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EQUAL STANDING AND THE JUSTIFICATION OF SOCIAL POWER

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ABSTRACT

A right to care may be vindicated only after the recipient has endured an interruption and an unpaid caregiver has supplied the missing work. That interval raises a question about equal standing: how can institutional authority remain justified when the person contesting it cannot safely withdraw? Drawing on political philosophy and doctrinal analysis of English care and capacity law, this article develops a principle of continuing responsibility for the burdens of complaint and transition. Rawlsian representation is extended to include people permanently unable to exercise the moral powers assumed in his conception of the citizen. A bounded duty of material assistance is defended against Nozick's entitlement theory, with explicit limits on compulsory personal service. The legal analysis distinguishes statutory responsibility, fiduciary loyalty and authority to decide for another, and examines the Supreme Court's 2026 revision of the deprivation-of-liberty test. Existing complaint and advocacy duties provide a foundation, but do not settle every question of interim continuity. The proposed reforms place responsibility for replacement arrangements on the commissioning authority, preserve caregivers' independent claims and require scrutiny of the evidence used to justify intervention. A scarcity example tests those protections against an equally urgent competing claim. The contribution is an account of how institutions should allocate the work, risk and irrecoverable losses of securing care while dependence continues.

Keywords: equal standing; dependency; caregiving; mental capacity; institutional authority; administrative burden

1 CONTESTED AUTHORITY IN A CONTINUING RELATIONSHIP

A person who disputes a care decision may still need the provider's assistance that evening. Someone must administer medication, help with food or make communication possible before a complaint can be investigated. The recipient's relative may supply what the institution withholds, although doing so requires another missed shift at work or another night without sleep. By the time a decision is corrected, both people may have sustained losses that the eventual provision of a service cannot repair. The allocation of this interval is part of the exercise of social power.

Consider Maya, an adult who needs substantial daily assistance, and her sister Clara, who combines unpaid care with employment and responsibility for a child. A commissioned provider supplies the remaining support. Maya communicates everyday preferences, but a proposed move involving unfamiliar staff and accommodation presents a more difficult decision. Clara's knowledge may help Maya understand it. Clara also has interests of her own: she cannot safely absorb every interruption in commissioned care, and her willingness to help today supplies limited evidence about what she can undertake next month. Suppose that a shortage also affects Ben, whose need is equally urgent. Nothing in the example establishes that Maya should take priority merely because she already receives a service or because Clara can articulate the family's complaint. The question is how an institution can justify its decisions to all three while their needs and obligations continue.

Equal standing requires more than an entitlement eventually vindicated. A person must be able to question the terms on which essential assistance is delivered without making bodily security the price of doing so. That requirement also protects the caregiver. An institution cannot secure the recipient's formal entitlement by assuming that a relative will supply whatever labour remains unallocated. I defend a corresponding principle of continuing responsibility: an authority that administers essential care must account for the burdens of contestation and transition, including the work it expects others to perform while its decision remains unresolved. This principle concerns the organisation of responsibility. It does not promise that every claimant can immediately obtain their preferred arrangement.

The problem is neither hypothetical in its entirety nor established by this example alone. The Joint Committee on Human Rights received evidence that fear of eviction or poorer treatment could discourage complaints in care settings. Its recommendation for stronger independent investigation reflects the difficulty of asking a dependent resident to initiate and

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sustain enforcement. Such evidence identifies a credible institutional risk; it cannot establish how frequently retaliation occurs across all providers.[1]

The argument proceeds through two questions that are often separated. The first concerns the justification of assistance, including its limits when another person's labour is at stake. The second concerns the authority exercised through the institutions that provide it. Rawls and Nozick expose different difficulties in the first question. English care and capacity law supplies a concrete setting for the second, with Canadian fiduciary doctrine serving a limited comparative purpose. The resulting account gives particular attention to what happens before review succeeds: support may be interrupted, evidence may remain with the provider, and an unpaid caregiver may become the institution's default contingency arrangement.

2 EQUAL STANDING AND PERMANENT DEPENDENCE

2.1 DEPENDENCE, STATUS AND THE REPRESENTED PERSON

Dependence describes a relationship through which a person obtains something they cannot presently secure alone. Vulnerability is wider: embodied persons remain exposed to injury, changing capacity and unequal access to institutional resources. Fineman's account directs attention to the social organisation of resilience, including the institutions that distribute the means of coping with adversity. It does not by itself determine whether a particular relationship treats its participants as equals. A benevolent hierarchy may protect its subjects effectively and still deny them authority to question its terms.[2]

Kittay brings the distribution of dependency work into clearer view. The person who provides indispensable care may become dependent on others for income, respite and the conditions of an independent life. Her account of *doulia* assigns social responsibility for supporting the people who sustain dependants. Public support for caregivers is therefore an established argument, as is the objection to assessing their contributions solely through paid employment. The present concern arises within that argument: an institution may acknowledge care in its final budget yet leave the caregiver to finance the period of assessment, complaint or transition through uncompensated work.[3]

Equal standing supplies a reason for questioning this arrangement. The importance of Maya's pain or bodily security does not diminish because she cannot earn, bargain or reciprocate. Clara's future does not become institutionally disposable because she has responded to Maya's need. These claims concern the significance of each person's interests in the justification of power. They allow differences in assistance and decision-making arrangements where those differences answer relevant needs. They exclude an inference from reduced capacity to reduced importance. Nussbaum's rejection of rational agency as the sole measure of dignity helps identify the substantive interests at stake, although her own capability threshold leaves some profound conditions outside its scope. Waldron's treatment of dignity as status explains why treatment as a subordinate is a distinct injury. The claim defended here concerns the equal importance of a person's interests even when reciprocal agency is permanently unavailable; neither account by itself supplies its complete justification or an allocation rule for scarce care.[4]

