/2013](http://www.mackworth-healthcare.com/big-fines-after-hoist-death/2013). (January 11<sup>th</sup> 2013).

<sup>546</sup> *Ibid.*

technologies can be beneficial in care, they need to be used safely and by trained staff. I now consider the effects of a different type of care technology, electronic surveillance, which prompts concerns in connection to those without capacity.

### 3(i). The advantages of surveillance technology

In recent years there has been a growth in the amount of electronic surveillance used in different care settings.<sup>547</sup> They have been increasingly utilised in order to keep a watchful eye on people, especially those without capacity.<sup>548</sup> One of the simplest and most cost effective forms of surveillance currently available are Global Positioning System trackers which can be fitted onto walking sticks for example.<sup>549</sup> An anecdotal story recounted to me concerns a family living in Australia with an older family member still living in the UK. He has dementia and lives in a care home. His family can use the GPS device in his walking stick to monitor where he is any time of the day or night. The family find this gives them a source of comfort and reassurance. Another anecdotal story concerns a woman with dementia using sensor technology at night to enable her to live in her own home. When carers are not present during the night, she has a sensor pad on her bed which activates should she be out of bed for more than twenty minutes. An alarm is triggered, alerting her daughter who can go to her home to check on her. Anecdotal evidence suggests technology can be useful in helping

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<sup>547</sup> Social Care Institute of Excellence *Electronic Surveillance in health and social care settings: a brief review* (2014) 6  
[https://www.cqc.org.uk/sites/default/files/CM111408\\_Item\\_8\\_Surveillance\\_literature\\_review\\_Appen\\_3.pdf](https://www.cqc.org.uk/sites/default/files/CM111408_Item_8_Surveillance_literature_review_Appen_3.pdf)

<sup>548</sup> Discussed later in this chapter.

<sup>549</sup> Hereafter these will be referred to as GPS.

families feel more secure about the well-being of their loved one, as well as enhancing the individual's independence.

McShane argues this kind of tagging is an effective remedy in supervising those with dementia.<sup>550</sup> He argues that high levels of stress caused when a person becomes disorientated and wanders off justifies the use of GPS devices. Anxiety is experienced not only by the individual but also carers and family members. McShane points out that GPS trackers are cheap, easy to use and enable individuals to be found more quickly.<sup>551</sup> McShane suggests trackers are preferable to the alternative of sedation because medication is not an adequate remedy for those that wander as it does not prevent them getting lost. He recommends the use of boundary alarms which allow individuals to walk up to a specific distance before an alarm alerts a carer to their whereabouts. Nonetheless he notes that if technology fails and does not alert carers the security of these options is notably reduced.<sup>552</sup>

### 3(ii). Arguments against surveillance

Despite the advantages of surveillance, particularly for families of dementia patients, ethical questions arise. O'Neill argues tagging loses sight of individuals and has come to be seen as a "quick fix".<sup>553</sup> The correct response to wandering should not be to simply restrict individuals by locking doors.<sup>554</sup> Adopting this approach suggests a

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<sup>550</sup> McShane (n526) 603.

<sup>551</sup> Ibid 603.

<sup>552</sup> McShane (n526) 603.

<sup>553</sup> O'Neill (n20) 606.

<sup>554</sup> Ibid 606.



desire to simply prevent wandering rather than trying to understand why individuals wander. Nevertheless O'Neill recognises that in some circumstances wandering can lead to greater risk and can upset patients, carers and families.<sup>555</sup> His fear is that tagging will be seen as a satisfactory response to the issue of wandering and there is a danger that it will become widespread in the same way sedatives did in the past.<sup>556</sup>

O'Neill argues we should steer away from assumptions about what is best in care services and there should be wider debate about the causes of wandering.<sup>557</sup> His work supports my argument that financial constraints should not be a primary factor in good care provision. Nonetheless the arguments above suggest that sometimes monetary concerns seem to be less of a consideration than knowing that a person is safe. However, ethical complications of tagging those that lack capacity should not be underestimated. Tagging should not be a blanket means of monitoring those with dementia. McShane's work supports this argument, noting that relatively few dementia patients (5%) get lost more than once.<sup>558</sup> On this basis, tagging all dementia patients would be disproportionate and unjust.

#### 4(i). Utilitarianism and technology

As discussed in the first chapter, utilitarianism was both reformist and progressive by standards at the time it was introduced. We could surmise that utilitarians would welcome increased use of technology in care as that could be viewed as progressive.

