I. Introduction

Everyone cares. Everyone is cared for. Yet caring receives surprisingly little attention from lawyers. The law degree is replete with cases about people making money, losing money and claiming money. The business office; the computer; and the racecourse feature prominently. The day care centre; the nappy changing table; and the care home bypass most undergraduate students, however. The well-dressed businessman with his rights of autonomy; freedom of contract; and presumption of innocence can be well advised by our law graduates. The exhausted mother of the disabled child, with little autonomy, freedom or innocence, cannot. She is an anomaly, outside the norm. Not even, perhaps, of particular interest to lawyers. After all, she will not be able to pay any fees. Yet everyone cares. Everyone is cared for …

Caring easily disappears from the picture when the production of economic value becomes a national obsession. Economic forecasts and share price changes are major stories in the media. The successful outing with the autistic child or the happy haircut of the demented woman is not. Economic indicators are linked inevitably to the well-being of the nation. ‘It’s the economy, stupid’ has become widely recognised as one of the greatest electioneering statements ever made.¹ As Martha Fineman notes:

The Dow Jones average is reported daily (even hourly on public radio) as though this reflected our country’s health and wealth, an economic indicator substituting for other forms of evaluation of national standing such as the equitableness of the distribution of the wealth the society is producing or the well being of the most vulnerable of our citizens. We seem blinded in a reverie of self satisfaction even as the position of our children and the historically disadvantaged subgroups in

¹ The phrase originates from the remarks made by James Carville, a strategist for Bill Clinton.
society deteriorates both from where they were a few decades ago and relative to the positions of these groups in other industrialized democracies.²

Perhaps the lack of attention paid to caring by the law is unsurprising. Law is best designed to deal with precise disputes: who did what to whom and when? Caring is about relationships. Individual acts of care can only be understood in the context of the relationship between the parties. Law is about enforcement; while caring is about the voluntary performance of acts motivated by love. Who would want to be cared for by someone who was only doing so under threat of court sanction? Law deals with people who are in dispute and need, in some sense, to be kept apart. Caring is about people being brought together.

These points reveal misguided presumptions about the nature of law and personhood. They do not show us that law and caring are incompatible, but simply that with certain ways of looking at the law and using certain principles to underpin the law, caring will not fit. They do not show that in their very essence caring and law are simply incompatible. This will be a major theme of chapter three.

A central theme running through this book is the argument that caring is an essential aspect of human existence. From our earliest days we are in caring relationships which are crucial to our survival; emotional well-being; and psychological identity. Caring is hardly some kind of luxury hobby or activity ancillary to other more important activities. It is central to our humanity. Feeding, bathing, changing, comforting, transporting, and nurturing are essential activities. Even if at times when we might feel we are independent and not in need of care, in fact we are dependent on others for the provision of food, transport and power. More importantly, we are dependent on others for comfort, company and identity.

The law for too long has been arranged around the vision of an able, autonomous and unattached adult. The law's role has been to enable him to retain his ability, autonomy and freedom. His rights are powerful tools to keep others out: rights to autonomy, privacy and liberty are used to maintain this character. Limitations on freedom need to be justified, typically by being chosen by the individual. This book argues for a different vision: one which starts with recognising that our identities, values and well-being are tied up with our relationships and the responsibilities that come with them. If the caring of dependents is accepted as central, then the values of autonomy, freedom and justice need to be used to enable and support caring.³ Our starting point focuses on interdependent relationships and not the isolated individual.

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Taking such a view has a significant impact on what we regard as the central role of the law and the state. A central role for the state must be to ensure that the dependency needs of individuals are met. Without that people cannot live dignified lives. Care cannot be dismissed as a private activity of no interest to the state. As Maxine Eichner puts it:

The care that children and other dependents receive from family members is inextricably intertwined with state policies. This care takes place in a matrix of constraints and entitlements that affect family members’ ability and opportunity to care for other members. The existence or nonexistence of minimum wage laws, union rights to bargain, and overtime provisions affect parents’ ability to meet the financial needs of their children and other dependents. Welfare reform laws requiring recipients to work in order to receive welfare subsidies affect parents’ ability to care for those with dependency needs. Family leave laws influence parents’ opportunity to stay home with their children. The stability and security of a parent’s job affects stress levels in the household, which also affect the quality of parenting. In these circumstances, the family has no ‘natural’ manner of functioning that it can be left to ‘apart from’ the state. Nor does the modern administrative state have a neutral, isolated position it can assume while leaving families autonomously to deal with their own affairs. Instead, the state is always and continually influencing how families conduct their affairs. The issue is not whether state policy will influence families but whether it will be formulated with this inevitable influence in mind. When it comes to the ways families function, no family is an island.

