

Is student well-being better served by an ethic of care or a duty of care? A perspective on the current debate in English higher educational

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Concern for the well-being of UK higher education students is highlighted by the tragic number of student suicides. In response, in England there have been calls for a statutory duty of care to be imposed upon universities which is currently being resisted. In a recent debate in the UK Parliament, the Minister of State for Skills, Apprenticeships and Higher Education said “this government does not believe that [a statutory duty of care] is the most effective way to improve outcomes for students” (Hansard 5.6.2023) and argued that a general duty of care already exists in common law. Yet it is not clear, in the current formulation, how the implementing of such a duty could be effective, for it is wholly dependent upon staff will, competence, and capability: all attributes of an ethics of care. Moreover, there is no call for an ethics of care even given the inconsistencies in practice within the sector. In these circumstances there seems no doubt that care ought to be provided but, without, a clarification of the nature of this, it is not clear if an institutional duty or a care ethics is required. This is attempted by drawing a distinction between the ontic and ontological phenomenon of duty and ethics of care..

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Background

The English higher education sector is regulated by the Office for Students (OfS). The Office is a non-departmental public body of the Department for Education, acting as the regulator and competition authority for the higher education sector in England. Without registration, or in breach of the registration conditions, institutions would face being deregistered, meaning they would lose state funding, be barred from recruiting international students, and potentially could not award degrees, while their students could not apply for loans. The sanction of deregistration is among a range of new enforcement powers the OfS could bring against universities if they fail to make adequate progress for all students with the ability and desire to undertake higher education. This is judged against their four regulatory objectives.

These are that students:

1. Are supported to access, succeed in, and progress from, higher education.
2. Receive a high quality academic experience, and their interests are protected while they study, or in the event of provider, campus or course closure.
3. Are able to progress into employment or further study, and their qualifications hold their value over time.
4. Value for money.

The measures are set out in a new consultation , which aims to encourage universities to better protect and support students who experience racial, homophobic, transphobic, religious and ableist harassment and sexual misconduct. In addition, a House of Commons Petitions committee showed various levels of support for students who had experienced poor mental health at university. The results evidenced patchy quality in the support universities provided .

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Structure

The paper addresses three issues:

- The current situation in England regarding the Statutory Duty of Care for English universities.
- The difference between an ethic of care and a duty of care located in feminist theory illustrated in the work Brugère and Ferrarrese
- How an ethic of care might be implemented, drawing a distinction between a scholarly community and a neoliberal collection of academics.

Context

The debate on student well-being and the emotional direct and vicarious trauma of suicide is the lynch-pin of increased interest in the duty of care owed by universities to their students. But before discussing the desire for statutory duties we should first test the assumption behind this claim. The suicide rate for higher education students in the academic year ending 2020 in England and Wales was 3.0 deaths per 100,000 students (64 suicide deaths); this is the lowest rate observed over the last four years (5.6 deaths per 100,000 students; 202 suicide deaths) compared with female students at 2.5 deaths per 100,000 students (117 suicide deaths). Tragic as these deaths are, they are significantly lower than for similar ages in the general population.

Legal requirements pertaining to Duty of care have been shored up in the area of employer responsibility in recent years. The United Kingdom and France have recently brought in legislation which imposes a statutory duty of care on employers. While there is currently no debate in France about extending this to the realm of the university, despite this country being a precursor in the business world, the United Kingdom and the USA have begun to question the existing scope of duty of care pertaining to universities. The evolving legal landscape is of interest here. Up until the 1960s, the university were granted a *loco parentis*, which is a “in the place of the parent” responsibility. This meant that universities had a parental responsibility for students’ welfare. In fact, this also gave universities the right to regulate in all areas of the personal lives of students including freedom of speech, associations and activities. They could also take disciplinary action without the student having a right to recourse. However, university students called for increased autonomy in the 1960s, which led to a shift in the responsibility of universities for student care. However, the situation is now changing once again. Courts in the USA have ruled that universities do owe a duty to protect or warn students from harm. In *Regents of University of California v. Superior Court of Los Angeles County*, the Supreme Court of California ruled that universities do owe a duty to protect students from harm (in this case foreseeable violence during curricular activities). In the UK, the courts have not upheld that the current Common Law Duty of Care imposes this responsibility on universities and courts tend to rule that in the absence of *in loco parentis*, universities are not responsible for the actions and activities of students. However, perhaps in part based on transatlantic rulings in this area, there has been a significant push to shore up legislation through a statutory duty of care in the UK.

