



W G HART LEGAL WORKSHOP 2015

## ***Law and the Ageing of Humankind***

ACADEMIC DIRECTORS:

**Professor Jonathan Montgomery**, University College London  
**Professor Richard Ashcroft**, Queen Mary, University of London

Monday 22 June – Tuesday 23 June, 2015

### **ABSTRACTS**

#### **DAY ONE: Monday 22 June**

14.00

##### **SESSION I: KEYNOTE 1**

**Professor Jonathan Herring, Professor of Law, Oxford University**

*Should Elder Law Exist?*

15.00-  
16.30

##### **SESSION II: RIGHTS OF OLDER PERSONS**

**Dr Eugenia Caracciola di Torella, Leicester University, and A. Masselot, Canterbury NZ**

***The EU and the challenge of eldercare***

A greater life expectancy combined with declining birth rates, has meant that, across Europe, the number of older (55-64), elderly (65-79) and very elderly (80+) people has grown to an unprecedented level (The 2012 Ageing Report, European economy 2/2012). It is estimated that today 20 million people in Europe care for older member of their family: caring for an ageing population presents multiple and complex challenges.

This paper explores the EU law engagement, both in terms of hard and soft law, with the care requirements of an ageing population. Although the need for high quality, financial sustainable and accessible adult care services has been highlighted for some time (COM(2001) 723"; COM(2002) 774; COM(2004) 304; COM(2007) 244 final and COM(2008) 635), progress in this area remains very slow. Arguably, this is due to the fact that it is still "new terrain" for EU law where, traditionally, the policy and the legal provisions related to the care of dependants have been addressed to young, healthy children. However, policy and legislation now urgently need to be reconceptualised to include the needs of older people. Adult care requires short and long term solutions and presents different and possibly more complex challenges than childcare (e.g. I. Carpenter, J. Hirdes, N. Ikegami, 'Long-Term Care: A Complex Challenge' OECD Observer, (2007) 27).

This paper argues that European Union (EU), using its core value as a starting point, has the potential to lead the development of care for older citizen. In particular, the growing influence of

the human rights discourse has provided the possibility to develop a comprehensive set of rights in this area.

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**Maeve O'Rourke, Durham University**

***Older person's rights to be free from torture and ill-treatment: the UK and Ireland***

This paper will begin by discussing the existing international human rights framework concerning older persons and by familiarising workshop participants with the current status of the UN process underway to consider the need for and potential contents of a dedicated international treaty on the rights and dignity of older persons. The strong division between UN member states over whether or not a normative gap in rights protections for older persons exists will serve as the introduction to my PhD research question, which I am in the early stages of exploring.

The paper will explain why I have chosen to examine whether the existing rule against torture and ill-treatment in international human rights law is sufficient to address core instances of rights violations affecting older persons, specifically abuse in the home, abuse in institutional settings, lack of access to palliative care and historical abuse. The reasons include (a) the rights violations which are being highlighted continuously through UN processes as primary concerns regarding the situation of older persons around the world; (b) problems particular to Ireland, which have been raised by Law Reform Commission reports, investigative journalists and civil society; (c) the status and content of the anti-torture and ill-treatment norm in international human rights law; and (d) the potential for the anti-torture and ill-treatment norm to adapt in response to increased consciousness of rights violations affecting older persons.

Finally, given my experience advocating on behalf of Ireland's Magdalene Laundries survivors for the past five years, I will discuss the potential of the rule against torture and ill-treatment to respond to the situation of older persons who have suffered abuse in their past. I will explain my use of the continuing violations doctrine to achieve recommendations from the UN Committee against Torture, and subsequent action from the Irish government, regarding the institutional abuse of thousands of girls and women prior to Ireland's ratification of the Convention against Torture.

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**Ann Mumford, King's College London**

***Inheritance taxation, death duties and Piketty***

This paper would consider perspectives on intergenerational equity as raised by recent developments in inheritance taxation in the UK and Europe. The literature addressing the taxation of inherited wealth developed substantially in the years immediately before the economic recession. The specter of repealing inheritance taxation (or estate taxation) in the UK, the US and several countries within the EU demanded attention, not least because of a striking paradox: inheritance taxation appeared to be a universally unpopular tax, with many of its most ardent attackers not likely ultimately to possess estates which would attract the charge. The literature from this recent era was inter-disciplinary, and addressed a number of important questions, including: why is this tax unpopular? Is the unpopularity connected with notions of a "good death," or the "no exit obligation" (Alstott) of modern parenthood? After the economic recession of 2008, however, a number of interesting developments within this research fell quiet. The foundations of the economy in specific countries (including the UK, which is the focus of this paper) appeared to be at risk, and inherited wealth appeared not to be the most significant problem. This paper proposes to revisit pre-recession literature, and to revive discussions. In particular, Thomas Piketty's *Capital in the Twenty First Century* (2014), amongst other insights, argued that historical patterns of distributions of wealth present a dynamic account of economic and social inequality. The inheritance taxation literature which is starting to emerge post-recession appears to be heavily

influenced by Piketty, and this paper proposes to contribute to this trend. In particular, this paper will consider the significance of twentieth century patterns of capital and taxation on the modern structure of the UK inheritance tax. The 1970s repeal of UK “death duties” with the capital transfer tax is a particularly significant moment, and will be considered in light of Piketty’s theses.