This is not to say that care is only a matter for the state. Families and friends are well-suited to providing intimate care because, as I will argue in chapter two, relationships are central. Yet families and friends are not able to provide the broader social support necessary to ensure that caring can take place effectively and that mitigates the disadvantages that flow from care. To quote Eichner again:

Determining that the state and families are both conjunctively responsible for meeting dependency needs does not mean that the state’s role should be identical to families’. Rather, each should bear responsibility for the area in which it has greater competence. This means that families should bear responsibility for the day-to-day caring for (or arranging the care for) children and others with dependency needs. Meanwhile, the state should bear the responsibility for structuring institutions in ways that help families meet their caretaking needs, and that support human development. This includes ensuring that families have safe and affordable caretaking options, as well as structuring other societal institutions, such as schools and communities, in ways that foster children’s and other dependents’ development and well-being. This division of responsibility recognizes the malleability and contingency of institutional structures. It does not artificially separate state action from the realm of families or presume that completely clear boundaries can be drawn between them, but it does assume certain spheres of authority will exist between the two.

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Currently, the state is failing to adequately support carers. In this book we will find plenty of examples of cases where the interests of those in caring relationships are ignored or excluded, and where legal styles of thinking fail to produce solutions that work for caring relationships.

One of the most powerful contributions to the inequality of women has been the devaluation of ‘women’s work’ and the exaltation of ‘men’s work’. The classification of care work as private or a labour of love has left its significance unrecognised and unrewarded. One of the ironies of modern life is that women’s increased opportunities in the ‘workplace’ has only been possible because other women have taken on the role of providing caring services such as child care, cleaning and the like. The children and dependants of the lowest paid workers are the ones who bear the cost of that.

II. Title

The title of this book is *Caring and the Law*, rather than the more obvious *Carers and the Law*. This is deliberate, for reasons elaborated on in chapters two and three. I will summarise those reasons now though, because they involve some of the central themes of this book. The more common terminology of discussing ‘carers’ and ‘cared for’ has received some justifiably trenchant criticism from disability rights advocates. It presents the person needing care as being the passive recipient of a kindness from the other. It perhaps also captures a rather patronising attitude towards those needing ‘looking after’. However, the preference from many writing from a disability rights perspective of using the language of help and the carer being a personal assistant fails, I suspect, to capture the reality of many caring relationships. This contains three features which I suggest make it preferable to talk of caring relationships rather than carer and cared for, or disabled person and assistant.

First, in a caring relationship the interests and identities of the two people become intermingled. Their interests become interdependent. It becomes impossible to consider the welfare or rights of the one in isolation. Hence the focus must be on the relationship, rather than the individuals.

Second, the language of ‘carers’ is generally taken to refer to those who are caring for older people or disabled adults. The unfortunate consequence of this is that it sidelines the many other forms of caring that take place, be that of children, friends or partners. While the appropriate legal response to different caring relationships may vary, it is important to recognise the broader range of care work that takes place.

Third, and flowing from the previous point, the language of ‘carer’ and ‘cared for’ ignores the fact that we all need care. We are all vulnerable and rely on others to provide for our needs. To divide society up into those providing care and those needing care disguises the vulnerability that we all face.
Further, for many people in the course of a relationship they will at some point be regarded as a ‘carer’ and at another point a ‘cared for’; and often both at the same time. To separate the parties in a relationship into carers and recipients of care oversimplifies the complexities of many relationships.

III. Ethic of Care

Many of the arguments in this book will be based on an ethic of care. This will be defined in chapter three. Ethic of care has received attention from writers from a broad range of disciplines including economics, education, law, sociology, philosophy, social policy and politics. One of the aims of this book will be to explore how an ethic of care might be applied in concrete legal proposals. This is not straightforward because much of the law is based on principles which are antithetical to an ethic of care approach. It is not surprising, therefore, that many writing on an ethic of care have avoided using it to produce concrete solutions. Our society and legal system would be very different if based on ethic of care principles. The journey to the ideal legal system looks to be a very long one, but I will suggest how changes can now be made to the law in this book.

IV. Real Life

Government publications on carers are typically accompanied by pictures of attractive, smiling and calm carers. The reality can be rather different. Caring is extremely hard work. In his book, The Selfish Pig’s Guide to Caring, Hugh Marriott, clearly a devoted carer himself, has this to say:

We didn’t apply for the job. Most of us don’t have a vocation for it. We’ve had no training. We’re certain we aren’t much good at it. Plus, and this is the nub of the matter, we’ve got our own life to lead. Are we expected to throw that away because of somebody else’s disability? We’ve got things to do, places to go. And now it looks as if we might not be able to.