The growing momentum behind a statutory duty of care has arisen especially since the Covid 19 crisis. Students in Britain found themselves isolated and particularly vulnerable especially during lockdown and imposed online learning. Measures of wellbeing which have been conducted by the ONS in the post pandemic period have shown that there has not been an uptick in young people’s wellbeing in line with the rest of the population. The Petitions Committee Oral evidence provided on the issue of a statutory duty of care suggests that students nowadays are less resilient than past generations and need more support. A lecturer from Swansea University

giving evidence to the enquiry posited that a statutory duty of care is necessary to ensure consistency in pastoral care towards students.

In law, English universities currently do not have the same defined legal duty for safeguarding their students as do colleges and schools. They have a more limited duty of care to ensure that students have a safe environment in which they can live, work and study. Families whose children have died by suicide are behind a campaign calling for higher education (HE) providers' duties to extend further. This is led by Learn Network, a community of bereaved families who are seeking, through their #ForThe100 campaign, to establish a duty of care for students under the law.

Their online petition, which was signed by more than 100,000 people, triggering the debate in parliament, said: "The mental health, safety and well-being of [higher education] students should be a government priority. Student engagement, retention and success should be another. Both are indisputably linked to the duty of care students receive. A duty of care already exists for staff, and for students under the age of 18 in HE. There should be parity in duty of care for all members of the HE community.

Universities already have duties under the Equality Act (2010) to put in place support for people with disabilities (including mental health conditions), section 75 of the Northern Ireland Act 1998, and duties around the protection of children and vulnerable adults. A key case was brought by the parents of Natasha Abrahart, who, despite debilitating anxiety, was denied alternative assessment because she did not have an "official" diagnosis. However, such a position is unfair in itself, for students should not have to be "officially disabled" or "vulnerable" in order to have their wellbeing protected. Funnelling students into such a narrow definition – which can take months, or even years, to obtain from an external source – as to who can and who cannot get reasonable adjustments, is not establishing a whole university approach to wellbeing.

In summary, current law offers only limited protection for students who experience harm because of negligence by their universities. It is to be noted that the UK Department of Education claims that a duty of care does exist not to cause harm to their students through the university's own actions although this view was not upheld in Abrahart case. This may confront the assumption held by many and advertised by universities that they abide by a duty of care to their students which is a general duty of care to deliver educational and pastoral services to the standard of an ordinarily competent institution. Yet general duty of care between the university and its students is claimed not to be analogous to that of a school and its pupils or an employer and its employees. This was because there was no "assumption of responsibility" for students' welfare either inherent in the relationship with students or arising from the actions of the university's staff when dealing with students. The university was therefore not responsible for any psychiatric harm arising from its actions or omissions. Indeed, in another institutional consultation by the OfS (2020) on quality and standards in higher education, where one would have expected the embedment of students' well-being in both the consultation and their response to said consultation, there was no explicit mention made at all.

If a statutory duty of care is imposed on a university, the accommodation of international students or students studying abroad becomes extremely problematic because risks are difficult to assess or follow up. In particular, with an increasing number of international students and exchange programme and the creation of international campuses, increased responsibility for students and appropriate measures to mitigate risk could prevent universities from providing valuable international experiences to students or core universal values which are intended to improve a young person's wellbeing.

