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EAHL Newsletter

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Special issue on legal
landscape concerning
the coronavirus
outbreak in the USA

* The information presented in the report
reflects data at the time of submission

EAHL
EUROPEAN ASSOCIATION OF HEALTH LAW

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Message from the President

August 2020
Issue No 4



EAHL President
Prof. JD. Karl Harald Søvig

Dear EAHL members,

The recent EAHL newsletters with our Covid-19 legislative survey have been welcomed by the members and I have received positive feedback from many, also outside our organization. The two previous editions of the newsletter cover 23 states.

This special edition contains an update from the US, written by Dean Harris, who many of you now from EAHL conferences. He has focused on coronavirus lawsuits. The overall impression from the European survey is that few such cases has reached the courtrooms. The situation is indeed different in the US, and thanks to Dean for sharing his knowledge and insight!

I would also like to thank Lukáš Prudil, who came up with the initiative to make a survey by EAHL. The EAHL administrative assistant, Lala Jafarova, also deserves gratitude. She has been helpful with all the newsletters.

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COVID-19 lawsuits “across the pond”: Ten categories of coronavirus lawsuits in the USA

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4 August 2020

The European Association of Health Law (EAHL) provided a detailed survey of legislative measures related to the COVID-19 pandemic, in the April and June 2020 special issues of the EAHL newsletter.¹ Many EAHL members put in a lot of time and effort in developing this very useful resource.

In his introductory message to that survey, EAHL President Karl Harald Søvig noted that “So far, few cases have reached the courts. Partly, this may be due to the duration of legal processes but it could also be explained by the fact that the population to a large extent accept the measures due to the extraordinary situation.”²

In contrast to the situation in Europe, there has been an explosion of lawsuits about COVID-19 in the United States. Large segments of the U.S. population do not accept the measures that are recommended by experts or mandated by government authorities. Instead, many people continue to follow the lead of a President who disputes the advice of medical experts, discouraged people from wearing masks, and claimed that COVID-19 would disappear “like a miracle.”³ Many people in the U.S. consider government restrictions on business or personal activities to be improper violations of their individual freedom, regardless of the effects of their individual actions on other people in the community.

There are far too many lawsuits related to COVID-19 in the U.S. to be able to discuss or even mention all of them.⁴ Instead, I decided to describe 10 different categories or types of COVID-19 lawsuits in the U.S., and provide an example in each category. (Many of these cases are still pending and are subject to further developments.) The 10 categories and the examples are as follows:

1. Disputes between a state government and the federal government: In the U.S. federal system, state governments have the primary authority for protection of public health, under the “police power” of the states.⁵

¹ <https://eahl.eu/newsletters>

² *Id.* at Issue 3, (June 2020), at 1.

³ See, e.g., Paz, C., “All the President’s Lies About the Coronavirus,” *The Atlantic*, (July 13, 2020),

<https://www.theatlantic.com/politics/archive/2020/07/trumps-lies-about-coronavirus/608647/>

⁴ See, e.g., [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020)

⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

The President has claimed that he has “total” authority to overrule state governors in regard to the coronavirus pandemic, but he is totally wrong.⁶ Usually, this type of Presidential bluster does not result in litigation, because the outcome is beyond dispute. However, some lawsuits have been filed by states against the federal government in regard to specific issues. For example, several states have sued the federal Department of Education over the formula that the federal government wants to use in allocating COVID-19 relief funds between public schools and private schools.⁷

2. Disputes between different branches of state government: Like the federal government, state governments must comply with the principle of “separation of powers” between legislative, executive, and judicial branches of government. If the office of the state governor and the leadership of the state legislature are controlled by different political parties, disputes can result in litigation between those branches of government. For example, in the State of Michigan, leaders of the state legislature from the Republican Party sued the state’s governor who is from the Democratic Party. The Republican legislators argue that the Democratic governor acted beyond her statutory authority in regard to her emergency declarations about the COVID-19 pandemic.⁸