17.00-  
17.45

### **SESSION III: KEYNOTE 2**

**Professor Jean McHale, Professor of Health Care Law, Director of the Centre for Health Law, Science and Policy, Birmingham Law School**

#### ***Human rights and the older citizen: a case for special protection***

We live in an increasingly ageing society, yet at the same time one which is driven by the demands of youth. The old are frequently marginalized, patronized or just simply ignored. Indeed perhaps the “old” can be regarded as the “new children”. Many of the discourses around the status and rights of children in the past leading to claims for enhanced human rights protection are very much reflected today in relation to the attitudes to the older person in society. This paper explores whether there is now a case for “special protection” in relation to the older citizen. It considers the case for a Convention on the Human Rights of the Older Person similar in structure to the UN Convention on the Rights of the Child. Secondly it considers whether there is also a case for a special body to provide oversight of the rights and interests of older persons. It explores the case for a Commissioner for the Older Person, something which is operational in Wales and Northern Ireland currently and drawing upon and developing further the recommendations made in the University of Birmingham Policy Commission Report Healthy Ageing in the C21st ( McHale was one of the academic directors of this Report).

## **DAY TWO: Tuesday 23 June**

09.15-  
10.45

### **PARALLEL PANELS**

#### **MORNING STREAM A - PROPERTY AND TAX**

**Juliet Brook, University of Portsmouth**

#### ***Where there’s a will – presumptions, assumptions and litigation***

Most people expect the wealth of the older generations (who have, on the whole, benefited from substantial increases in property values during their lifetimes) to be retained within the family; indeed, the younger generation are often relying on this wealth for their own retirement. However, many elderly form close relationships with carers and neighbours in their final years. This can lead to them executing new wills with legacies in favour of new friends at the expense of the expectant family. As a result, private client practitioners report a noticeable increase in contentious probate work, and this trend looks set to continue.

This paper will explore the manner and circumstances in which challenges are made to wills, and will consider whether the various burdens of proof and presumptions of capacity and validity make it difficult for the family to successfully contest a will. Whilst the burden of proof is always on the propounder of a will, the presumption of “omnia praesumuntur rite esse acta” means that any will that appears to be validly executed will be presumed to be valid. The burden of proof is then

transferred to the challenger; if a will appears rational on the face of it, in order to contest it on the basis of lack of capacity (the most common ground) the challenger will need to find clear evidence of lack of capacity. The test for testamentary capacity is kept low to ensure that elderly testators retain their autonomy, but the result is increased litigation with family members left disappointed.

The nature of recent contentious probate cases suggests that there are many instances where there is little doubt that the testator was acting of their own volition. The problem is therefore not simply a question of how we protect vulnerable testators against fraud and undue influence, but is a more subtle one concerning the slow loss of faculties over time, leading the testator to re-evaluate (sometimes inaccurately) their relationship with, and obligations towards, their nearest and dearest.

It is important that the legal response does not act as a deterrent to making a will, yet contains appropriate presumptions and assumptions as to capacity and intention. A variety of practical solutions to this problem will be examined, and these will be informed by theoretical approaches to vulnerability (such as Fineman) to explore how best the balance can be maintained between autonomy and paternalism. These proposals will then be evaluated by applying them to recent cases and considering their effectiveness at reducing the amount of contentious probate work, from which there are few real winners.

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**Sidney Ross, 11 Stone Buildings**

***Protection of estates against post-death claims***

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**Richard Walters, Queen Mary, University of London**

***Pensions: Perspectives from the Tax World***

With an aging population, pension provision has become ever more important. Over the last hundred years or more the tax system has encouraged saving for pensions by both individuals and institutions. This paper will examine the tax incentives that have been given for pensions, how these have changed and some of the issues that have arisen. These incentives are vital to encourage saving to supplement the basic state pension which does little but to raise recipients to the poverty line.

The tax system has allowed relief both for contributions to pension funds and to the income of those funds. The key principle has been to encourage saving but equally to ensure that the savings are ultimately spent in providing benefits for retirement. Such reliefs, however, have attracted those who see pensions as a tax shelter rather than as investment for retirement. They have also been exploited by insurance companies and their aggressive salesmen. The response of Parliament has at various times been to regulate pensions and then later de-regulate them.

The provisions in the Finance Act 2004 and its companion Pensions Act 2004 led to a rationalisation and liberalisation of the system. These liberal provisions lasted only a few years as the financial crisis of 2008 and its remedies undermined the assumptions of these reforms and led to a tightening up of the reforms. In the last year the Pensions Act 2014 and the Taxation of Pensions Act 2014 have led to further liberalisation. This liberalisation has included braking the long term link between pension saving and annuity purchase. In the short term this may be popular but one wonders whether this is similar to the disastrous liberalisation of pensions in the 1980s.