Another essential and practical objection to the statutory duty of care is clear in Durham University's "Statement on the Duty of Care". It underlines that the university does have a Duty of Care to students which is set forth in the Health and Safety, Equality and Employment Legislation, but it is required to set out certain limits to the university's responsibility for student health and wellbeing. As the statement underlines: "Universities are not expected to develop or

deliver bespoke physical health or mental health treatment services as they are not statutory health bodies. We provide support services to our

students and employees that are designed to enable their successful study, scholarly pursuits or success in their employed roles". Indeed, the essential issue is having the necessary healthcare qualifications to be able to intervene effectively. Ultimately, what might be more helpful is an integrated approach with NHS providers. Mental health was underlined as a significant priority in the NHS Long Term Plan but there are significant gaps in student support. The UUK initiative to work with NHS England and Office for Students to create a nationwide support service would seem to be more effective than statutory legislation. It proposes that community mental health teams could be assigned to ensure that students have access to care with specific touchpoints across the country. UUK underlines that universities cannot be sole responsibility for care and a coordinated approach is necessary. They argue: "Given the size, diversity, and dispersal of student populations, we believe that these existing duties provide a proportionate and practical regulatory framework for student safety and health. We do not believe a further statutory duty would be the best approach to improve outcomes for students." They further argue that if the attention is to prevent the worse form of illbeing (suicide), universities would need full custodial or health care rights which does not seem possible or appropriate

A duty of care and an ethics of care

The dominant conceptions of Western morality are in terms of Kantian (deontological) and utilitarian theories as based on impartiality, formal rationality and universal principles. Utilitarianism interprets beneficence in a maximizing way and makes it the whole of morality, whereas Kantianism grounds morality differently. For Kant, autonomy as a capacity for universal self-legislation is the supreme principle of morality. You should act only in such a way that your action could become a universal law for all rational beings. This approach argues that moral reasoning is formulated on the basis of deduction for universal rules. In such theories a duty is dependent upon impartial reasoning, not in the impulse to act in partial cases.

Indeed, attention to the singular rather than the universal is an indication of arbitrary reasoning and thus has less moral worth than moral principle based on universal rules. Kant's ranking of duty as primary and inclination as secondary leads to a moral philosophy based on normative theory of the autonomous subject and subsequently codified in legal frameworks of justice as independence, but risk achieving no more than a moral gesture in the continuity of neoliberal governmentality . In law, the moral position is not essential to their creation but impartiality of the judiciary interpretation and application apply.

The moral theory known as "the ethics of care" implies that there is moral significance in the fundamental elements of relationships and dependencies in human life; dependencies revealed through the attentiveness of the carer to the needs of the vulnerable as they, the vulnerable, individually conceive and live them. In this context, care ethics seeks to maintain relationships by contextualizing and promoting the well-being of care-givers and care-receivers in a network of social relations . This approaches the realities of the singularity of the vulnerability person, not the impartiality derived from a Kantian duty of care and implicit in statutory duties. The premise of impartiality in the universal Kantian (and also utilitarianism), is, as Ferraresse suggests, no more than a "fetish of generality [which] is a powerful mechanism of indifference to others (2021:15. It is "a rhetorical tool used to confer legitimacy on a homogenising moral viewpoint grounded in abstract duty" (ibid:18).

Along the same theme, Brugère (2019) reveals a distinction between the morality and the ethics: "Morality is related to the necessity of justice established with the framework of a reference to neutral , impersonal subjects who guarantee the perspective of equality" (2019: 33) whereas the ethic approach is an approach to others' vulnerability "in their singularity" (ibid:3).

Ethics is thus embodied in the rational process of solicitude or care as an equalisation of condition in asymmetrical relations which “moral principles and law render inextricable and imperceptible” (ibid: 34). A position that requires embodiment in practice is not abstract theories of intent.