Relational equality already gives this inquiry a substantial theoretical foundation. Anderson's democratic equality joins opposition to oppression with effective access to the conditions of freedom throughout a life. The argument here develops that concern within a continuing institutional relationship. A claimant's standing is tested when they object, when the assistance previously supplied by a relative becomes unavailable, and when the institution's answer will arrive too late to prevent a loss. Attention to those transitions makes the distribution of procedural work part of the assessment of the care arrangement itself.[5]

The entitlement to justification must also survive an inability to demand reasons personally. Forst's account makes the relation between power and justification central, but a care institution needs arrangements through which a person's interests can be represented without attributing the representative's judgement to them.[6] Familiarity is valuable evidence. It is also compatible with conflict, exhaustion or an understandable preference for an arrangement that eases the representative's burden. Clara should be heard about Maya's communication and history, while having a separate opportunity to explain the limits of her own undertaking. Where their interests diverge, requiring Clara to speak for both may silence one of them.

2.2 WHAT MUST CHANGE IN RAWLSIAN REPRESENTATION?

Lifelong dependence on assistance does not entail an absence of the two moral powers. A person may need extensive bodily care and remain fully capable of a sense of justice and a conception of the good. The harder problem concerns those permanently unable to develop or exercise the two moral powers assumed in the construction of the citizen. *Political Liberalism* describes the citizen as a 'fully cooperating member of society over a complete life'. *A Theory of Justice* treats moral personality as sufficient for equal justice, while leaving its necessity and permanent incapacity unresolved. Those

[1] Joint Committee on Human Rights, *Protecting Human Rights in Care Settings* (Fourth Report of Session 2022–23, HC 216, HL Paper 51) paras 94–102, 106–08.

[2] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 1, 11–12, 18–20 <https://openyls.law.yale.edu/bitstreams/f23fa6fb-d926-43dd-8627-d880c7337a8a/download>.

[3] Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (2nd edn, Routledge 2020) 2, 35–37; Eva Kittay, 'Love's Labor Revisited' (2002) 17(3) *Hypatia* 237, 242–44.

[4] Martha C Nussbaum, 'Human Dignity and Political Entitlements' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (President's Council on Bioethics 2008) 351, 362–64; Jeremy Waldron, 'Dignity, Rank, and Rights' (Tanner Lectures on Human Values, University of California, Berkeley, 21–23 April 2009) lecture I, paragraph beginning 'I am aware that nothing I say here will persuade Catholics or Kantians'.

[5] Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109(2) *Ethics* 287, 313–19 <https://doi.org/10.1086/233897>.

[6] Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Jeffrey Flynn tr, Columbia University Press 2012) 191–95.

formulations cannot be collapsed into a general claim that dependent people are outside justice.[7] Rawls also recognises natural duties of mutual aid and respect. In *Justice as Fairness* he explicitly accepts duties to human beings however severe their disabilities, leaving their relative weight and the extension of his theory for further consideration. His discussion of health care at the legislative stage addresses the restoration or maintenance of citizens' capacity to cooperate, while acknowledging a problem beyond that assumption.[8] The remaining difficulty is justificatory: how should the institutions exercising continuing authority over a person be chosen when the account used to justify them takes reciprocal cooperation as its central case? Care for someone who will never acquire the relevant capacities must have a basis that survives the failure of restoration.

The proposed amendment is to represent such persons directly as subjects of the basic structure, with interests in bodily security, attachment, communication and freedom from arbitrary interference. A representative performs the deliberative task; the interests being represented remain those of the person governed. This extends the constituency whose claims shape the initial justification, instead of postponing the hardest cases until institutions designed for cooperating citizens have been selected. The veil of ignorance would conceal whether a represented person needs lifelong support, can exercise the moral powers, provides unpaid care or contributes through taxation. It would not conceal the general facts of dependence or the possibility that some lives require sustained assistance without reciprocal productive participation.

A political liberal can reasonably object that this amendment imports a controversial theory of human worth. Rawlsian construction begins, however, with political conceptions of persons and society; it does not generate its justificatory premises from an empty procedure.[9] The proposed extension rests on the public fact that institutions already exercise coercive and distributive authority over people with profound impairments. Excluding their interests from the initial constituency would require a reason for treating that authority as answerable to others but not to them. Diverse religious and secular views can support inclusion without agreeing on the ultimate source of human value. This offers a possible political justification, although it changes Rawls's stipulated constituency and cannot simply be attributed to his original formulation.

Representation presents a further objection: an artificial party may supply the theorist's preferred answer under cover of speaking for someone who cannot contest it. The amendment therefore needs institutional consequences capable of testing the representative's claims. Evidence of communication, attachments and past choices must be distinguished from a judgement about welfare; conflicts must be disclosed; and another person must be able to challenge the proposed account. These safeguards cannot recover preferences that have never been formed or cannot be ascertained. Their purpose is to keep the exercise of protective authority open to scrutiny without pretending that every justified decision is the person's own choice.

Rawls's attention to the family and the basic structure remains indispensable. He treats the family as subject to principles of justice and recognises the unequal consequences of reproductive and caregiving work. His preferred institutional alternatives to welfare-state capitalism also concern the distribution of productive assets and political influence, going beyond relief after market outcomes have occurred.[10] Accordingly, a care policy should be assessed both for the support it supplies now and for the opportunities left to recipients, relatives and paid workers over time. A service that keeps Maya safe by permanently excluding Clara from employment has resolved one immediate shortage by creating another person's lasting disadvantage. That consequence belongs in the assessment of the institution, even when Clara initially agreed to help.