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<sup>555</sup> O'Neill (n20) 606.

<sup>556</sup> Ibid 607.

<sup>557</sup> O'Neill (n20) 606.

<sup>558</sup> McShane (n526) 603.

If we consider use of tagging or similar surveillance devices in relation to those with dementia we can see how potentially dangerous it would be to accept technology without question.<sup>559</sup> Individuals who have dementia are in a vulnerable position because they are less likely than those without dementia to be able to engage in active discourse. The ability to engage actively generally decreases as dementia progresses and individuals may not be able to judge the advantages or disadvantages of tagging appropriately.

Given the relatively small amount of dementia patients that wander, having an automatic assumption they should all be tagged is equally concerning.<sup>560</sup> Dementia patients will be particularly subject to the opinions and decisions of others.<sup>561</sup> There has been a tendency in some areas to infantilise dementia sufferers in the past.<sup>562</sup> Treating dementia patients this way has not necessarily been intended to be derogatory but could blind carers to what the individual requires for their wellbeing.<sup>563</sup> The utilitarian stance is inappropriate because it fails to look at people as individuals, a necessity in good care. I argue that where people have dementia, the need for responsiveness to individuals is critical because of the nature of the illness. What is needed instead of blanket adoption of surveillance technology are better understandings of dementia in order to develop better care.<sup>564</sup> As we have seen, the

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<sup>559</sup> Particularly if we assume all technology is good and fail to analyse the benefits for the individual.

<sup>560</sup> I am not suggesting that all patients are tagged at present but warning against treating those individuals as a group as a result of their diagnosis. I am arguing against making blanket assumptions because of a certain condition. In my view, any homogenous treatment which fails to recognise the needs of the individual are inappropriate in care.

<sup>561</sup> O'Neill (n20) 606.

<sup>562</sup> Astell (n23) 7.

<sup>563</sup> O'Neill (n20) 606.

<sup>564</sup> Niemeijer (n21) 128.

utilitarian state tends to label people in groups, applying resources accordingly. In care this is inappropriate generally but significantly detrimental in dementia care.<sup>565</sup>

The utilitarian approach would see clear benefits in having the security of cost effective methods of surveillance on a broad scale. As Jonsen notes, the utilitarian state would be likely to evaluate care technologies on the basis of price.<sup>566</sup> Technology of this kind can offer peace of mind to families and carers if care recipients are inclined to wander. If surveillance is uncomplicated more carers could use them without the need for extensive, time consuming training. If reliable technology could be used along these lines the utilitarian regime would be more likely to encourage it. In a cash strapped care landscape it could be argued that it makes a lot of sense in terms of not having to be watched over by busy care staff.

In examining utilitarian approaches to technology in care it is useful to recall that the theory focuses on what will produce happiness.<sup>567</sup> It should be remembered this will be deemed as good based on the happiness of the majority however, not the minority.<sup>568</sup> In respect of physical care provided by carers, utilitarian approaches would focus on whether technology could reduce pressure on them. The utilitarian viewpoint would take the path that if technology is available to make care work easier, it should be embraced. If we reduce this to its simplest conclusion we could argue that technology has been developed and is there to be used.<sup>569</sup> Unfortunately this narrow

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<sup>565</sup> Niemeijer (n21) 115.

<sup>566</sup> Jonsen, A, R., 'Bentham in a Box: Technology Assessment and Health Care Allocation' *L.Med. and Health Care* [1986] 14 172.

<sup>567</sup> Identified in chapter one.

<sup>568</sup> Beauchamp, D, E., 'Public Health as Social Justice' *Inquiry* [1976] 3-14.

<sup>569</sup> Niemeijer (n21) identifies an increase in care technology development from the 1980s to the millennium and beyond.

application overlooks the fact that care is a responsive practice and fails to consider the nuances and individual nature of care. Although technology can enhance care in some respects there need not be an assumption that it is the best way to progress.<sup>570</sup> By failing to take into account the wishes and needs of the cared for we are not going to be in a position to provide the optimal care they deserve. The utilitarian state, promoting blanket policies, cannot react rapidly enough to changes in technology to enable it to provide effective care.