These issues raise the condition of the very principles that underlie the beneficial nature of statutory duty of care and whether it is applicable to higher education; principles that in the higher education press, and more widely, are not being discussed. Ferrarese argues that such an approach will often deny the dignity of the individual by homogenising it as a moral viewpoint which is grounded in abstract duty, thus quietening the voice of individual who suffers. Caring for students both within their academic lives and for their circumstances beyond the institution has proven to be critical to the way in which students respond to the institution and to their own responsibility to study. This is caring that cannot be covered in any obligation of care but emerges from authenticity in the well-being of others and the informal distribution of such care can lead to the carer being vulnerable. Forms of academic assessment developed for a distinctive set of skills and abilities often alienate others with different ways of being in the world. Respecting diversity, equality and inclusion is about understanding the vulnerability of change and its unexpected consequences; it is about merit and recognition, both of which respect the talented but not at the expenses of these less able. Care cannot be contracted, although it can be facilitated by organizations’ structures and procedures. Moreover, an ethics of care warns against a well-ordered control through structural dependencies that give a face to a simulacra of care which, essentially, transforms care into functionality within a legal entity under statute.

A helpful summary of the above discussion is Heidegger’s distinction between the ontic, the factual transaction of life which can be assessed, legitimised and controlled, and the ontological, the being of caring, within which the ontic is enacted or not.

Vulnerability; the singularity of an ethics of care

Vulnerability conceptually embraces all kinds of human fragilities manifest in individuals differently. Care means attending and responding to vulnerability, where vulnerability is defined as “susceptibility to harm, need, loss, coercion, domination, or other ills or blights” Engster, 2019: 106). Moreover, it is personal reflecting difference, not sameness, and in a Heideggerian sense the expression of care means “an existential and basic ontological phenomenon which is nevertheless is not simple in its structure” (1962:240). As part of Heidegger’s ontological care structure, I would suggest we consider that anxiety is a way of disclosure of Being and the anxiety inherently about “our potentiality-for-being-in- the-world” (ibid:235) is ontologically revealed in our vulnerability. I further want to suggest that it is in this sense that concern about our own vulnerability as well as that of others as simultaneous acts of empathy, reveals care as an ontological phenomena rather than a functional (ontic) one, but both are necessary for an interpretation of care.

By considering the issues of sameness and individualism, with the aim of identifying ways in which universities address both concepts through their educational and service provisions, I begin with an understanding of the difference between sameness and individuality and will try to resist reducing ‘difference’ to disqualification and exclusion rather than inclusion and absorption. Further, as Deleuze (2014) suggests, difference is distinguished from diversity and otherness by its inter-genus nature and by the resemblance upon which it depends. Within the university there is a need for a genuine ethic of care where a student-centred pedagogical ethos seeks to facilitate, at different levels, both the sameness in terms of collective cooperation (in that student choice to become forms of engineers, physicians, teachers, artists, etc.) and the way in which students might generate their self-identity, as they perceive it, in their individual ‘becoming’. Confronting such dependency works through the attentiveness of the carer to the need of the vulnerable as they conceptualise and live them for themselves.

The notion of vulnerable voices initially raised by Gilligan (1982) has been abused by UK universities. It is used in the singular- not as might be expected to emphasis singularity -but as a

desensitising homogenising narrative device to manage student engagement and reduce its impact, thus betraying and denying the vulnerable. There is evidence of the in the 2023 National Student Survey (NSS) where students clarity on their voice being acted upon was on 61% the lowest of all level of satisfaction. For example, as regards the concept of the student voice, Young and Jerome (2020) have highlighted an institutional power that stifles the notion of individual student voice such that students are not liberated by being heard but rather suffer from the perpetuation of an existing imbalance of power in the higher education sector. This suggests a rather homogeneous, uncritical view of students who can be treated and managed most efficiently as a poorly differentiated whole with one student voice. The 'student voice' is based upon a concept of what a student is, whereas an individual student's voice is created through acquaintance; not just any student, but this particular student. The personal tutorial approach required to generate such a level of understanding of the individual student voice is expensive, and is improbable given the constrained financial and resource imperatives of universities and neo-liberal government policies. To hear her directly we need to provide for her self-expression and give space for self-creation of her own identity; one which is more than an example of 'a student' and is a unified and distinct entity in its own right, though it may share certain features with the ubiquitous other. Brugère's perspective is insightful here when she states the ethics of care "deconstructs the possibility of a collective master narrative that involves each and every individual in an impersonal and indiscriminate way "(2019:41).