From this history, some reflections can be made. Firstly, pensions are long term issues which require some stability, but which stability is difficult to achieve in a fast changing world. It is not good that pension provision is becoming a matter of acute political controversy, and that the recent changes

were made without consultation. Secondly, the pensions system is too complex for those other than experts to understand. It is inevitable that there will be some exploitation of the system by both pensioners and by pension funds. Thirdly, raising one's head from the detail the problems from pension illustrate the comparative decline of economic rewards for workers.

09.15-  
10.45

## **MORNING STREAM B – DO NOT ATTEMPT RESUSCITATION DECISIONS**

**Kate Beattie, One Crown Office Row**

### ***Discussing death: Do not resuscitate orders and patient rights in the end of life decision-making***

According to evidence from the Equality and Human Rights Commission, Do Not Attempt Cardio-Pulmonary Resuscitation (DNACPR) orders are likely to affect most of the population directly or indirectly. 68% of the population die in hospital and 80% of these die with DNACPR notices in place. In other words, in relation to more than 50% of the population, a decision is taken in advance of their deaths that, if they are subject to a cardio-pulmonary arrest, they will not receive cardio-pulmonary resuscitation (CPR).

In the recent case of R (Tracey) v Cambridge University Hospitals NHS Foundation Trust [2014] 3 WLR 1054, the Court of Appeal affirmed the rights of patients to be involved in decisions about DNACPR orders, holding that there was a presumption in favour of patient involvement which could only be rebutted by convincing reasons. Further cases are pending before the courts challenging DNACPR decisions based on allegedly discriminatory views of the quality of life of people with lifelong conditions such as Down's syndrome and cerebral palsy.

This paper considers the Tracey case, the right to respect for private life under Article 8 ECHR and its implications for end of life care of an ageing population:

- Futility vs harm: Are there clinical decisions which should be kept from a patient with capacity? How does the law conceptualise these decisions?
- Tackling discrimination and assumptions based on age and disability.
- Should the law protect a right to a second opinion?
- Should DNACPR be covered routinely in advance treatment decisions, or by all patients coming into hospital?
- Incapacitated patients: What are the limits of clinicians' involvement in best interests decisions about the quality of future life that an individual would regard as acceptable?
- Myths and perceptions about CPR: Are doctors' concerns justified?
- The scope of the right to life and the right to respect for private and family life.

The author, who was junior counsel for the family in Tracey, argues that the case reflects a trend towards greater procedural rights and more explicit decision-making around death and dying, with implications beyond decisions about CPR treatment itself.

**Dr L Osman, King's College London**

### ***'Do not attempt resuscitation' (DNAR) decisions – a mandatory decision to be routine and desensitised early in life for our ever-greying population***

We live in an ageing population. People are living longer, due not only to the advance of healthcare and medical technique, but also due to the uniform desire of most healthcare professionals to extend the life-span of their patients. The traits of beneficence and non-maleficence represent the core of medical ethics, and are the backbone of medical practice, arguably to the extent of

extending the life-span of patients at all costs, without realising situations where this is not appropriate. The demands of our ageing population arguably call for increased training for doctors surrounding end of life care: "... how the process of dying unfolds, how people experience the end of their lives, and how it affects those around them" - Atul Gawande, 'Being Mortal'. Our society is transforming, and my presentation will highlight the impending necessity that this must be recognised in the practice of healthcare and the parameters of law in order to account and provide for our greying society.

As a junior doctor, I witness the establishment of 'DNAR' orders. It is primarily a clinical decision, and one that can create an emotive response for patient and family. My presentation will expand the concepts and theories surrounding the ethics and law of DNAR, and identify whether these are still appropriate for our ageing population. My approach involves balanced analysis, encouraging the reader to identify where their moral and legal intuition lies from an academic and human view.

I will pose some uncomfortable questions, such as whether there is a proposed call to make such decisions mandatory earlier in life, at a point when the patient is in good health and full capacity? Are we moving towards a DNAR decision that is desensitised towards the emotive response of humanity surrounding the end of life? Such questions are justified with the intent to increase moral and legal awareness of DNAR decisions, in such a way to develop the clinical practice and approach towards our ageing population. This will benefit the awareness of patients, healthcare professionals and medico-legal professionals.

To conclude, my presentation will deliver a balanced approach of ethical and legal perspectives, maintaining a focus on the needs and protection of our ageing population. It will identify how such interconnected concepts are essential to be addressed by healthcare and legal professionals, in order to be aware of potential social demands of the greying population. These may include the possible transformation of healthcare practice by creating conflicting roles and duties of doctors: promoting the care of the sick, or trying to 'play God'? If DNAR is established early in life, is there 'legal space' for Advance Decisions? Ultimately, the potential risk of dehumanising our ageing population must be addressed.