#### 4(ii). Technology and paternalism

Assessing utilitarian attitudes to technology, it is important to consider another deleterious approach to care, paternalism, because it is often applied where utilitarianism is not appropriate. I consider issues surrounding paternalism specifically in the context of dementia care.<sup>571</sup> There is evidence that there is a tendency to adopt protectionist attitudes to individuals with dementia, which stems from the aversion of risk but also ideas that those with dementia have somehow reverted to babyhood.<sup>572</sup> As a result, dementia patients are framed as being unable to exercise their own autonomy or choice and dignity becomes a side issue.<sup>573</sup> Yet it is crucial that intentions concerned with minimisation of risk to individuals do not result in complete eradication of risk.<sup>574</sup> If this approach becomes the primary basis of providing care instead of

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<sup>570</sup> Niemeijer (n21) 27.

<sup>571</sup> Discussed in chapter four.

<sup>572</sup> Reisberg, B., Kenowsky, S., Franssen, E.H., Auer, S.R., Souren, L.E., 'Towards a science of Alzheimer's disease management: a model based upon current knowledge of retrogenesis' *International Psychogeriatrics* [1999] 11:7.

<sup>573</sup> Hughes and Louw (n19) 847.

<sup>574</sup> Niemeijer (n21) 65.

individual need, care becomes a means of control and management.<sup>575</sup> Although it is recognised that safety is a significant factor in care, quality of life should be evaluated. Safety should not be permitted to outweigh autonomy purely through a desire to keep a person in one place rather than permit them to wander within a certain area.<sup>576</sup> It is perhaps this view that led to the sedation of those with dementia in the past. Nevertheless it should not be an automatic response that the best way to care is to keep someone sitting in a chair or locking doors.<sup>577</sup>

Tagging is of particular concern because it is being used for people who may not have any say in the matter or even knowledge of it.<sup>578</sup> Paternalistic notions that tagging is the answer overlooks the fact that we still do not know why individuals wander.<sup>579</sup> Astell supports this, arguing that if we could identify what triggers the desire to wander we could provide better individualised care rather than imposing expectations on patients.<sup>580</sup> She argues care should be focused on the individual and not the way we want care to work as caregivers.<sup>581</sup> Such a change in approach would require a conscious move towards practice of responsive person centred care. It is critical to my argument that those with dementia do not need to be managed, instead needing responsive and intuitive care in line with feminist thinking. Paternalistic approaches tend to focus on managing and control but fail to acknowledge individuals at the heart

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<sup>575</sup> Hughes and Louw (n19) 847.

<sup>576</sup> Niemeijer (n21) 27.

<sup>577</sup> Astell (n23) 6.

<sup>578</sup> McShane (n526) 604. He identifies a situation where a wife tags her unwitting husband when he goes out alone.

<sup>579</sup> O'Neill (n20) 606.

<sup>580</sup> Astell (n23) 6.

<sup>581</sup> Ibid 13.

of care.<sup>582</sup> We can identify this approach through the application of best interests which depends on views of professionals, families and carers.<sup>583</sup>

Paternalistic arguments in respect of technology might consider whether the need for it is more beneficial to carers or the cared for.<sup>584</sup> As discussed, use of hoists can be seen as positive for carers as it can diminish the risk of injury. That argument is compelling because injuries which affect the back can have lasting effects, limiting a person's mobility. Yet this is only useful where carers receive appropriate and regular training to use these devices. In evaluating benefits of technology we need to think about who is benefitting and what the consequences are when technology fails or human error occurs. In the case of *R (on the application of A) v East Sussex CC*, the council appeared to have adopted a paternalistic approach in its attitude towards the parents.<sup>585</sup> East Sussex County Council had been happy for the parents to care for their two daughters at home but tried to impose its handling requirements on them.<sup>586</sup> The parents objected, not least because on one occasion one of the daughters had begun to slip through the sling and on another, under water while in the bath.<sup>587</sup> The council believed that its policy should be followed and resisted the parents' feelings that manual handling was a better way to care for their daughters. The case highlights the need to recognise the wishes of individuals in care settings and the importance of balancing requirements in each particular case. Instead of rejecting the desire to lift their daughters manually, the court recognised that a better approach would look at

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<sup>582</sup> Niemeijer (n20) 55.

<sup>583</sup> Enshrined in s4 Mental Capacity Act 2005.

<sup>584</sup> Niemeijer (n20) 55.

<sup>585</sup> *R (on the application of A) v East Sussex County Council (No.2)* 6 CCL Rep 194.

<sup>586</sup> (n585) [8].