3 BOUNDED ASSISTANCE AND THE LIMITS OF ENTITLEMENT

3.1 THE OBJECTION FROM NOZICK

Nozick's historical theory asks whether holdings arose through just acquisition and transfer, subject to rectification and the Lockean proviso. Rights operate as side constraints on the pursuit of desirable outcomes. His objection to redistribution cannot therefore be answered by observing that the recipient's need is serious or that a transfer would increase welfare. Nor do unsolicited benefits establish a debt merely because they have been supplied. The force of the argument is sharpened by Nozick's formulation: 'Taxation of earnings from labor is on a par with forced labor.'[11]

Assume an entirely just history of acquisition and transfer. This removes rectification as an available shortcut. Suppose that a general contribution from available resources would protect Maya against grave injury, with every contributor retaining essential security and substantial control over their life. I defend the permissibility of such a contribution under a bounded principle of assistance. Its justification begins with the equal importance of persons' basic interests and asks what claims each may reasonably assert over resources within a common legal order. It treats the power to exclude others as qualified, from the outset, by fair contributions necessary to avert grave and otherwise avoidable harm. Nozick's strongest response is that this description has already displaced the entitlement that needs defending. A right is meant to protect its holder even when violating it would produce a valuable result. Describing an owner's remaining interest as marginal does not answer that objection, because it measures the strength of the claim through the very comparison that side constraints resist. The proposed assistance principle consequently offers a rival account of the scope of property rights. It is not a deduction from Nozick's premises. The disagreement concerns whether a title satisfying Nozick's proviso must nevertheless be qualified by a further duty of assistance.

There is a reason to qualify that power. Property law enables persons to plan and pursue projects within an organised system of enforcement. Its justification must account for the position of those whom exclusion exposes to the loss of bodily

[7] John Rawls, *Political Liberalism* (paperback edn with a new introduction, Columbia University Press 1996) 18–21; John Rawls, *A Theory of Justice* (rev edn, Belknap Press of Harvard University Press 1999) 442–46.

[8] Rawls, *A Theory of Justice* (n 7) 98–99, 297–98; John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Belknap Press of Harvard University Press 2001) 170–76, especially 176 n 59.

[9] Rawls, *Political Liberalism* (n 7) 103–07.

[10] Rawls, *Justice as Fairness* (n 8) 137–40, 162–68.

[11] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 28–34, 95, 150–53, 169–72, 174–82; quotation at 169.

security, including people who have never had a meaningful opportunity to acquire resources. A fair contribution can preserve the practical purposes of ownership while preventing its enforcement from making another person's basic protection depend entirely on the owner's discretion. This argument does not erase the contributor's separate life. It requires an assessment of the cumulative scheme, including taxation, caring commitments and other legally imposed burdens. A sequence of individually modest demands can consume the independence that each demand purports to respect.

The distinction between resources and compulsory service must withstand Nozick's objection about control of labour. A pooled material contribution generally leaves a person able to choose their occupation, associates and daily activities, and permits the burden to be discharged through fungible resources. Occupational conscription directs the person's activity itself. Compulsory bodily use places another's needs in authority over bodily integrity. Indefinite service gives the beneficiary or institution continuing control of the provider's future. These differences concern the kind and extent of authority conferred, not merely the amount of benefit obtained. A resource levy can nevertheless become excessive if its scale or sanctions destroy meaningful occupational choice or essential security. Calling it taxation cannot settle the matter.

The principle is thus bounded by retained agency, fair distribution and legitimate public authority. Contributions should be specified through publicly contestable rules, assessed across the whole burden and open to challenge for error or disproportion. Available voluntary arrangements and less burdensome means matter to necessity. Failure of those arrangements strengthens the case for material assistance where grave harm remains avoidable, but cannot authorise bodily invasion or the assignment of a particular person to continuing service. Kant's permission for compulsory public poor relief is an important antecedent for the compatibility of assistance and juridical freedom, although his account does not supply every limit defended here.[12]

3.2 INVENTION, UNDERTAKING AND THE FUTURE PERSON

Nozick already places internal limits on ownership in his sole-waterhole and castaway examples. His proviso does not protect every exercise of exclusion. The newly synthesised medicine example nevertheless distinguishes an inventor who creates an option from readily available materials without appropriating them so as to worsen others' position. Selling the resulting medicine on chosen terms does not, in his account, breach the proviso.[13] Assume also that the inventor has accepted no patient and promised no continuing supply. Urgent need then supplies no basis for pretending that a fiduciary office has been undertaken. Under the assistance principle, an already produced dose might nevertheless be subject to a compensated transfer if this were necessary to prevent grave harm at a fair and bounded cost. Such a proposal would have to account for production costs, investment and the prospective conditions of innovation. It would rest on general assistance, not on a fictitious promise by the inventor.

If rescue instead depends on the inventor's continuing intellectual work or personal bodily service, the conclusion changes. Public authorities may offer payment, organise alternative production or seek other willing assistance. Their inability to secure those arrangements leaves a serious unmet claim; it does not transfer ownership of the inventor's future activity. This is a difficult implication of bounded assistance. A theory that prohibits compulsory personal service must accept that some urgent needs will remain unmet when every available remedy would require it.

A voluntary undertaking creates additional reasons, particularly when another person has reasonably relied on it. Those reasons can justify compensation, practicable notice and a safe transfer of responsibility. They should not make unlimited personal service enforceable. Nozick's acceptance of voluntary self-enslavement exposes the disagreement.[14] A person's earlier consent cannot exhaust the claims of the person who must later live under the arrangement. The objection concerns the authority that others would acquire to direct that later life. Mill's rejection of enforceable voluntary slavery is relevant here; Kant's limits on personal-service contracts provide another, historically qualified antecedent.[15] In a care relationship, the consequence is an obligation to organise transition without converting reliance into an institution's right to indefinite unpaid labour.