"The wiser mind mourns less for what age takes away than what it leaves behind." – William Wordsworth (1770-1850).

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**Professor Rosie Harding, University of Birmingham**

***'You can put a dog to sleep, but my mother had to go through hell': Carer accounts of end of life with dementia***

End of life issues are especially difficult for people with dementia and their family carers, as the person themselves is often unable to make and communicate their views in a way that would be respected by our autonomy-centred healthcare decision-making frameworks. Notwithstanding the Committee on the Rights of Persons with Disabilities recent requests that States move away from 'best interests' decision-making for those with cognitive impairments, the prospects of people with dementia being supported or facilitated to avail themselves of the (relatively limited) legal options for assisted suicide are slight. This paper uses a feminist socio-legal approach to interrogate empirical data from a multi-method questionnaire (n=185) and focus group (n=15) study with family carers of people with dementia, funded by the British Academy. The analysis draws on carers' experiences towards the end of their loved ones' lives with dementia, to explore the limits of current socio-legal approaches to 'dignity in dying', including perspectives on advance directives, (assisted) suicide and euthanasia. I argue that the feminist concepts of vulnerability and relationality provide us with the conceptual tools to understand the experience of care at the end of life with dementia. I examine the complex narratives of carers who have seen their parents, partners or relatives struggle with indignities, insecurities and injustices in death with dementia. I argue that a

vulnerabilities approach offers some inroads into understanding why people with dementia are generally excluded from legislation permitting physician-assisted suicide, and the inevitable boundaries that are created by capacity-focused thresholds. I then complicate this analysis with an exploration of the importance of relationality for everyday decision-making, and the significance of supportive care networks in making decisions. I argue that by utilising a relationally inflected vulnerabilities lens, we can see more clearly the conceptual and practical limitations of current regulatory regimes in the context of the end of life with dementia, and begin to find ways to improve them.

11.00-  
12.00

## **PARALLEL PANELS**

### **MORNING STREAM A - DISCRIMINATION**

**Dr Elaine Dewhurst, Gary Lynch-Wood, Dr Sheena Johnson, University of Manchester, and Dr David Horton, University of Liverpool**

#### ***The interconnection between job substitutability, retirement flexibility and age discrimination principles***

This paper contends that the ability of an individual to be substituted in their job by another individual (referred to in this paper as 'internal job substitutability') is inherently connected with the retirement policies applied in those particular jobs. Where jobs are internally substitutable, retirement policies tend to be more flexible, and mandatory retirement policies are rare. In this regard, it is also submitted that justification of mandatory retirement policies under age discrimination law is less difficult in cases where internal job substitutability is low and vice versa. Therefore, the central thesis of this paper is that there is a distinct interconnection between job substitutability, retirement flexibility and age discrimination principles. The paper will begin with an exposition of the existing age discrimination principles relating to retirement policies and, in particular, mandatory retirement policies. It will then outline the results of a pilot study involving interviews with legal and retail firms in the Greater Manchester area and support the results of this study with an analysis of all the retirement cases, where the claimants have alleged age discrimination, before the Employment Appeals Tribunal since the introduction of the age discrimination rules in 2006. It is concluded that there is a connection between job substitutability and flexible retirement policies and that the law on age discrimination (in particular, the justificatory principles) appear to support this connection. It is also concluded that, in order for the age discrimination principles to be more effective and achieve their purpose, an awareness of this particular connection is vital.

**Stuart Goosey, Queen Mary, University of London**

#### ***Identifying wrongful age discrimination***

The Equality Act 2010 permits age distinctions where the treatment can be shown to be "a proportionate means of achieving a legitimate aim." The Act therefore offers greater scope for the use of age distinctions than race or sex distinctions. This reflects the common perception that age discrimination is "different" from other forms of discrimination and is more easily justifiable. This paper examines whether this perception is correct and, if so, how justifiable age discrimination can be distinguished from wrongful age discrimination. The author identifies norms that explain the wrongness of discrimination and examines whether these norms are applicable to cases of age discrimination. Contrary to the conventional accounts of discrimination, there is no single norm, such as liberty or equality, that can explain each case of wrongful discrimination. Each norm fails to account for certain instances of wrongful discrimination. A plausible approach is that the

wrongfulness of discrimination can be explained by drawing on a plurality of norms. To identify wrongful age discrimination, then, one must draw upon a range of norms, including liberty, equality and dignity. In determining how these norms are applicable to age discrimination and therefore identifying wrongful age discrimination, the unique features of age as a social phenomenon must be recognised. While age has similarities to traits such as race and sex - including use in the creation of stereotypes and contributions to personal identity - there are important differences; most notably, age groups are constructed according to the passing of time - persons move into and out of age groups as time passes - unlike racial and gender groups, where group membership has greater rigidity. This means that the benefits and burdens experienced by particular age groups are temporary and restricted to particular points in the life cycle. The unique features of age as a concept ensures that we need a legal framework to tackle wrongful age discrimination that is sensitive to the unique moral problems raised by age and ageing.