3. Disputes between state government and local government: In several U.S. states, political disputes between state and local governments reflect fundamental differences between urban and rural areas in their demographics, income, and level of education. As compared to rural areas, urban areas have a higher percentage of Black and Hispanic residents, a higher percentage of young people, a higher level of education, and higher level of income. In some states, the governor and leaders of the state legislature are members of the president’s Republican Party, while local government in urban areas of the state is controlled by the Democratic Party. The COVID-19 pandemic in the U.S. is having a disproportionate effect on Black (African-American) and Latino people, including higher rates of infection and higher rates of death than White Americans.⁹ Some Democratic mayors in urban areas are attempting to protect their populations by imposing requirements such as wearing masks, but some of those mayors have been stopped at the state level by their Republican governors who are opposed to those legal mandates. For example, the Republican governor in the State of Georgia (Brian Kemp) is trying to prohibit local governments in that state from requiring people to

⁶ Savage, C., “‘Total’ Power, and its Limits,” *New York Times* (April 15, 2020).

⁷ Rodriguez, O and D Eggert, “States Sue Department of Education Over Pandemic Relief Funds Being Diverted to Private Schools,” *Time* (July 7, 2020), <https://time.com/5863903/departments-of-education-lawsuit-coronavirus-relief-funds/>

⁸ Mauger, C, “Legislature asks Michigan Supreme Court to consider emergency powers case,” *Detroit News* (May 26, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/26/legislature-asks-michigan-supreme-court-consider-emergency-powers-case/5258029002/>

⁹ Oppel, R, *et al*, “Racial Disparity in Cases Stretches All Across Board,” *New York Times*, (July 6, 2020).

wear masks, but the Democratic Mayor of Atlanta (Keisha Lance Bottoms) refused to comply with the governor's order and continued to impose a local mandate to wear masks. The governor of Georgia (a White Republican) sued the mayor of Atlanta (an African-American Democrat who has been infected by COVID-19) in state court, in an effort to prevent the Mayor from enforcing her local order.¹⁰

4. Disputes between political parties and state or local government: If a state or local government prohibits large gatherings during the pandemic, such as sporting events and concerts, can that restriction be applied to prevent a political party from holding a political rally or convention? In the State of Texas, the Democratic mayor of Houston and other city officials cancelled their previous agreement, which would have allowed the Texas Republican Party to hold a political function in a city convention facility. The city's cancellation was based on a "force majeure" provision in the agreement, because of the spread of COVID-19 in Houston. The Texas Republican Party sued city officials in state court, in an effort to require the city to allow the political convention in the city's facility. The Republicans' request was denied by the local state court and by the Texas Supreme Court. In a separate lawsuit in federal court, a federal district judge held that the city must allow the Republican convention to be held in the city's facility, as a matter of constitutional rights. However, the decision of the federal district court was stayed by the federal Court of Appeals for the 5th Circuit, which effectively prevented the Republican convention from being held in the city's facility.¹¹

5. Disputes between private businesses and state or local government: Many private businesses, such as bars and restaurants, have objected to state or local orders that required them to close entirely or limit their business activities during the COVID-19 pandemic. For example, a trade association of bars and restaurants in the state of Colorado filed a lawsuit against the governor and the state health agency to challenge the state's limits on capacity in bars and restaurants and the state's prohibition of alcohol sales after 10:00 pm.¹² In addition to challenging a government's legal authority, some bar owners complain that state or local governments are discriminating against them, by imposing more severe restrictions on bars than the government imposes on restaurants. For example, bar owners in Volusia County, Florida are suing state officials for prohibiting bars from selling alcohol for consumption on the premises, while allowing restaurants to sell alcohol for on-premises consumption.¹³ State and local officials usually respond to this type of argument

¹⁰ See, e.g., <https://www.11alive.com/article/news/health/coronavirus/lawyers-for-mayor-bottoms-file-brief-responding-to-gov-kemps-lawsuit/85-6cb8e0fc-f8a6-4621-9cd5-a6f47ab83330>