<sup>587</sup> (n585) [20].

how to minimise risks when manual lifting was taking place.<sup>588</sup> For these reasons it is difficult to see how a paternalistic approach is appropriate in care because it neglects to give adequate scrutiny to individual needs. A paternalistic attitude assumes those in positions of power, including carers and families, can make decisions for those directly involved in care. Niemeijer argues that we should avoid believing this approach is best for patients.<sup>589</sup> He acknowledges that in care, one person will always be in a more vulnerable position than another. He warns against assuming that vulnerable people no longer possess any autonomy or their own opinions.<sup>590</sup>

## 5. The value of the human touch

When discussing developing technology in care and increasing use, we need to evaluate how this might affect caring human interactions. Tronto advocated responsive and reciprocal care practice as the basis of good care.<sup>591</sup> If we accept this, we must question whether technology can become a substitute for the real physical touch of a person. As discussed earlier, using care technology is not a straightforward answer in itself. Bail argues we should not fail to address ethical issues simply because of refinements in technology which allow wider use in care.<sup>592</sup> Bail describes the vast array of technology available to carers and care institutions.<sup>593</sup> Technologies include devices as simple as locking doors through to complex alarm systems and use of video

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<sup>588</sup> (n585) [131].

<sup>589</sup> Niemeijer (n21) 55.

<sup>590</sup> Ibid 55.

<sup>591</sup> Tronto (n244).

<sup>592</sup> Bail (n529) 281.

<sup>593</sup> Ibid 281.

surveillance. If we consider the criticisms of Bail<sup>594</sup>, Astell<sup>595</sup> and McShane<sup>596</sup> in relation to using sedation and widespread use of physical restraints<sup>597</sup>, a more 'hands off' approach might be considered preferable. Sedatives can have powerful side effects and restraints can cause injury and distress in some circumstances.<sup>598</sup> Alternative use of GPS trackers allows individuals to wander more independently and free staff from having to follow them to monitor safety. The benefits of GPS allows staff to undertake other activities while permitting wandering to a relatively safe degree. The patient themselves might prefer to wander alone and not be followed around or coaxed back to a particular place.<sup>599</sup> However, benefits of human carers to recognise needs and react appropriately is one that cannot be replaced by technology.

Only a human being can be responsive to increased risk of falls in different circumstances, recognising stumbles and moving to offer support. Niemeijer noted in his ethnographic study that care staff were reluctant to rely too heavily on technology, preferring more reciprocal approaches to care.<sup>600</sup> Technology has made significant inroads in care and helped to free up time in domestic homes but is currently unable to replicate natural human responsiveness. Lanchester argues technology has clear advantages, alleviating the burden of heavy, repetitive work and evolving constantly.<sup>601</sup> Despite powerful advancements in development of humanised robots there is still a long way to go before they can ape a human being's responses in the

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<sup>594</sup> Bail (n529) 281.

<sup>595</sup> Astell (n23) 8.

<sup>596</sup> McShane (n526) 603.

<sup>597</sup> Bail (n529) 281.

<sup>598</sup> Ibid 281.

<sup>599</sup> McShane (n526) 604. He discusses a man who prefers to go out alone rather than with his wife all the time.

<sup>600</sup> Niemeijer (n21) 89.

<sup>601</sup> 'The Robots are Coming' London Review of Books [2015] Vol. 37, No. 5, 5<sup>th</sup> March, 3, 8.



same way.<sup>602</sup> Responsiveness is critical in good care practice and it is difficult to see how technology could replace that, no matter the advances made. Technology should not be utilised as a means of replacing care staff as this is an asset to everyone involved in caring relationships.<sup>603</sup> The value of a touch, a smile or just a few words should not be underestimated.<sup>604</sup> Human contact is significant for those who lack capacity to express their wants and needs.

The value of balancing technology against manual care of people has been recognised in the courts. In *R (on the application of A) v East Sussex CC (No.2)* the family carers wanted to lift their daughters manually while the Council advocated use of a hoist.<sup>605</sup> The family argued the Council's policy failed to consider individual needs and previous use of hoists had led to harm.<sup>606</sup> In acknowledging the importance of the human touch in care Munby LJ said "I recognise of course that the compassion of the carer is itself a vital aspect of our humanity and dignity and that at a very deep level of our instinctive feelings we value and need the caring touch of the human hand".<sup>607</sup> Munby LJ placed considerable value on preferences for manual handling and stated that a "human being is more than a machine" and this could be "why we have an instinctive and intuitive preference for the touch of the human hand rather than the assistance of a machine".<sup>608</sup> These quotes make persuasive arguments for the importance of people in care and accepting that while technology can be an aid to care, it cannot replace human beings.