4 UNDERTAKING, OFFICE AND THE LEGAL ALLOCATION OF RESPONSIBILITY

4.1 WHICH OBLIGATION, OWED BY WHOM?

Need, undertaking, wrongdoing and public office identify different routes to responsibility. A general duty of assistance does not select Clara as the person who must perform it. An undertaking may identify a provider and a defined service. Wrongdoing may require repair of a loss caused by breach. Public office places a decision-maker under the statutory and public-law duties governing the function. More than one route may apply, but each needs its own justification and legal basis. Otherwise an institution can move from the true proposition that Maya needs assistance to the unsupported conclusion that Clara must continue supplying it.

Hohfeld's distinctions clarify the allocation. Maya's claim to a specified service correlates with another's duty to provide it. Clara's liberty to decline additional unpaid work means that she owes no duty to accept that work; it does not itself require a public authority to fund a replacement. A legal power to initiate a complaint may trigger an investigative duty, whereas merely being free to express dissatisfaction changes no legal relation. An immunity against termination on a prohibited ground corresponds to the provider's disability to alter the entitlement on that ground. The opposites matter as well: an

[12] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1991) Ak 6:325–26 (Gregor 136–37).

[13] Nozick (n 11) 180–81.

[14] Nozick (n 11) 331.

[15] John Stuart Mill, 'On Liberty' in JM Robson (ed), *Collected Works of John Stuart Mill*, vol XVIII: *Essays on Politics and Society, Part I* (University of Toronto Press and Routledge & Kegan Paul 1977) 213, 299–301; Kant (n 12) Ak 6:283, 329–30. Kant permits penal bondage and some hired service of indefinite duration; his account is not a universal fixed-duration rule.

exposure to a valid power of termination is not an immunity, and a duty to perform an accepted obligation excludes a liberty simply to disregard it.[16] These relations must be established from the applicable law and agreement. The normative argument can explain why further protection is justified, but cannot supply an existing cause of action by redescribing it.

Formal relations also leave questions about effective power. A provider may lack lawful authority to suppress a complaint yet control the records and assistance needed to pursue it. Hale's analysis of legally supported exclusion explains why bargaining conditions cannot be understood independently of the rights through which access is controlled.[17] The relevant question here is concrete: can Maya obtain the evidence and communication support required to challenge the provider without first securing the provider's cooperation? If not, enforcement arrangements leave significant control with the party whose conduct is disputed.

4.2 THE CONTRIBUTION AND LIMITS OF FIDUCIARY REASONING

Miller explains fiduciary responsibility through a distinctive form of discretionary authority over another's practical interests. This is a theoretical account of why certain powers attract obligations, not a substitute for identifying the undertaking and interests required by the applicable law.[18] In *Alberta v Elder Advocates of Alberta Society*, the Supreme Court of Canada rejected a proposed fiduciary claim based on the government's role in setting and administering accommodation charges for elderly residents. The pleading required an undertaking of loyalty, an identifiable beneficiary or class subject to the fiduciary's control, and a legal or substantial practical interest liable to adverse effect. The Court's statement that 'vulnerability alone is insufficient' identifies an important limit to an otherwise tempting analogy.[19]

English law supplies a related warning. In *Bristol and West Building Society v Mothew*, Millett LJ identified loyalty as the fiduciary's distinguishing obligation, separating fiduciary breach from a failure of care. *Hopcraft v Close Brothers Ltd* confirms the importance of an objectively assessed undertaking of loyalty and rejected fiduciary status on the motor-finance facts before the Court. It also recognises that a fiduciary administering interests for several beneficiaries may have to act impartially among them.[20] A person entrusted with Maya's money for a defined purpose may therefore face a different set of obligations from a commissioner deciding how a public care budget should meet competing lawful claims. The commissioner cannot promise every applicant priority over all others.

Fox-Decent's fiduciary theory of public law seeks to explain the obligations of state authority towards those subject to it.[21] It illuminates the need to justify decisions, manage conflicts and preserve the purposes for which authority is held. Canadian doctrine does not, however, govern English commissioning, and neither exposure to public power nor serious need automatically establishes a private-law fiduciary claim. The comparative lesson is that the character of the entrusted interest and the authority assumed must be identified before assigning the duty. For Maya and Ben, impartial administration of public responsibilities may be the appropriate demand; for a representative controlling Maya's assets, loyalty to her entrusted interests may be central.

5 CARE, CAPACITY AND LAWFUL INTERVENTION IN ENGLAND

5.1 WHOSE CARE HAS BEEN PROMISED?

The Care Act 2014 gives the distinction between a recipient's need and a relative's undertaking practical legal significance. Section 1 requires attention to wellbeing in the exercise of Part 1 functions. A carer's assessment under section 10 must consider ability and willingness to provide care, including whether the carer is likely to remain able and willing. Employment, education and other activities enter that assessment. Section 18(7) excludes from the adult-needs duty 'such of the adult's needs as are being met by a carer'. Read with the assessment provisions and statutory guidance, this requires attention to the care actually available and its sustainability. It supplies no authority to compel Clara to maintain the arrangement. Section 20 separately governs duties to meet a carer's eligible needs.[22]

The adult's entitlement nevertheless depends on the statutory conditions. Section 18 addresses eligible needs, ordinary residence or presence in the specified circumstances, and the applicable financial, request or capacity conditions. Sections 24–26 govern planning and personal budgets. Section 18(4) concerns arranging care where an adult lacks capacity to arrange it and no person authorised under the Mental Capacity Act or otherwise in a position to arrange it can do so. It does not itself determine where the adult must live.[23] For Maya, the authority must establish which needs it is responsible for meeting and

[16] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 30, 32, 44, 55 <https://doi.org/10.2307/785533>.

[17] Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470, 471–74, 478 <https://doi.org/10.2307/2142367>.

[18] Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58(4) *McGill Law Journal* 969, 1011–15 <https://doi.org/10.7202/1019051ar>.

[19] *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 [28], [36], [42]–[53], [57]–[60].

[20] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 16–18; *Hopcraft v Close Brothers Ltd; Johnson v FirstRand Bank Ltd; Wrench v FirstRand Bank Ltd* [2025] UKSC 33 [89], [91], [93], [100]–[110], [276]–[289].