11.00-  
12.00

## **MORNING STREAM B – ADVANCE DECISIONS TO REFUSE TREATMENT**

**Isra Black, King’s College London, Ralf Jox, University of Munich**

***‘When and how I shan’t die’: advanced decisions to refuse treatment as a human right***

**Ruth Horn**

***Who should decide? Patient preferences and advanced decisions in England, France and Germany***

Legal regimes for advance decisions to refuse treatment - laws permitting a (legally) autonomous individual to issue a decision whose purpose is to govern her medical care and treatment following the loss of decision-making capacity - are increasingly prevalent in Europe. However, a plurality of legal models for advance decisions exists, expressing varying commitments to respect for the individual's precedent autonomy.

This panel takes a European perspective in discussing principled and practical challenges for advance decision regimes. It examines the extent to which variation in the legal regimes for advance decisions is defensible, and the problems faced in securing respect for advance decisions, both in jurisdictions that prima facie express a robust commitment to precedent autonomy, and those in which that commitment is weaker.

**Isra Black (& Ralf Jox), 'When and how I shan't die': Advance refusals of treatment as a human right**

Recent European Court of Human Rights litigation in the context of assisted suicide has disclosed a right to decide the moment and manner of death within the right to private life protected by Article 8 ECHR. We advance that this right applies also to refusals of treatment, both contemporaneous and advance. We argue (using George Letsas' typology) that on both substantive and structural facets of the margin of appreciation, only regimes for advance decisions that enshrine robust respect for precedent autonomy are likely to be Convention compliant.

**Ruth Horn, “Who should decide? Patient Preferences and Advance Decisions in England, France, and Germany”**

Following the recommendations of the European Council (2009, 2012), several European countries have accorded legal status to advance decisions (ADs). Yet, although discussed as important means to enhance patient autonomy, in practice ADs are only infrequently implemented. I argue that the reasons for this vary across countries, and refer to different values accorded to patient preferences. Comparing legal texts, public debates, and interviews conducted with physicians in England, France,

and Germany, this talk explores problems that arise in each country with regard to ADs. Such a comparison is an important starting point to rethink theoretical concepts of ADs and to redefine national and international guidelines that take into account cultural particularities.  
Ralf Jox, 'Why legal acceptance of advance decisions is not enough: towards implementing advance care planning'

Germany is one of the European countries that confer a relatively strong authority to advance decisions (ADs) by law. However, recent empirical studies showed that ADs have only a marginal effect on care pathways – in contrast to their promise. I will analyse the reasons for this deficit and hence develop the appropriate solutions. We do not only need more endeavour by the health care professions (e.g. regarding qualification of professionals), also the law is required to do more than merely accept ADs as binding decisions: health law should introduce structures and incentives for AD counselling and regional implementation, and legal proceedings should be initiated if health care professionals or others ignore valid and applicable ADs.

13.00-  
14.30

## **PARALLEL PANELS**

### **AFTERNOON STREAM A - RELATIONSHIPS**

**Dr Sue Westwood, University of Surrey**

***'My friends are my family': an argument about the limitations of contemporary law's recognition of relationships in later life***

Current law and social policy in the various UK legal systems privilege the conjugal couple, biological and filial relationships. Friendship remains on the margins of regulatory recognition. Yet friendship is of growing significance in contemporary social relationships. This is particularly so for older people, especially older lesbian, gay and bisexual people, who are more likely to be estranged from biological family, less likely to have intergenerational networks (due to historical restricted access to parenting) and more likely to have networks comprising 'families of friends.' This paper offers an overview of the place of friendship in key areas of law and social policy relating to older age: pensions, benefits and inheritance; medical decision making; mental health and mental capacity legislation; and social care policy. It focuses in particular on how (hetero-)normative constructions of ageing kinship in state models of community care disadvantage older LGB individuals whose kinship networks do not map on to these models. The extent to which contemporary law is keeping up with changing, ageing, relationship forms will be considered, along with its implications for equality in later life.

**Barbara Jones, AARP Foundation, California**

***Emerging legal issues affecting grandparents who are the primary caregivers of their grandchildren***

At early common law, grandparents lacked any substantive rights with regard to custody of their grandchildren. Life expectancies of eighteenth and nineteenth century grandparents often prevented them from becoming active participants in the lives of their grandchildren. The life expectancy of older adults is steadily increasing. In 2010, more Americans were 65 or older than in any previous census. A large number of these people are grandparents who are now active participants in the lives of their grandchildren and the role of grandparents is changing. The erosion of the nuclear family beginning in the 1960s has resulted in an increasing number of older people in the United States and other Western societies who support and care for younger generations. Recent American census data indicates that about 10% of all children in the U.S. live with a

grandparent. Grandparents, and other extended relatives step in not only when the child's parents are either unfit parents or unable to care for their children, but also step in to provide child care for working parents. In the U.S. about 2.7 million grandparents are "grandparent caregivers", i.e., grandparents who have primary responsibility for their grandchildren yet very few of these grandparents had legal custody arrangements. In the US between 1970 and 1990 the percent of children living in grandparent-maintained households doubled. In the UK, there are approximately 14 million grandparents, one in every three people over the age of 50. The number of children being raised by grandparents has likewise increased in the UK.