¹¹ Langford, C, "Fifth Circuit Bars Texas GOP From Holding In-Person Convention," *Courthouse News Service*, (July 18, 2020), <https://www.courthousenews.com/fifth-circuit-bars-texas-gop-from-holding-in-person-convention-amid-pandemic/>

¹² Gstalter, M, "Colorado bars and restaurants sue governor over 'no alcohol after 10 pm' rule," *The Hill* (July 24, 2020), <https://thehill.com/homenews/state-watch/508859-colorado-bars-and-restaurants-sue-governor-over-no-alcohol-after-10pm>

¹³ Griffin, N, "Volusia Bar Owners Sue State for Alleged Discrimination Amid Reopening," *Spectrum News 13*, (July 14, 2020), <https://www.mynews13.com/fl/orlando/news/2020/07/14/volusia-bar-owners-sue-state-of-florida>

by pointing out that different business activities pose different levels of risk to public health, and some business activities are more dangerous than others.

6. Disputes between religious organisations and state or local government: The First Amendment to the U.S. Constitution guarantees the free exercise of religion. This includes the right to practice for every religion. In some situations, the religious freedom of one person or group conflicts with the rights and interests of other people. In those situations, the conflicting rights and interests may be resolved by the federal courts, including the U.S. Supreme Court. The COVID-19 pandemic raises this type of conflict, when a state or local government applies its restrictions on large gatherings to churches and other houses of worship. In California, rules of the state government limited attendance in houses of worship to 25 percent of capacity in the building or a maximum of 100 people. A church in California asked a federal court for an injunction to prevent the state from enforcing those rules. The church argued that it should be treated the same as similar non-religious (secular) businesses, such as restaurants, supermarkets, retail stores, and shopping malls, which are not limited to 25 percent of capacity under California rules. However, the U.S. Supreme Court denied the church’s request for an injunction, because California treated churches in a manner that was similar to the state’s treatment of comparable secular gatherings such as concerts, spectator sports and movie theaters.¹⁴ As Chief Justice Roberts wrote, California’s rule “exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.”¹⁵

7. Disputes between abortion providers and state government: A pandemic can reduce access to reproductive health services in several ways, such as orders for “lockdowns,” fear of going to clinics, closing of borders, and shortages of supplies, drugs, and devices.¹⁶ In the U.S., some state governments have used COVID-19 as a pretext (an excuse) to limit access to abortion. During the pandemic, some states prohibited medical procedures that were not emergencies or not immediately necessary. The purpose of that type of prohibition was to preserve hospital capacity and personal protective equipment (PPE) during the pandemic. In some situations, that type of prohibition made sense, but some anti-abortion officials used it as a way to restrict access to abortion in their states. For example, the governor of Texas issued an executive order with that type of prohibition. Then, the Attorney General of Texas stated that the governor’s order prohibits “any

¹⁴ South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (May 29, 2020).

¹⁵ Id. at 1613.

¹⁶ Webber, M, “How coronavirus is changing access to abortion,” *Politico*, (May 21, 2020), https://www.politico.com/news/2020/05/21/how-coronavirus-is-changing-access-to-abortion-273193?utm_campaign=khn%3a%20daily%20health%20policy%20report&utm_medium=email&hsmi=88353231&hsenc=p2anqtz--xpe73ym9zapk1fzfjs-rgnyfqiyxiehwoeau9a2pi6oppyr2dtn-mnqqg9zm_58zvcfv8jnytz3om7gwb764ohbmhw&utm_content=88353231&utm_source=hs_email

type of abortion that is not medically necessary to preserve the life or health of the mother.”¹⁷ Abortion providers sued Texas state officials, but a federal Court of Appeals generally agreed with the state officials.¹⁸