7 Eg N Folbre, Who Pays for the Kids? Gender and the Structures of Constraint (Routledge, 1994).
8 Eg N Noddings, Caring: A Feminine Approach to Ethics and Moral Education (University of California Press, 1984).
11 V Held, The Ethics of Care (Oxford University Press, 2006).
12 Eg S Sevenhuijsen, Citizenship and the Ethics of Care (Routledge, 1998).
13 Eg B Hobson, Gender and Citizenship in Transition (Macmillan, 2000).
But aren’t we just as important as they are? Why are we expected to sacrifice ourselves for somebody else? And yes, I mean sacrifice. We’re not talking about giving up five minutes of time once or twice a week. Or putting off a holiday from this year to next. We’re talking about changing our entire way of life. The old one wasn’t perfect, but it was the best we could do. This new one isn’t even ours. It’s somebody else’s life. And it’s one that doesn’t suit us at all.14

As Laura Kessler puts it, care ‘can be self-annihilating, mind deadening, and repetitive. Caregiving can be dream deferring and socially isolating.’15

It is easy, and appropriate, to paint a gloomy picture of those undertaking caring relationships. Carers UK and the Carers Trust have quite rightly highlighted the disadvantages suffered by those undertaking care work. A survey by the Carers Trust reported that a third of carers feel so bad they do not want to wake up in the morning16 and 45 per cent said they felt so depressed they could not cope. In the same survey the level of financial disadvantage was highlighted, with 53 per cent borrowing money because of their caring role and 45 per cent cutting back on food and heat to make ends meet.17 Caring can cause ill-health, with carers being twice as likely as others to have mental health problems.18

We will explore the disadvantages suffered by carers later in chapter two.

Carers UK estimates that there are 6.4 million people providing unpaid care.19 By ‘carer’ they mean ‘unpaid care by looking after an ill, frail or disabled family member, friend or partner’. Over the next 30 years, it is predicted that the number of carers will increase by 3.4 million (around 60 per cent).20 Currently, around 12 per cent of the adult population are caring. Around 1.25 million people care for more than 50 hours a week.21 The 2001 Census suggested that 58 per cent of carers were women. Notably many carers are older, with the peak age for caring being between 50 and 59, with more than 20 per cent of that age group providing care.22 Young people undertake significant levels of care, with 174,996 carers under the age of 18 providing care according to the 2001 Census, and 13,029 of them providing at least 50 hours a week.23 A disproportionate number of these young carers are from certain ethnic minority backgrounds (including Bangladeshi, Black African, Black Caribbean and Pakistani).24

18 Carers UK, Facts About Carers (Carers UK, 2009).
19 Carers UK and Leeds University, Valuing Carers (Carers UK, 2011).
20 Carers UK, Key Facts About Carers (Carers UK, 2012).
21 Carers UK, Facts About Carers (Carers UK, 2009).
22 Ibid.
23 Ibid.
In the popular imagination carers tend to be presented in one of two ways. On the one hand there is the picture of the exhausted carer, which has effectively been portrayed by organisations seeking to promote carers’ rights. Typical would be the description in The Guardian of carers who ‘face financial ruin, stress and exhaustion as they battle to cope with the demands of 24-hour care and a bureaucratic system that makes their lives a misery.’25 On the other hand carers are presented as self-sacrificing paragons of virtue. As a recent White Paper puts it, ‘The Government recognises and values the contribution of carers. By caring for people in their own time and supporting other people’s independence, carers embody the spirit of the Big Society.’26

Mothers in particular are glorified. George Washington’s comment is still typical today: ‘All I am I owe to my mother. I attribute all my success in life to the moral, intellectual and physical education I received from her.’27

While not wanting to mock or downplay the significance of mothers, there are serious dangers with the glorification of motherhood. Three will be seen in this book. The first is that anyone who falls short of the highest standard is seen as a failure. In chapter seven we shall see the extraordinarily high standards to which the criminal law can hold mothers. The second is that the care of mothers is assumed. Just as the teenager who treats the family house like a hotel with no apparent awareness of the work behind the scenes, the state takes for granted the care provided by mothers and others. The third is that the care of others who do not fit within the traditional model of motherhood or family life is discounted. Hence, for example, the care in same-sex relationships or care by children is overlooked in discussions or presentation of care.28 This sidelining of care can even be found in academic writing. In his influential study of ethics, David Heyd explains that his ethical analysis will not cover mothers who make sacrifices for children because that belongs to ‘the sphere of natural relationships and instinctive feelings (which lie outside morality).’29 Although to give him credit, at least caring gets a mention. In many other works of political and moral philosophy caring is simply ignored.