Previously, the increase in children living with grandparents was attributed to high rates of divorce, teen pregnancy, as well as increases in drug and alcohol abuse and incarceration. More recently, the economic and housing crisis has caused more people to live in multigenerational households. Many children live with their grandparents for five or more years. Grandparents' resources are being taxed and many of these households are living in poverty with little resources. Likewise, the legal rights and resources of grandparents in the U.S. and England are inadequate and should be improved. In the twenty-first century, there is a societal interest in protecting a child's relationship with their grandparent particularly when the grandparent is the primary caregiver. This proposal would examine emerging legal issues that have arisen in the U.S. and England when grandparents are left caring for children and explore the need for legal responses to better serve grandparent households.

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**Dr Mimi Zhou, Hong Kong, Dr Michael Dunn, Oxford University**

***Theorising 'Elder Law': towards relational account***

Alongside analyses of specific areas of the law that concerning the lives of older adults, 'elder law' scholarship has been characterised by recent attempts to provide an overarching theoretical narrative of the emergence and function of this area of the law. Such endeavours have put forward a variety of interwoven descriptive and normative claims. At one level, they seek to explain how the law relating to older adults operates, and invoke concepts to account for the links between different areas of elder law by reference to, for example, the application of constitutional principles or the function of economic forces. At another level, these theories also make claims about the direction in which the law ought to travel. In normative terms, scholars in this field have typically looked to human rights arguments to safeguard basic protections for older adults, or, less commonly, have turned to more communitarian accounts of social values to justify the need to include older adults in society, in ways that are equitable both within and between generations.

These theories, along with elder law as a body of scholarship, have developed largely in North America and Western Europe. In this paper, we draw on an account of the legal regulation concerning older persons in China to argue that it has focused on the creation, shaping and management of relationships of numerous kinds: between older adults; between older adults, family members and other members of society; and between older adults and state institutions. Thus, instead of providing an account that focuses primarily on how elder law targets individuals or groups of individuals, our account of the complex regulatory web of elder law in China identifies a concern with the regulation of relationships between actors and agencies of different kinds.

This account of the relational character of Chinese elder law has, we suggest, certain characteristics that ought not to be dismissed out of hand and that could be valuable in the ongoing attempts to theorise elder law in other jurisdictions. In descriptive terms, elder law remains elusive in its ability to be neatly explained, and there is scope for expanding the relational dimensions of current theories. More normatively, it is uncertain whether an individual rights-based approach would have traction in the Chinese context. Furthermore, we argue, it is equally possible that an attempt to better shape the relational connections between older adults and other individuals and agencies could have significant normative force. Here, we look to recent attempts to re-frame the human

rights of older adults in relational terms, such as the Chicago Declaration on the Rights of Older Persons, which offer protections to older adults whilst simultaneously recognising that it might not be the person him/herself who ought to be the target of regulation.

13.00-  
14.30

## **AFTERNOON STREAM B – INTO ‘CARE’?**

**Beverley Clough, University of Liverpool**

### ***Health and community care in an aging population: Accountability, equality and social justice***

The protection of the human rights of older people is becoming an increasingly urgent concern. At the same time, an analysis of the current legal protections available for older people to challenge health and care decisions exposes the obstacles faced in obtaining meaningful recognition and implementation of these rights. This paper will explore some of the challenges facing older people when seeking to use the law to assert or secure their rights in this area. The lack of accountability that attaches to many decisions affecting the health and care of elderly people will be problematized through consideration of the discretionary powers enjoyed by doctors and public bodies in making day-to-day decisions impacting upon the enjoyment of health and well-being. The responsiveness of the legal framework and institutional structures in this area will be further challenged through an evaluation of the limited ability of the courts, through judicial review, to respond to the various sources of inequality and disadvantage that affect older people. This is compounded by cases such as *McDonald v UK* in the European Court of Human Rights, which demonstrates the wide and malleable margin of appreciation enjoyed by states in the context of socio-economic rights. Questions around the appropriateness of judicial involvement in cases concerning socio-economic rights and ‘positive obligations’ will be explored, and an argument framed that the participative and deliberative aspects of judicial review are key to ensuring accountability. An approach to social justice rooted in capabilities theory, and Sandra Fredman’s multi-factorial approach to equality will form the basis of the theoretical critique in this paper, and will be used to argue for a more substantive engagement with the rights in question. This is particularly important in this context where intersecting sources of inequality can work to entrench disadvantage.