8. Disputes between workers in meat processing plants and the federal government: Like nursing homes and prisons, there have been many COVID-19 cases among workers in factories that process beef, pork, and poultry products. Companies that own meat processing plants warned of impending shortages of meat, and urged government authorities to allow the processing plants to operate, despite high numbers of infected workers.¹⁹ On April 28, 2020, the President issued an executive order under the federal Defense Production Act of 1950, in which the President authorized and directed the Secretary of Agriculture to “take all appropriate action under that section to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA.”²⁰ This executive order allowed the plants to operate but did not really protect the safety of workers, because the “guidance” issued by the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) did not impose meaningful requirements. For example, those guidelines only required the meat companies to use engineering controls for social distancing of workers by six feet “if feasible” and “if possible.”²¹ As a practical matter, those government actions forced meat workers to make a terrible choice. If they returned to work, they took the chance of catching COVID-19, and possibly spreading the infection to their families every day when they return home from work. If they refuse to work in the plant, they could lose their jobs, which in the U.S. often includes loss of health insurance, and they could be disqualified from receiving unemployment benefits, because their loss of employment might be unfairly characterized by state officials as “voluntary.” In an action that was not specifically related to meat processing plants, a large labor union (the AFL-CIO) requested the Secretary of Labor to issue an Emergency Temporary Standard for Infectious Diseases (ETS) to protect workers from COVID-19. The Secretary of Labor refused to issue the ETS, and the AFL-CIO appealed to the federal Court of Appeals for the District of Columbia Circuit. However, the court denied the labor union’s request on the ground that the Secretary of Labor and his officials

¹⁷ <https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all>

¹⁸ *In re Abbott*, 956 F.3d 696, 2020 U.S. App. LEXIS 12616 (5th Cir. April 20, 2020).

¹⁹ Warren E and Booker C, Letter to meat processing companies (June 22, 2020), <https://www.warren.senate.gov/imo/media/doc/2020.06.22%20Letter%20to%20meatpacAkers%20investigating%20manipulation%20of%20COVID-19%20crisis.pdf>

²⁰ <https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/>

²¹ Meat and Poultry Processing Workers and Employers, Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA) (Updated July 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>

are “entitled to considerable deference” and those officials “reasonably determined that an ETS is not necessary at this time.”²²

9. Disputes between migrants and the federal government: The context for migration disputes in the U.S. is that the government does not provide safe detention facilities, and does not meet the basic health care needs of migrants in detention. On July 8, 2019, the UN High Commissioner for Human Rights (Michelle Bachelet) stated that she was “appalled by the conditions in which migrants and refugees—children and adults—were being held in detention in the United States of America after crossing the southern border.”²³ In addition, more than 5,000 migrant children were forcibly separated from their parents by the U.S. government.²⁴ Some government officials have indicated that forced separation was an intentional policy for the purpose of deterring people from migrating to the US.²⁵ It is unclear whether the U.S. government has adequate records, and, therefore, some children might never be reunited with their parents. Now, the government is using the COVID-19 pandemic as an excuse to further limit immigration and asylum, which is what the president and his administration wanted to do for a very long time.²⁶ Beginning in March of 2020, the U.S. Centers for Disease Control and Prevention (CDC) began issuing a series of orders, under a section of the federal public health law, to prevent residents of specific countries from entering or remaining in the U.S., supposedly for the purpose of preventing the spread of COVID-19. Organisations that advocate for the rights of migrants filed a lawsuit against federal officials on behalf of a boy from Honduras (known by his initials as “J.B.B.C.”). The boy entered the U.S. as an unaccompanied minor, had no symptoms of COVID-19, and was in custody of the U.S. government. The advocacy organisations argue that the public health law does not authorize the government to operate a parallel legal process, which is separate and apart from immigration law and which is not subject to the rights and safeguards provided by immigration law.²⁷ On June 24, 2020, the federal district court granted the boy’s request for a temporary restraining order, which prohibits the government from removing him from the U.S. while the lawsuit is pending.²⁸

²²<https://www.chamberlitigation.com/sites/default/files/cases/files/20202020/Order%20Denying%20Mandamus%20--%20In%20re%20AFL-CIO%20%28D.C.%20Circuit%29.pdf>