The power to act, however, is not universally distributed and declines in the vulnerable in their actions and their voices. It is not equally distributed across the collective of the university, for it must recognise the difference that the place and spaces of the university has on the fragility and vulnerable of others. As individuals, we make our being feasible by questioning the reality of our everyday experiences in the context of the knowledge we have of ourselves and others through a preparedness and courage to imagine, accept and create new knowledge. To do this we have to care for ourselves and for others facing and rejecting self-deceit and bad faith in ourselves and others and in so doing we make ourselves vulnerable, plus a vulnerability for others in their singularity. In doing so and in recognising our self in others we are called upon to care for others in their existential being. Freedom resides in our choice to act on our potential, and potentialities are aligned with the properties of our individuality that determine powers to act. However, not all the properties of a thing are equally important to the understanding of the specific activities, relationships, commitments, etc., which give meaning to an individual's identity, yet all of which contribute to our potentialities.

The exploration of our being provides the potential for us to understand our life project and to seek it; to understand being as our becoming is not deterministic but is also emergent. It is not unencumbered: it requires a blending of knowledge and realities in order that we might have the power to reflect and deliberate about the potential impact of our actions. These expressions of individuality are not primarily self-absorbed, for, as Johnson suggests, individuality is 'grounded in an ethical existential commitment to work out one's identity in relation to greater surrounding forces that comprise the individual's horizons of significance' (2014: 71). Most importantly, this process is not static but is in constant motion, in flow with complexity and causation. The acceptance of a dominant societal discourse restricts and enframes our ability to see the openness available to us and imposes an existential horizon where none need be.

If this is the case, staff will feel empowered and compelled to follow their instincts. In all cases, it would establish a culture of prevention, ideally one in which crisis is avoided, leading to safer operational systems and safer daily practices, delivering ways of working that are less risky for vulnerable individuals. It is these care activities which generate the sensitivity and concern for others that emerge from the practical activities of caring for the need of the vulnerable. We don't need to frame people in terms of deficits to expect to cultivate care, and making people feel inadequate and incompetent is a wasted endeavour.

There are professors, still committed to teaching, who speak out for what they see as right and risk condemnation for not publishing or seeking higher scores on teaching metrics, regardless of the actual impact that this might have on transformative learning. They are concerned with the students' transformation through an educative experience and not as technicians of knowledge provision. They care in ways that the commodification of teaching through metrics cannot achieve. Such dispositions can create for and recognise vulnerability and embrace an ethic of care regardless of the imposed performativity of surveillance and the labourisation of care implicit in corporate initiatives. The degree to which the university embraces an ontology of vulnerability is central to any claims of an ethic of care. It is no excuse to claim that one is just doing one's job when financial analysis renders the vulnerable weaker. And banners of a whole-university culture of care don't do it: only caring does.

What would an ethic of care look like in universities?

An ethic of care cannot be added onto the functions of a university but needs to be the ethos of the institution, driving it through its strategic plan structures and relationships with all its stakeholders. It would involve defining student success in terms much more nuanced than the mechanical measure such those announced by the UK Government which seek to offer universal high quality in higher education by protecting students (and taxpayers) arguing "university courses that fail to deliver good outcomes, with high drop-out rates and poor employment prospects will be subject to strict controls" (17.6.2023). This seems to define universities in terms that are not relational or process-driven but economically defined outcomes. This sets up a cultural of performativity where vulnerability and completion can flourish, not the realisation of a caring space.