**Craig Lind, University of Sussex, Rod Edmunds, Queen Mary, University of London**

### ***Choosing where to live: aging, capacity and professional misunderstandings of the law***

This paper offers critical reflections on the decision-making process for older people whose capacity to decide how and where they should live during their final years is questioned. The Mental Capacity Act 2005 provides a model process for decision-making for people whose capacity to make decisions is in doubt. The paper reflects on Court of Protection proceedings (not always reported) in which the Act has been used to move older people from their homes into institutional care (apparently against their wishes). It will argue that, where public bodies and care professionals are involved in decisions and misunderstand the legal principles upon which those decisions should be made, older people’s wishes can easily be overridden and the worthy ambitions and meticulous design of the Act can be as easily undermined. The position is exacerbated by three factors. First, decisions of professionals (usually with the support of some family members and friends of the person ostensibly without capacity) can be put into effect immediately and without the intervention of legal institutions; second, older people will typically have no realistic prospect of gaining access to legal or other assistance to question the professional decisions at the time they are made; and third, even if they had access to proper advice and support to challenge decisions, the process necessary to challenge those decisions most often takes considerable time which takes its toll on the health, well-being and

capacity of older people (precisely what the Act was designed to avoid). In this paper we will reflect on the parallels with child care proceedings and the role of legal institutions in policing the decisions of other professionals to remove children into care.

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**Daniel Bedford, University of Portsmouth**

***Avoiding institutionalisation: dignity, vulnerability and exposure to risk***

This paper explores the emerging use of human dignity in the assessment of whether it is in the best interests of an elderly person who lacks capacity to be placed in an institutional care setting, rather than being allowed to remain in their home. The Court of Protection has recognised that the well intentioned efforts of the state to place an elderly person in an institutional setting on the grounds of personal safety can itself end up being abusive of human dignity. In this respect, human dignity appears to have an important role to play in recognising that where there is a risk of physical injury at home, those risks have to be considered pragmatically in light of the potential consequences of institutionalisation for other dimensions of a holistic concept of personality, including the emotional and social aspects of the person. One of the key consequences of this approach to the best interest test is the recognition that any intervention to protect the elderly should not be based on a mere fanciful risk of future physical injury, nor should risk of injury be avoided at all costs. Human dignity arguably makes an important contribution to the recognition that it is not possible to eliminate all human vulnerability in the form of openness to potential harm for 'all life involves risk.' Nor, more importantly, is it desirable to attempt to wholly eliminate vulnerability to such potential harm, for 'all life is an experiment'.

Drawing on vulnerability theory, the paper seeks to cast light on this judicial use of the concept of human dignity by arguing that vulnerability is central to the very type of dignity that we possess as human beings. Our openness and receptivity to what can affect us means we are not only exposed to risks of decomposition, destruction and passivity, but also the possibility for creativity, fulfilment, and relationships. It is the vulnerable nature of the human condition that enables us to develop, sustain and unfold our capabilities in relation to others. In this light, the paper argues that some things that are a potential source of our activity, fulfilment or creativity, will carry certain incidental risks of deterioration, which cannot be removed without also making those things impossible. Dignity thereby requires a degree of positive risk taking for the elderly on the basis that it is integral to the realisation of human flourishing. Safety cannot be an overriding consideration, for risk is unavoidable and any attempts to avoid it by keeping the elderly 'metaphorically wrapped up in cotton wool' will negatively impact upon basic human functioning or social activity. The paper therefore argues that appeals to vulnerability and human dignity are not only to be invoked to justify safeguarding measures for the elderly, but also to enable the elderly to be open to certain manageable risks.

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14.45-  
16.00

**PLENARY**

**SESSION IV: RIGHTS OF OLDER PEOPLE IN CARE**

**Helen Meenan and Nicola Rees, Kingston University; Professor Israel Doron, Haifa University**

***'Towards Human Rights in Residential Care for Older Persons: International Perspectives'***

In recent years, few subjects have attracted more attention in the British media than the poor, negligent or haphazard quality of care received by older people in residential care homes in the United Kingdom (UK). This raises questions about the regulation of these homes and the source and application of standards of care within them including the role of human rights. In general, the

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perception of human rights in the lives of older people in the UK has been erratic and unpredictable. At times human rights appear to let older people down and at other times, in the hands of skilled campaigners, human rights arguments have helped to fill gaps or achieve a humane solution to their plight in individual cases.

This presentation is based on our forthcoming book which explores the rights of older people and their quality of care once they are living in a care home, and considers how we can commence the journey towards a human rights framework to ensure decent and dignified care for older people.

The book takes a comparative approach to present and future challenges facing the care home sector for older people in Africa (Kenya), the Arab world (Egypt), Australia, China, England, Israel, Japan and the USA. An international panel of experts have contributed chapters, identifying how their particular society cares for its older and oldest people, the extent to which demographic and economic change has placed their system under pressure and the role that residential elder care homes play in their culture. The book also explores the extent to which constitutional or other rights form a foundation to the regulatory and legislative structures to residential elder care and it examines the important concept of dignity.