[21] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (OUP 2011) 27–30.

[22] Care Act 2014, ss 1, 10(1), (4)–(6), 18(7), 20; Department of Health and Social Care, *Care and Support Statutory Guidance* (updated 30 October 2026) paras 6.15, 6.18–6.19 <https://www.gov.uk/government/publications/care-act-2014-supporting-implementation/care-and-support-statutory-guidance>.

[23] Care Act 2014, ss 18(1)(a), (c), (2)–(4), (6)–(7), 24(1), 25(1), (3), (5), 26(1); Care Act 2014 (Commencement No 4) Order 2015, SI 2015/993, arts 3, 5(a). The request-based duty in s 18(3) is not commenced insofar as needs are met through care-home accommodation.

what services will meet them. It must also ascertain Clara's current undertaking. A budget calculated on the assumption that she will continue despite evidence to the contrary describes a service that may never be delivered.

If Clara becomes unable to continue safely, section 19(3) permits urgent provision before the usual assessments have been completed. The statutory guidance calls for an immediate response to urgent need, but identifies the subsection as a discretionary power.[24] This distinction matters to the reform proposed below. Existing law provides routes to urgent assistance and enforceable duties where their conditions are met. It does not already contain a general fixed deadline requiring every commissioner to replace all withdrawn family care at public expense. A new transition duty must specify its relationship to eligibility, ordinary residence, charging and the allocation of responsibility between public bodies.

Independent advocacy can assist with the existing statutory processes. Sections 67–68 require it in defined circumstances where substantial difficulty in involvement is not adequately addressed by an appropriate person. Regulation 4 makes further provision both for specified accommodation situations and for material disagreements where the authority and appropriate person agree that advocacy serves the individual's best interests. These are distinct routes. The regulations also address access to relevant records, challenges to decisions and conflicts between people who might otherwise share an advocate.[25] Clara's familiarity with Maya therefore need not make her the sole representative, particularly where the dispute concerns the amount of care Clara can provide. Advocacy outside the statutory conditions requires another legal, contractual or institutional basis.

5.2 SUPPORTING A DECISION AND AUTHORISING PROTECTION

The Mental Capacity Act 2005 begins with a presumption of capacity and requires practicable support before a person is treated as unable to decide. An unwise choice does not establish incapacity. The inquiry concerns the particular decision at the material time and the causal relationship between an impairment or disturbance and inability to understand, retain, use or weigh the relevant information, or communicate a decision.[26] Maya's difficulty evaluating a proposed move calls for adapted explanations and communication support. It cannot be resolved by assuming that a decision about residence belongs to Clara because she understands the care arrangement better.

Where a decision must lawfully be made for a person who lacks capacity, section 4 requires practicable support for participation and attention to wishes, feelings, beliefs and values. In *Aintree University Hospitals NHS Foundation Trust v James*, a dispute about withholding specified life-sustaining treatments, Lady Hale required welfare to be considered 'in the widest sense' and from the patient's point of view.[27] That approach gives the person's experience substantial weight within best interests. It does not make another person's account of those wishes conclusive, nor turn best interests into a general authority to restrain or move someone. The decision and any interference require the legal basis appropriate to them, including the Act's separate provisions governing care acts, restraint, court orders and deprivation of liberty.[28]

Article 12 of the Convention on the Rights of Persons with Disabilities requires equal recognition of legal capacity, support in its exercise and safeguards against abuse. The Committee's General Comment No 1 rejects substitute decision-making and requires the best interpretation of will and preferences where significant efforts cannot ascertain them. Its 2018 corrigendum replaced paragraph 27 so that the characteristics identifying substitute decision-making are connected disjunctively. A regime may therefore fall within the Committee's criticism without satisfying every listed characteristic.[29] The United Kingdom's treaty obligations and the Committee's interpretation must be taken seriously, but the Mental Capacity Act remains the operative domestic framework. Its best-interests standard is not identical to the Committee's position.

The difficulty is acute when supported communication and careful inquiry leave several plausible interpretations of Maya's preferences. The protective position defended here permits action in a narrowly specified case: incapacity for the decision has been established, grave harm cannot otherwise be averted, a lawful power exists, and the measure is proportionate and open to prompt review. A final Court of Protection decision under section 16 requires the statutory incapacity threshold; the distinct interim jurisdiction under section 48 cannot be treated as a finding that threshold has already been proved.[30] Uncertainty about preferences supplies no independent power of intervention.

This position departs from the Committee wherever protection, rather than the best interpretation of will and preferences, supplies the decisive justification. It should be defended in those terms. The decision-maker must identify the evidential gap, the support attempted, the competing interpretations and the reason immediate action is necessary. An institution should also examine whether its own failure to provide communication assistance created the uncertainty. That inquiry preserves a practical distinction between enabling Maya's decision, interpreting her preferences and exercising protective authority for which someone else must answer. A refusal made with capacity remains her decision, subject only to an independently applicable lawful ground of intervention.

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[24] Care Act 2014, s 19(3); Department of Health and Social Care, *Care and Support Statutory Guidance* (n 22) paras 5.26–5.27, 5.33, 6.26.

[25] Care Act 2014, ss 67–68; Care and Support (Independent Advocacy Support) (No 2) Regulations 2014, SI 2014/2889, regs 4(2)–(3), 5(5)–(8), 7. Regulation 4(2) concerns qualifying NHS-arranged hospital stays of at least 28 days or care-home stays of at least eight weeks, with the stipulated best-interests condition.

[26] Mental Capacity Act 2005, ss 1(2)–(4), 2(1)–(4), 3(1)–(4).

[27] Mental Capacity Act 2005, s 4(3)–(7); *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 [39]–[45].

[28] Mental Capacity Act 2005, ss 1(5)–(6), 4A–6, 16.