Regarding mental health and well-being, this remains voluntary although the government has endorsed and suggested all universities should join the University Mental Health Charter Programme which set out the principles for a whole-university approach to mental health. That includes the need for mental health training relevant to the role of individual staff. Specifically, for universities, this means considerations must be given to an individual's context and background and the context of the institution as a whole. Disciplines, teams, peer groups, interpersonal relationships, culture, common practices, behaviours and the physical environment at university are all determinants of the mental health of our communities" (2019:10).

Currently, an instrumental, auditable approach to student well-being embraces the action of English universities. Looking at two aspects of student wellbeing: harassment, sexual misconduct and mental health, the regulator approach by their own admission remains piecemeal. In a recent consultation on safeguarding students, the OfS has recognised some of the issues of safeguarding students from harassment and sexual misconduct on campus, indicating that poorer? students are more likely to experience sexual assault and racial harassment and have lower levels of overall happiness and higher levels of anxiety. They are more likely to be impacted by the cost of living crisis and live in poor quality housing.

To remedy these injustices, the OfS's answer is to impose a new condition of registration on universities and colleges in relation to harassment and sexual misconduct. Part of this condition is "the training that it will provide to all students and all staff about what constitutes harassment and sexual misconduct and, in the case of staff, how to handle disclosures, formal reports, and investigations" (2023:7).

Both the approaches fail, I believe, to address the ontological issues that are evident in an ethics of care. An ethic of care is sufficient to enable student well-being and is not necessarily enhanced by a statutory duty of care. This is a big ask of institutions in a complex environment riddled with policy contrition, governability and political ideology. They will need to argue against the real narrative of well-being, where it is more of an irritant in the machine-like progress

of work-ready students. It requires bravery, not legation and it is perhaps more evident in those universities that see or imagine wisdom in their mission and spirituality in their purpose.

Don't blame the tree for its fruit, but those who are caring for the tree

There seems little doubt that higher education institutions could do better in the care for their students and staff (see footnotes 7 and 12). An ethics of care requires recognising others as individuals and caring for them, it is not achieved as a functional inclusion in job description. Certainly, a statutory duty will give impetus to provide university staff with skills to notice and procedures to follow on caring but not to feel and then to respond to the suffering of others. Institutions, like the planter of the tree, could attend to providing the conditions that nurture the tree and those conditions are ethic not statutory. It is creating an ethos where caring is recognised as a relational essential in our being and then developing and supporting staff to help to create an organizational structure that has processes, networks and policies to facilitate them. Caring for students, both within their academic lives and for their circumstances beyond the institution, has proven to be critical to the way in which students respond to the institution and to their own responsibility to study. This is caring that cannot be covered in any obligation of care, but emerges from authenticity in the well-being of others. Caring in this sense needs to be woven into the fabric of the university, it needs to be the university. Care and its disposition of compassion cannot be contracted and vulnerable ought not to be a collective adjective. We don't need to frame people in terms of personal vulnerability or in terms of deficits to expect to cultivate the compassionate, and making people feel inadequate and incompetent is a wasted and corrupting endeavour. We need to find time to recognise our needs and those of the vulnerable to care authentically.

Respecting diversity, equality and inclusion is about understanding the vulnerability of change and its unexpected consequences; it is about merit and recognition, both of which respect the talented but not at the expense of these less able. For example, forms of academic assessment developed for a distinctive set of skills and abilities often alienate others with different ways of being in the world and to respect this, academics need to give, not to take, time for students and organisations ought to provide that for both student and academics. It can be built into the work schedules. Students can be encouraged and even rewarded for taking time to respond to others whose needs are greater than theirs, both within a class and outside it. Curriculum can embed ideas of compassion in the substance, context and application of the learning that is hoped for. Caring acts can be recognized, large and small, in various ways. Students can be encouraged to seek to be settled with themselves and with others. It is in the sense that the analogy of the tree works. The trunk and branches of the tree determine how the blossom will flourish and become the desired fruit fed by ethics not by a statutory duty of care.

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