The international approach suggests steps that England and other countries could take, in order to improve the experience of receiving care and to promote the role of human rights in both the public and private sector and, in the practice of care giving.

Helen Meenan is best known for her work on age discrimination and law and ageing and holds an Honorary Appointment at the Faculty of Business and Law, Kingston University, United Kingdom, where she previously held the Jean Monnet Chair in European Law.

Dr Nicola Rees, Director of Studies and Principal Lecturer, Faculty of Business and Law, Kingston University, United Kingdom.

Professor Israel Doron is Head of the Department of Gerontology at the University of Haifa, Israel and Founder of the Law in the Service of the Elderly Association in Israel.

Helen Meenan, Nicola Rees & Israel Doron Eds., *Towards Human Rights in Residential Care for Older Persons International Perspectives*, to be published September 11, 2015 by Routledge (ISBN 9780415725552 (In Press))

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**Dr Nicholas Kang-Riou, University of Salford**

***Revisiting the right to autonomy of older people in care homes from the lens of relational autonomy***

One of the specific problems of ageing is the diminution of autonomy stemming from diminishing mental or physical capacities leading to the loss of an individual home. Many of our rights are connected to possessing an individual home where our autonomy can be protected and exercised. When an older person is transferred to a care home or a nursing home, the continued capacity to live in a self-determined and autonomous manner is restricted. This is even more so for people living with dementia who now constitute the majority of people living in care homes in the UK. In this context, the main guarantee of autonomy is meant to be secured by the protection of legal capacity and consent.

This is for instance what the Committee of Minister of the Council of Europe Recommendation CM/Rec(2014)2 to member States on the promotion of human rights of older persons insists upon. Article 9 of the Recommendation states : 'Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, inter alia, the taking of independent decisions with regard to all issues which concern them', and article 11 guarantees the right to legal capacity.

	<p>The paper argues that such an angle of protection is actually problematic and that it can even be counter-productive as the autonomy and self-determination depends on how much one is helped to stay connected with others and engaged in meaningful activities.</p> <p>In particular, it has been proven that part of what people with dementia lose in terms of personal autonomy can be regained through individually supported social activities. The idea of human rights focusing on independence can on the contrary leave the person isolated and with increasing frailty. The paper engages with the concept of ‘relational autonomy’ and questions to what extent it should replace the traditional individualistic vision in order to better frame the human rights issues of older people in residential care.</p> <p>In so doing, the paper argues in favour of a specific approach to the human rights of older people but one which is also revisiting the traditionally agreed foundations of human rights interpretations.</p>
	<p><b>Alison Brammer, Professor Mo Ray, Keele University</b></p> <p><b><i>Adult abuse in residential settings in England – analysis of care standards tribunal jurisdiction</i></b></p> <p>The abuse of vulnerable adults, including older people, may take place in a variety of settings. A national prevalence study was conducted in England and Wales in 2007 focussing on abuse of adults aged 65 and over in domestic settings. It found a prevalence figure of 4%. To date there have not been any similar prevalence studies of that scale with a focus on abuse in residential establishments. Evidence may, however be drawn from a range of sources to suggest that such abuse takes place. As a powerful example, a BBC Panorama documentary using undercover film footage highlighted extensive abuse of adults with learning disabilities in Winterbourne View private hospital. The circumstances have subsequently been examined in a serious case review and questions how such abuse could continue undetected by the regulatory body and the safeguarding authority. This paper provides an inter-disciplinary critical analysis of a further source of evidence – published reports of the care standards tribunal. This tribunal acts as an appeal body against decisions of the regulatory body, the Care Quality Commission (CQC). CQC responsibilities include regulation and registration of residential and nursing homes. Specifically the Commission may refuse or grant registration of a care home, impose conditions on registration, assess the fitness of a manager, cancel existing registration, including emergency closure of a home. The tribunal hears evidence of the concerns of the regulator on which their decision is based. Such evidence often includes alleged incidents or patterns of behaviour which might be described as abusive. Examples include inappropriate use of medication, excessive restraint, rough handling and verbal abuse. This paper provides a thematic analysis of tribunal reports over the last 10 years, including the standard of ‘fitness’ applied to managers. The key consideration is identification of different types of abuse and the extent to which the categories contained in statutory guidance for the protection of vulnerable adults from abuse, ‘No Secrets’ (2000) and the new statutory guidance to the Care Act 2014, are reflected. Both recognise that abuse can take place in various settings and that the perpetrator may be a family member, carer, stranger or paid professional. We argue that within an emerging knowledge base there is merit in recognition of a separate category of ‘institutional abuse’ which recognises the particular nature of abuse in residential settings by staff employed to care.</p>
<p>16.00-16.45</p>	<p><b>SESSION V: KEYNOTE 3</b></p> <p><b>Professor Richard Ashcroft, Queen Mary, University of London,</b></p> <p><b>Professor Jonathan Montgomery, University College London</b></p> <p><b><i>Aging without withering: the need for a positive spin?</i></b></p>

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