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<sup>602</sup> *Top Ten Humanised Robots Designed To Match Human Capabilities and Emotions*, by Easton (March 2015) <https://wtvox.com/robotics/top-10-humanoid-robots/> Accessed September 25<sup>th</sup> 2015.

<sup>603</sup> Niemeijer (n21) 33.

<sup>604</sup> Astell (n23) 13.

<sup>605</sup> *R (on the application of A) v East Sussex CC (No.2)* [2003] 6 CCL Rep 194.

<sup>606</sup> (n605) [15] Munby LJ.

<sup>607</sup> (n605) [120] (Munby LJ).

<sup>608</sup> (n605) [120] (Munby LJ).

## Conclusion

In this chapter, I advance the argument of my thesis by illustrating that utilitarian ways of thinking about the application of care technology can be inappropriate. Instead I present feminist arguments based on importance of the human touch and reciprocity. I sought to explore how development of technology in care has been advanced and refined. I chose to focus on hoists and surveillance because of their widespread but different use in care. In considering the implications of using hoists, the practical benefits to carers and care recipients seemed fairly obvious. They alleviate stress and strain that lifting inflicts on both and can save time. Through the unreported cases highlighted, we can see significant problem areas associated with this piece of technology. Problems revolved around staff being provided with adequate training and keeping that updated when new equipment was bought.<sup>609</sup> Additionally we saw the impact that poor maintenance has in care situations.<sup>610</sup> It seems evident that if we are going to increasingly use technology in care, we need to ensure that we keep carers up to date with progress and maintenance. In relation to surveillance, the questions seem to concentrate on more abstract notions of autonomy and economy. There are significant ethical issues connected to the care of those with dementia. The fact that often dementia patients lack capacity means they are subject to the wishes of others. Surveillance is a contentious area because it has a myriad of concerns attached to it, including dignity, privacy and reduction of contact between carers and patients.

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<sup>609</sup> Care Quality Commission prosecution (n540).

<sup>610</sup> Daily Telegraph (n541).

In examining utilitarian and paternalistic attitudes to care technology, I argued that neither of these adequately evaluate its use. The utilitarian system is too focused on economic concerns to allow a nuanced and appropriately receptive approach. In prioritising the cost effective models, it misses the importance of care based on individual need and responsiveness. The paternalistic approach is equally poor because it considers those with dementia as a group with a similar set of needs. Paternalism considers those with dementia as displaying behaviour which needs to be controlled and managed. Paternalism fails to try and understand what initially triggers this behaviour and respond to it appropriately. The paternalistic attitude places dementia patients in one group and carers and families in another.

I have presented feminist considerations of care technology and explored some of the problems associated with different types. One of the objectives of this chapter is to advance the importance of the human touch in care. Although I recognise technology can be beneficial, I argue it should act as an enhancement in care, not as a replacement for carers. I acknowledge there is a balancing act to be considered in relation to each piece of technology. We must consider for whose benefit it is being utilised and whether desires of carers and families should be curtailed. If we want to encourage an emphasis on person centred care with the individual at the heart, we need to consider the benefits for that individual. As a result this approach would, in line with feminist principles, have to take place ideally on a case by case basis with as many pros and cons as possible necessarily scrutinised. Technology can be a valuable asset in care and it is not my intention to dismiss it or consider it to be bad, but we must remember that the individual must come first. The responsive nature of care is unique to human beings and that should be of critical importance. I have shown

that utilitarianism and its alternative, paternalism, cannot provide the thoughtful response to technology that is required in care provision. Feminist approaches have more potential for progressive responses to dilemmas of contemporary care.

## Conclusion

This thesis argues that utilitarianism informs how the state *thinks* about care and that this is significantly damaging. Until the state thinks about care differently, solutions to the crisis in the provision of care will not be found.<sup>611</sup> My work is important because care provision in its current format is unsustainable in the long term. Utilitarianism, I argue, with its emphasis on distributing resources to maximise individual welfare and on resource constraints has imbued contemporary care decisions. I propose a more nuanced and intuitive feminist approach which could lead to more progressive outcomes in care because it would cultivate resilience and promote human interaction and responsiveness in care provision. A feminist approach would enhance the importance of the individual at the heart of care and emphasise the critical nature of human embodiment.