²³<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24800&LangID=E>

²⁴ <https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791>

²⁵ <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/>

²⁶ Kanno-Youngs, Z and M Haberman, “Trump Administration Moves to Solidify Restrictive Immigration Policies,” New York Times, (updated July 23, 2020), <https://www.nytimes.com/2020/06/12/us/politics/coronavirus-trump-immigration-policies.html>

²⁷ *J.B.B.C. v. Wolf*, Complaint for Declaratory and Injunctive Relief, (U.S. District Court for the District of Columbia, filed June 9, 2020), <https://www.clearinghouse.net/chDocs/public/IM-DC-0077-0001.pdf>

²⁸ Order, (June 24, 2020), <https://www.clearinghouse.net/chDocs/public/IM-DC-0077-0005.pdf>

10. Disputes about the presidential election during COVID-19: The U.S. election is only a few months away, and opinion polls show that a significant majority of Americans want a change from the current president. On July 30, 2020, the president raised the possibility of postponing the election.²⁹ The president does not have the authority to postpone the election,³⁰ but the president and his officials could take actions that would interfere with a free and fair election. Moreover, there are two structural problems in U.S. elections that might prevent the outcome from truly reflecting the will of the people. The first structural problem is the electoral college system, in which the winner of the presidential election is not necessarily the candidate who gets the most votes in the nation as a whole, but rather the candidate who gets the most “electoral votes.”³¹ Many experts anticipate that the president will again lose the popular vote, as he did in 2016, but he still could be re-elected by the electoral college, if he could get a small majority of popular votes in a few “swing” states that are seriously contested. The second structural problem is that procedures and qualifications for voting are established by state governments, even in elections for the U.S. presidency and other federal offices.³² Some state governments use that power to influence the outcome of elections, in favor of the party which controls the state government. In those states, groups of people that are more likely to vote for the opposing party, such as minority groups, face additional barriers to voting by “vote suppression.”³³ Now, the COVID-19 pandemic adds another layer of complexity, because many people are seriously worried about going to a polling place, and they would rather vote by mail. A few states already make extensive use of voting by mail, and most—if not all—states allow people to vote by mail in some circumstances, such as disability or absence from the state at the time of the election. The issue is whether states should give everyone the option to vote by mail during the COVID-19 pandemic. The Supreme Court of Texas held that the state election law, which allows voting by mail if a voter has a “disability,” does not allow voting by mail by a person who is worried about catching COVID-19 as a result of voting in person.³⁴ In a separate federal lawsuit, a federal district judge held that any Texas voter is allowed to vote by mail, but the federal Court of Appeals for the 5th Circuit disagreed with the federal district judge and issued a stay of that judge’s order.³⁵ The U.S. Supreme Court declined to lift the stay,

²⁹ Welna, D, “Citing Election Delay Tweet, Influential Trump Ally Now Demands His Re-Impeachment,” (July 31, 2020), <https://www.npr.org/2020/07/31/897724197/citing-election-delay-tweet-influential-trump-ally-now-demands-his-re-impeachmen>

³⁰ *Id.*

³¹ National Conference of State Legislatures, “The Electoral College,” (July 6, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx>

³² *Shelby County v. Holder*, 570 U.S. 529, 2013 U.S. LEXIS 4917 (2013).

³³ Brennan Center for Justice, “Vote suppression,” (2020) <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression>

³⁴ *In re State of Texas*, 2020 Texas LEXIS 452 (Supreme Court of Texas, May 27, 2020).

³⁵ *Texas Democratic Party v. Abbott*, 961 F.3d 389, 2020 U.S. App. LEXIS 17564 (5th Cir. June 4, 2020), request denied, 140 S. Ct. 2015, 2020 U.S. LEXIS 3377 (June 26, 2020).

which means that the decision of the 5th Circuit remains in effect, and Texas voters do not have the right to vote by mail on the ground that they are worried about catching COVID-19.³⁶ 220

³⁶ Id.