V. Politics and Care

Previously caring was seen as an issue of little relevance to political campaigning, but now that is very different. In 2008 the Government produced *Carers at the Heart of 21st-Century Families and Communities*, a major re-examination of the relationship between carers and the state. In its introduction Gordon Brown declared:

> Caring for our relatives and friends when they are in need is a challenge that the vast majority of us will rise to at some point in our lives. At any one time 1 in 10 people in Britain is a carer—the majority of them, of course, still women. It is a testimony to the importance of families that so many of us are prepared to make the personal sacrifices that caring can involve in order to help our loved ones lead fulfilling lives even in the face of incapacity or disability. Our support and appreciation for carers is therefore not just fundamental to ensuring that those of us in need of care are able to receive it, but goes right to the heart of our values as a society and our ambition to create a fairer Britain.30

Care has become a major political issue. Sadly, it is economics which has largely driven the sudden interest in care. Due to a range of social changes, including work patterns, family breakdown and changing demographics, an increasing number of people are becoming dependant on state care. The cost of this on the state and on individuals is huge. The state is worried by the growing cost of care and the middle class is concerned that their legacies will be eaten up with care costs. The Dilnot Report,31 designed to deal with this concern, has received considerable attention. As we shall see in chapter four, governments have consistently failed to deal with the complexities of the economic costs of care.

The think tank, the New Economics Foundation carried out research on the true economic value of the work performed by various careers. Much media attention greeted its finding that hospital cleaners contributed more to society than bankers.32 As they point out, tax accountants, although richly rewarded, contribute negatively to the overall wealth of the country. While slightly tongue in cheek, what such studies show is that the rewards our society gives are not necessarily governed by logic. No one would die or suffer unbearably if

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31 Department of Health, *Commission on Funding of Care and Support* (Department of Health, 2011).

accountants, journalists or professors stopped work for a few weeks. However, they would if carers stopped caring. That is perhaps a ‘cheap point’ but it highlights the need to rethink what it is that we value in society. Care has not been seen as a major marker of a good society for too long. We need to elevate care to being recognised as a major requirement for a successful state.

VI. The Structure of the Book

Chapter two will explore the meaning of care and what is meant by a caring relationship. This will include an exploration of the lives of those in caring relationships. The chapter will describe the struggles facing those in caring relationships and attempt to identify the amount of caring that takes place in the UK currently.

The third chapter will define an ethic of care. It will set out some of the key principles underpinning the approach. However, this will not be an uncritical analysis of an ethic of care. There are serious difficulties with aspects of ethic of care and there are undoubted tensions that arise when it is put into practice. These are particularly apparent for lawyers because an ethic of care abjures abstract principles and instead focuses on finding solutions that are appropriate in the particular context. The chapter will argue that, appropriately understood, an ethic of care provides a powerful way of reorganising society and law in a way which puts caring centre stage.

The fourth chapter will examine the state’s response to care. As already mentioned in this introduction, there is increasing political interest in care. There is still much debate over the role of the state in care. The chapter will look at the provision of payments and services in cases where care is needed. The chapter will explore the inadequate current response of the state to caring relationships and consider how that might be improved. It will also analyse the recent proposals for reform that the Government has put forward.

The book then turns to some particular areas of law to examine how caring relationships are accommodated. Chapters five and six explore family law and medical law respectively. One might suspect that these would be areas of the law where caring relationships would receive particular recognition and attention from the law. They do not. We shall see, even in these areas of law where relationships are so important, a fixation on individualised legal personhood and individualised models of rights. Hence, in medical law the legal approach is still very much based on a single patient before a single doctor. The interests of those in relationship with the patient are utterly eclipsed by talk of my right to make my decisions about my body. In family law, while relationships are central to the topic, the law privileges particular kinds of relationship. These tend to be sexual relationships, rather than relationships
based on care. I argue in this chapter for a rethinking of this area of the law and recommend a family law which is less sexy and more careful!

Chapter seven looks at other areas of the law and their relationship with caring. It considers human rights law, employment law and tort law as examples where caring often goes unrecognised and unvalued. These areas highlight the way that the law makes assumptions about what we can expect from an employee and what is economically valuable, all of which downplay the importance of care.

Chapter eight acknowledges the ‘dark side’ of caring, namely that of abuse within intimate relationships. The chapter highlights the dangers that an ethic of care can valorise caring relationships but fail to recognise the need for protection. However, it argues that proper support and valuing of caring relationships requires an effective legal response to protect people in them.

The final chapter seeks to bring out some of the key themes in the book.33

I hope to change the way caring and the law are viewed through the arguments in this book. There is a way to make caring the central principle of the law. The law in all areas can be rewritten with caring as the underlying tenet. Money and individual rights, while important, are a sandy foundation, but caring is the rock on which society stands.

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33 B Sloan, Informal Carers and the Law (Hart, 2012) provides an excellent discussion of the detailed law on carers.