My argument is a feminist argument. I evaluate how care has traditionally become an expectation of women as a result of the utilitarian system and the problems this has led to in the twentieth and twenty-first centuries. Women's priorities have changed and they are far more likely to work on a full-time basis. Nonetheless, the expectation they should remain responsible for care within the family has not shifted in the same way. I examine how other countries with similar issues have begun to attempt to tackle the problem and consider how effective they have been.

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<sup>611</sup> The crisis in care covers many factors, including under-funding, neglect, abuse and lack of appropriate services and effective care provision. There has not been scope in this work to consider all these factors but they are all critical to a rethinking of care. *Care in Crisis – What's next for adult social care?* Age UK (January 2014). <http://www.ageuk.org.uk/Documents/EN-GB/Campaigns/CIC/PDF%20Care%20in%20Crisis%20-%20What%20next%20for%20social%20care%202014.pdf?dtrk=true> Accessed 16<sup>th</sup> September 2016.

In considering technologies of care, I evaluate how local authorities implement care plans and the response of the courts when these were challenged. I consider that arguments of what might be seen as acceptable risk have been replaced by paternalistic approaches under the guise of safety. In connection with documentary technology I also considered more practical technologies and compared them to feminist care values. It is easy to see how technology has been viewed as a solution to problems in care but it has become an emerging problem in itself. Feminism is a more productive way to think about how we should apply care technology. Technology has a place in care but it should be used in conjunction with carers who promote good care through distinctly human relationships, not as a substitute for carers. I conclude that a utilitarian basis for care provision is no longer adequate and instead a feminist approach should be considered as a framework for state care provision.

The first chapter introduces utilitarianism and explains how it came to be incorporated into the UK welfare state. Although I recognise that utilitarianism was progressive at the time it was introduced, its focus on maximisation of happiness for the majority allows the needs of individuals to be overlooked. The utilitarian spotlight on male actors engaged in the paid workforce continues to provide the basis for the paradigm legal subject in the twenty-first century. That subject is valuable economically but in contrast, anyone who does not fit that ideal model is not viewed as beneficial in the same way. Additionally, a framework based on male interests has meant that women have been consistently viewed as less important. The consequences have been particularly significant in areas like care which affect women disproportionately. I argue that while the welfare state did offer positive opportunities for change, as it has

expanded so has the level of bureaucracy associated with it. Anyone wishing to challenge local authority decisions can find it extremely difficult to penetrate the layers of complexity that surround social care decisions. I argue that utilitarian normative male standards have been evident in judicial thinking and use the case of *McDonald* to highlight how utilitarian rationality, based on resources and outcomes, were evident in the Court's majority deliberations.

The second chapter contributes to the thesis by identifying two feminist theories, the ethics of care and vulnerability theory, which underscore the relationality and vulnerability inherent in all human beings. I use other feminist arguments to support my claims that these approaches present the most appropriate way forward for effective transformation of care. I argue that care is a feminist issue through gendered expectations as well as the ways in which caring responsibilities impact on women as they grow older. I argue that to establish effective changes in the way care is thought about, men need to be encouraged and enabled to care too. I do not claim that either the ethics of care or vulnerability approaches are perfect theories and identify some particular critiques which I believe are relevant to my argument. I claim that if care can be considered as a concern which affects us all, regardless of gender, then it can be repositioned in society's thinking as a valuable, public concern which demands open, considered debate.

The third chapter builds on the second chapter by reinforcing the impact that feminism could have in promoting more nuanced approaches to care. It also explores how other countries have applied what could be perceived as feminist principles in order to transform care policies. In this chapter I identify the extent of care needs in the UK and

the difference in numbers between those who receive formal care (through residential or other care services) and those that have care needs but are receiving informal care. There has been a simultaneous increase in the private care provision market. Unfortunately, expansion of the market has not improved the position of those employed as carers.

The ethics of care as considered in this chapter highlights the importance of trust and reciprocity in care, as well as relationships between care givers and care recipients. I argue that the ethics of care views care as much more than something which should be restricted to the private domain. If care is seen as private, it reinforces the silent, marginal position of women involved in care practice. I also evaluate how other countries with similar contemporary care problems have tried to implement changes. The Netherlands particularly seems to have adopted an approach akin to the ethics of care, introducing gender neutral, flexible work policies to enable both genders to provide care. Nonetheless, I note that care remains considered as a primarily private, family responsibility in the Netherlands, suggesting that there is still some way to go.