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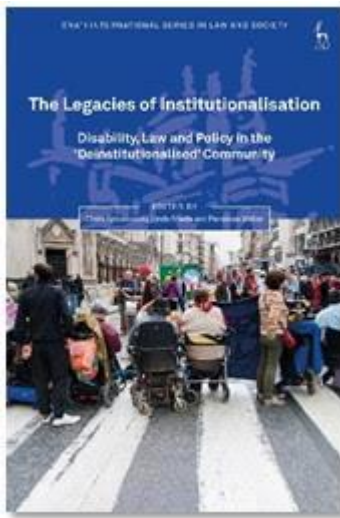
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Discounts for our members



The Legacies of Institutionalisation

Disability, Law and Policy in the 'Deinstitutionalised' Community
Edited by Claire Spivakovsky, Linda Steele and Penelope Weller

This is the first collection to examine the legal dynamics of deinstitutionalisation. It considers the extent to which some contemporary laws, policies and practices affecting people with disabilities are moving towards the promised end point of enhanced social and political participation in the community, while others may instead reinstate, continue or legitimate historical practices associated with this population's institutionalisation. Bringing together 20 contributors from the UK, Canada, Australia, Spain and Indonesia, the book speaks to overarching themes of segregation and inequality, interlocking forms of oppression and rights-based advancements in law, policy and practice. Ultimately this collection brings forth the possibilities, limits and contradictions in the roles of law and policy in processes of institutionalisation and deinstitutionalisation, and directs us towards a more nuanced and sustained scholarly and political engagement with these issues.

Claire Spivakovsky is Senior Lecturer in Criminology at the University of Melbourne.

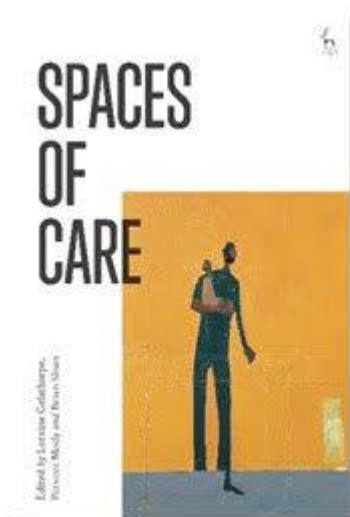
Linda Steele is Senior Lecturer at the Faculty of Law, University of Technology Sydney.

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Spaces of Care

Edited by Loraine Gelsthorpe, Perveez Mody and Brian Sloan

The collection examines the ways in which the emerging interdisciplinary study of care provokes a reassessment of the connections and disjuncture between care and governance, ethics, and public, personal and professional identities.

Evolving from a project coordinated by the Cambridge Socio-Legal Group, *Spaces of Care* brings together leading international scholars to articulate what we may consider to be a useful analytic of care. Lawyers, anthropologists, sociologists and criminologists reflect on specific aspects of conceptualising caring relations in 'spaces'. These spaces include: communities of care and abandonment; self-care and kinship care; spaces as 'gaps' in care; the meanings of marketised care; and the ways in which care is constructed and constrained in different ways in venues such as homes, prisons, workplaces and virtual spaces.

Common themes include temporality (historical specificity) and the dynamics of care across time and place; subjectivity (including different experiences of care); the economies of care (including the commodification of care; public and private manifestations of care; privatised 'care'); disruptions of care (which generate vulnerabilities with regard to continuities of care); eligibility (those deemed to be deserving and undeserving of care); relationalities of care (collective and individual agency in caring relations, kinship care), and technologies and imaginaries of care (as in new notions of care forged by those in online virtual worlds such as Second Life).

Loraine Gelsthorpe is Professor of Criminology and Criminal Justice and a Fellow of Pembroke College, Perveez Mody is a University Lecturer in the Department of Social Anthropology and a Fellow of King's College and Brian Sloan is a College Lecturer and Fellow in Law at Robinson College, all at the University of Cambridge.

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