[29] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 12(2)–(4); Committee on the Rights of Persons with Disabilities, 'General Comment No 1 (2014): Article 12: Equal Recognition before the Law' (19 May 2014) UN Doc CRPD/C/GC/1, paras 12–15, 21, 26–29; 'Corrigendum' (26 January 2018) UN Doc CRPD/C/GC/1/Corr.1, replacing para 27.

[30] Mental Capacity Act 2005, ss 2(4), 16(1)–(3), 48.

5.3 DEPRIVATION OF LIBERTY AFTER THE 2026 REFERENCE

The inquiry under Article 5 of the European Convention on Human Rights has changed significantly. In *P v Cheshire West and Chester Council*, the majority's acid test combined continuous supervision and control with lack of freedom to leave. Lady Hale's observation that 'a gilded cage is still a cage' rejected the assumption that a comfortable placement could not involve deprivation of liberty.[31] On 2 June 2026, seven justices unanimously overruled the acid test in *A Reference by the Attorney General for Northern Ireland*. Lord Sales and Lady Simler gave the joint judgment. The reference concerned the Northern Ireland Health Minister's competence to issue a revised code using a different approach to deprivation of liberty. The Court held that issue of the proposed code was within competence, although the draft required revision. It expressly reserved P's individual case, on which argument had not been heard.[32]

The governing inquiry is multifactorial, beginning with the individual's concrete situation and examining the type, duration, effects and implementation of restrictions. The acid-test factors remain relevant but are insufficient by themselves. Purpose, relative normality and the person's response can matter in context. Consent for Article 5 is autonomous from domestic legal capacity: someone unable to decide residence under the Mental Capacity Act may have sufficient awareness to understand their immediate circumstances, express a view and manifest acceptance. Mere compliance may be insufficient; where a person can express a view and serious doubt remains about their attitude, consent cannot be inferred.[33]

The Court's insistence that 'choices made by individuals with impaired understanding should be respected where possible' explains the autonomy claim behind the change. A binary domestic capacity finding may obscure that form of agency. Maya's contentment, distress or attempts to leave can affect the legal assessment even after she has been found unable to decide between the available care arrangements. The converse difficulty is institutional. Where the conclusion that there is no deprivation removes access to the corresponding Article 5 safeguards, the practical power exercised over her may remain extensive. A provider still controls assistance, daily routines and access to familiar people. The judgment's attention to individual experience therefore strengthens the case for accurate communication and independent scrutiny of the evidence used to infer acceptance. Apparent contentment should be examined in the circumstances in which it is expressed, especially where the same institution supplies both the care and the account of the person's response.[34]

The Department of Health and Social Care confirmed that the decision has immediate effect throughout the United Kingdom. It also confirmed the continued operation of the existing authorisation procedures in England.[35] Schedule A1 remains available for qualifying hospital and care-home arrangements, and Court of Protection authorisation is required in relevant cases outside that scheme; the court also has jurisdiction in hospital and care-home cases. Section 21A specifically concerns review of Schedule A1 authorisations. The replacement Liberty Protection Safeguards had not been brought into operation by the publication date.[36] A change in the substantive Article 5 test must therefore be distinguished from abolition of statutory authorisation and review. Even where Maya's arrangements fall below the deprivation threshold, care duties, capacity requirements and other applicable protections continue to govern the authority exercised over her.

6 CONTESTATION, CONTINUITY AND THE WORK OF ENFORCEMENT

6.1 WHAT A COMPLAINT REQUIRES OF THE CLAIMANT

An official with an excessive caseload must decide which facts to investigate, which categories to apply and which cases can wait. Lipsky's account of street-level bureaucracy explains how organisational pressures enter these apparently individual decisions.[37] The person encountering delay consequently faces more than the judgement of one official. Staffing, information systems and the allocation of investigative time can determine whether their claim is understood at all. An institution that adds duties without the capacity to perform them may transfer the practical work to the claimant or the nearest relative.

Herd and Moynihan distinguish learning, compliance and psychological costs in dealings with the state. These categories help expose what Clara must do to obtain a formally available service: locate the responsible body, recover documents, repeat Maya's history, respond within prescribed times and sustain the uncertainty of the process.[38] Some verification is necessary to allocate public resources fairly. Its necessity does not answer who should perform it. The authority should retrieve information already within its systems and explain why any further demand is relevant. Requiring Clara to

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[31] *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19 [45]–[50], especially [46] (Lady Hale).

[32] *A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2026] UKSC 16 (2 June 2026) [35]–[40], [203]–[209] ('2026 Reference').

[33] *2026 Reference* (n 32) [53(i)–(v)], [118], [135], [172], [184]–[191], [200]–[201].

[34] *2026 Reference* (n 32) [27]–[34], [135]–[141], [185], [188]–[192]; quotation at [135].

[35] Department of Health and Social Care, *UK Supreme Court 2026 Judgment on What Constitutes a Deprivation of Liberty* (updated 22 September 2026) sections 'The 2026 judgment', 'Who this applies to' and 'Existing DoLS authorisations' <https://www.gov.uk/government/publications/changes-to-the-definition-of-deprivation-of-liberty/uk-supreme-court-2026-judgment-on-what-constitutes-a-deprivation-of-liberty>.

[36] Mental Capacity Act 2005, ss 4A(2)–(5), 4B, 16(2)(a), 21A, sch A1 para 13; Department of Health and Social Care, *Deprivation of Liberty Safeguards (England), 2025 to 2026: Background, Quality and Methodology* (5 November 2026), 'Review and replacement of DoLS'. Schedule A1 applies to adults aged 18 or over; s 4B supplies a narrow route pending a court decision.

[37] Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (30th anniversary expanded edn, Russell Sage Foundation 2010) xi–xii.