The fourth chapter contributes to the thesis by discussing how risk has become a dominant concern with care provision, and how risk arguments are approached in a way that is consistent with utilitarian principles. My argument is that in care, as in life generally, it is not possible to eliminate risk completely and indeed it is not desirable to do so. I argue that a better basis for thinking about risk taking in care provision would be to carry out a case by case analysis of risk, always made in the context of the particular individual. As such, risk would be measured more appropriately, potentially enhancing care.



I argue that care plans are a legal technology which have significant impacts on individual lives and must be sensitive to their needs. I use case law to illustrate how care plans have sometimes been used to frame both family members and individuals as risky as a means for local authorities to implement their care plans. I analyse the contrasting approach of the courts, recognising that courts will place a heavy weight on the value of family relationships and realistic understandings of risk. I suggest that instead of local authorities formulating care plans which are designed to avoid risk, especially when risk is connected to resources, they must centre the needs of the individual at the heart of the care plan.

In the final chapter of this thesis I consider a particular contemporary issue within care provision, the use of technology to test my argument that a feminist approach would provide a more nuanced way to determine whether or not the use of technology enhances the human practice of care. I note how utilitarianism has formed the basis for decisions about the appropriateness of care technology. I argue that this has been a response to the problems in care caused by a shortage of carers as well as constrained resources. I focus on two distinct kinds of technology, hoists and surveillance, evaluating the pros and cons of each for both carers and care recipients. I discuss cases where care practice has failed due to inappropriate knowledge and maintenance of hoists. I argue that this highlights the importance of carers being able to interact appropriately with care technology and that this should be a continuous process. In relation to surveillance I argued that ethical dilemmas should be at the forefront of considerations, particularly where care recipients lack capacity. I claim that

often paternalism steps in to replace utilitarian rationality where those without capacity are concerned and argue that this fails to address or consider individuals.

As an alternative I discuss a feminist approach to care in relation to the human touch. I argue that human carers should be essential to good care practice with practical technology providing support as and when required. I argue that technology should be used alongside carers but on an individually considered basis, evaluating exactly how the care recipient will benefit. I claim that feminist approaches to care prioritise the person at the centre of care and emphasises the nuanced human responsiveness that only reciprocal care can bring. I argue that as a framework for good care, feminist approaches offer the most appropriate means to develop sustainable systems of care into the future.

In conclusion, I have found that a utilitarian basis for care is at the root of some of the most significant problems in contemporary care. I suggest that the double effect of expecting women to continue caring responsibilities while also being active in the paid workforce is unsustainable, both at present and in the future. In addition, the utilitarian focus on resources is detrimental in care because it has the effect of preventing good care provision, instead expecting those subject to it to make the best of inadequate situations. As a result I present feminist arguments as an effective alternative. The feminist theories I identify emphasise the very human nature of care, placing critical importance on the value of trust and reciprocity. I argue that recognition of human embodiment and relationships is an essential part of care and too often this is lost when resources are allowed to overtake as a consideration.

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I discuss the way in which risk is considered and state that it is used inappropriately as a means of imposing care plans. I conclude that care would be far more sensitive to individual need if it was accepted more widely that risk is a normal part of life and might actually be beneficial to care recipients to a degree. In addition to more realistic approaches to risk, I conclude that although technology can provide clear advantages in care practice, it can only be used in close conjunction with human care givers. Care givers must be properly trained and that should be an ongoing process as technology advances. Furthermore I conclude that where technology is used in care for individuals that lack capacity, more abstract ethical considerations should be analysed before implementation. Fundamentally I argue that care should be reevaluated as a necessarily human practice, placing human responsiveness and contact at its core. I believe that this can only be achieved through feminist approaches to the transformation of care.

To take this work further I would like to explore care systems in other countries with similar problems in contemporary care in more depth. I would particularly like to focus on how far these can be said to have a feminist aspect and how that could be applied to the UK in the future. My work would also provide a good basis for more detailed and extensive analysis of care technology, especially in connection with provision of care for those that lack capacity. I believe that care recipients without capacity are notably vulnerable in care provision, susceptible to the wishes and intentions of others in a unique way. As such I feel that this thesis would act as an excellent basis from which to begin for further study.

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