[38] Pamela Herd and Donald P Moynihan, *Administrative Burden: Policymaking by Other Means* (Russell Sage Foundation 2018) 2–3; Donald Moynihan, Pamela Herd and Hope Harvey, 'Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions' (2015) 25(1) *Journal of Public Administration Research and Theory* 43, 45–46, 47 n 1 <https://doi.org/10.1093/jopart/muu009>.

reproduce an institutional record that the authority can assemble more reliably makes her unpaid labour an undeclared part of the administrative budget.

A provider's accumulated experience and access to records may also confer advantages of the kind Galanter identified in repeat players.[39] Those advantages do not establish that providers invariably prevail. They explain why adding a formal appeal may leave the distribution of effective power largely intact. In the Court of Protection, participation can require specialised communication and an understanding of the person that conventional written submissions cannot supply. Kong and colleagues' qualitative study, based on interviews conducted in 2019–20 with 44 legal practitioners and 12 retired judges, examines professional understandings and practices of participation. It did not observe hearings or interview the people whose capacity was in question. Its findings therefore support analysis of professional approaches and their reported difficulties, without establishing the prevalence or effectiveness of participation across the jurisdiction.[40]

Exit offers an incomplete answer. Anderson's discussion of private government distinguishes several responses to private authority, including exit, voice and substantive legal constraint.[41] In care, departure may mean losing a home, trusted staff and a workable means of communication. Staying may preserve those goods while exposing the resident to continued decisions they contest. A defensible complaint system must therefore make voice usable during dependence. The Joint Committee's evidence about fear of adverse treatment reinforces the need for scrutiny that does not depend entirely on a resident's willingness to confront the provider.[42]

6.2 EXISTING SAFEGUARDS AND THE ADDITIONAL OBLIGATION

English law already regulates complaints. Regulation 16 of the 2014 regulated-activities regulations requires effective arrangements and investigation with necessary and proportionate action. CQC guidance expressly addresses victimisation and adverse effects on care following a complaint. The 2009 local-authority and NHS complaints regulations require prompt acknowledgement, discussion of handling and response arrangements, efficient investigation and a reasoned response.[43] The proposal here builds on that baseline. The remaining question is what secures support when a disputed reduction or termination will take effect before the complaint produces an answer. Judicial review can provide a route to challenge unlawful public action, including an application for urgent interim relief. The procedural requirements themselves demand evidence, a clear account of urgency and a proposed order. The statutory complaint procedure supplies no general automatic suspension of the disputed decision, and the availability of a judicial application does not establish that a dependent person can obtain timely assistance to make it.[44] Nor does later correction necessarily restore missed work, lost contact or deterioration during the interval. Institutional design should reduce those risks before they arise instead of assuming that a successful final remedy will make the claimant whole.

For essential care, a complaint about a proposed reduction or termination should trigger prompt independent consideration of continuity. This is a proposed general safeguard, extending beyond the existing complaint requirements. The reviewer should be independent of the disputed decision and the immediate provider, and should identify the needs that would otherwise go unmet, the legal responsibility for meeting them and the practical alternatives. Essential support should continue pending that assessment unless a specific safety or legal reason requires immediate change. Where continuation by the same provider is unsafe or impossible, responsibility must pass to a named authority or provider through an arranged alternative. The responsible commissioning authority should organise and initially finance the gap, subject to lawful charges and later adjustment between the responsible bodies. Legislation would be needed where current powers and duties do not support that interim responsibility. This would not freeze every disputed service indefinitely. A reasoned interim decision could alter the arrangement after considering urgency, competing claims and the consequences of interruption.

The caregiver's position requires a corresponding transition duty. I propose an enforceable outer deadline for the responsible authority to arrange replacement support after receiving notice that an unpaid carer's contribution will end. The deadline would bind the authority. It would create no minimum period of compulsory unpaid service, and an earlier loss of ability or safety would require an earlier response. An appropriate statute would identify the triggering notice, the responsible body, the urgent route, review and enforcement, and the relationship to existing eligibility and charging rules. Where responsibility is disputed between bodies, an interim organising responsibility would prevent the dispute itself from leaving care unprovided. Public organisation need not mean that all replacement care is free of lawful charges.

No particular number of days can be justified from the evidence examined here. Setting the outer limit requires evidence about replacement capacity and the consequences of delay, together with provision for urgent cases. This leaves a task for legislative design, but the direction of the obligation is clear. Clara must not become the residual provider because the authority has failed to organise an alternative. Responsibilities arising from an assumed care role still matter, including practicable notification and safe handover. The Mental Capacity Act's offence of ill-treatment or wilful neglect is relevant where its

[39] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95, 97–103 <https://doi.org/10.2307/3053023>.

[40] Camillia Kong and others, 'Justifying and Practising Effective Participation in the Court of Protection: An Empirical Study' (2022) 49(4) *Journal of Law and Society* 703, ss 2, 3.2–3.3, 4 <https://doi.org/10.1111/jols.12398>.

[41] Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Stephen Macedo ed, Princeton University Press 2017) 65–70.

[42] Joint Committee on Human Rights (n 1) paras 94–102, 106–08.

[43] Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936, reg 16(1)–(2); Care Quality Commission, 'Regulation 16: Receiving and acting on complaints' (updated 16 May 2025), guidance on reg 16(1)–(2); Local Authority Social Services and National Health Service Complaints (England) Regulations 2009, SI 2009/309, regs 13–14.

[44] Civil Procedure Rules, rr 54.2–54.3, 54.6(1)(c), 54.10(2)(a); Practice Direction 54B, paras 1.2–1.3, 1.7–1.8, 2.1–2.4, 4.1; SI 2009/309 (n 43), regs 13–14.

conditions are satisfied.[45] It cannot be converted into an administrative entitlement to indefinite family labour. Any further care beyond Clara's undertaking should rest on fresh agreement, with remuneration and expenses addressed expressly where appropriate.

Continuity also requires access to evidence and to the person. Existing advocacy duties should be used fully. Beyond their scope, commissioning arrangements and, where necessary, legislation should secure independent assistance, timely disclosure of relevant records with appropriate privacy protection, and scrutiny of termination following a complaint. Public oversight must itself remain answerable. Pettit's concern with public domination applies to inspection and protective intervention as well as to private providers.[46] Residents should have a say in visits and communication arrangements, and regulators should explain intrusive measures. Investigation of recurrent patterns can reduce dependence on individual complaints, provided that responsibility for replacement care is established before enforcement disrupts a service.

7 SCARCITY, COMPETING CLAIMS AND IRRECOVERABLE LOSS

The proposed continuity protection faces a serious objection. Existing recipients may obtain an advantage over equally urgent applicants simply because an interrupted service is more visible than one never supplied. Ben's claim tests that possibility. If his need is as serious as Maya's, the institution must compare them on terms that do not reward Clara's persistence or penalise a person without an effective representative. The practical costs of moving Maya are relevant because they are consequences of the available options. Incumbency alone cannot decide the allocation.

Suppose now that Maya has been found unable to decide about residence after practicable support, and the evidence still leaves her preferred option uncertain. Clara cannot continue safely. No replacement home-care worker is available, and transferring Ben's equally urgent support would expose him to comparable harm. A temporary placement can secure Maya's physical care but will reduce privacy and familiar contact. The authority must investigate whether the shortage is genuine and whether less disruptive arrangements can be assembled. If the temporary placement remains the only lawful way to prevent grave harm without imposing comparable harm on another, its justification must address the losses it creates. Capacity, best interests and any deprivation of liberty require their respective legal determinations. Neither an asserted funding shortage nor the existence of an empty bed supplies authority to move her.[47]

This conclusion permits an outcome that falls short of everyone's legitimate interests. Clara may be unable to provide what would make Maya's preferred arrangement possible; Ben cannot be required to surrender equally necessary support; and a public authority cannot summon a willing workforce immediately. The bounded-assistance principle prohibits solving the shortage through compulsory personal service. A just response must therefore identify the least harmful lawful option, explain the competing claims and continue the search for a better arrangement. Maya's distress remains a reason to improve and shorten the placement even if it does not, by itself, establish that the initial decision was unlawful.

The comparison should attend to severity, reversibility, likely benefit, communication needs and the burdens that each option places on others. Productive worth and family influence supply no reason to discount a comparable claim. Where relevant reasons leave claims equally urgent, an impartial allocation procedure is required. These are proposed criteria for care decisions, not a formula that mechanically resolves every conflict or a restatement of Rawls's lexical ordering. Rawls's priority of basic liberties, fair equality of opportunity and the difference principle concerns the assessment of institutions under its own conditions.[48] It supports the further question whether the care system leaves disabled people, unpaid carers and paid workers with fair opportunities over a life, after immediate protection has been secured.

Responsibility should also be located at the time when action was possible. Reasonable frontline decisions during a shortage can coexist with an earlier failure to plan, commission or maintain capacity. Conversely, an unmet need does not prove that every official involved acted wrongfully. Review should identify who held the relevant power and resources, what could reasonably have been done and which obligations continue. Contact with familiar people, access to records, communication support and periodic reconsideration may remain practicable even when the preferred placement is unavailable. Those tasks should be assigned rather than left to whoever feels unable to refuse them.

The distributional assessment must recognise what support actually enables. A high care budget is not equivalent to a large disposable income: much of it may be required to obtain opportunities that others can exercise at little cost. Relevant evidence includes the support delivered, opportunities made usable, interruptions, time spent securing services and burdens transferred to unpaid carers. These are dimensions for institutional evaluation, not a validated composite index. Their measurement would require separate empirical work. They direct attention to a consequence that an expenditure total can conceal: a formally generous entitlement may leave Maya without reliable assistance and Clara without time she can call her own.

[45] Mental Capacity Act 2005, s 44(1)–(2); see also s 5(3). Section 44 concerns the specified care, attorney and deputy relationships; kinship alone is not the statutory test.

[46] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 3.

[47] Mental Capacity Act 2005, ss 1(5)–(6), 4, 4A, 16; *2026 Reference* (n 32) [53], [191], [201].

[48] Rawls, *Justice as Fairness* (n 8) 42–44, 57–59, 170–76; Rawls, *Political Liberalism* (n 7) 7.

8 CONCLUSION

Continuing care exposes a weakness in accounts of institutional justice that assess the allocation and the eventual remedy while leaving the interval between them unexamined. During that interval, authority remains operative. The recipient lives with the disputed arrangement, and someone bears the labour and risk of maintaining support. Equal standing requires those burdens to enter the justification of the institution's decision from the outset.

The argument extends established accounts of dependency and relational equality through a principle of continuing responsibility. Its philosophical commitments include direct representation of people unable to exercise the moral powers assumed in the Rawlsian conception of the citizen and bounded material assistance compatible with the separate lives of contributors. Its legal application distinguishes statutory care duties, personal undertakings, fiduciary loyalty and authority to decide for another. The 2026 deprivation-of-liberty judgment makes the distinction especially significant: a person's experience can carry legal weight despite a finding of incapacity, while substantial care power may persist outside Article 5 authorisation.

Existing English protections provide important foundations, but the proposed settlement goes further. Independent consideration of continuity during a complaint, a transition deadline directed at the responsible authority, and assistance with the work of enforcement would require specified legal and institutional arrangements. Their design must protect equally urgent claimants and preserve the caregiver's ability to withdraw from an unsustainable role. Some losses will remain unavoidable under scarcity. What an institution must explain is why those losses fall where they do, what it could have done earlier, and what responsibility it retains after the immediate decision. A right to care acquires practical force when the person can question its administration without having to finance the challenge through insecurity or another person's unbounded service.