

## Chapter Six

### Vulnerabilities and Older Owners

#### (1) Introduction

Although there are clear and specific risks associated with home equity transactions for any owner (and particularly marginal owners), regardless of age,<sup>1</sup> the particular tensions between competing housing paradigms for older owners emphasise the ways in which their decision-making concerning use of housing equity is framed by specific contextual factors.<sup>2</sup> While older owners are a widely differentiated population, both in terms of socio-economic circumstances and financial and legal capabilities, this chapter considers whether the economic, demographic, social, housing preference and risk contexts of housing equity use for older owners create specific vulnerabilities which affect their ability to negotiate housing equity transactions or the impact of adverse transactions on their wellbeing. By exploring the factors which may render an older owner particularly vulnerable in relation to financial transactions affecting their homes, this analysis begins to consider how these vulnerabilities map onto the legal concepts that potentially trigger protection for vulnerable populations, and to evaluate the appropriate theoretical and practical bases for any legal protections deemed necessary in this context.

One area of vulnerability considered in this chapter relates to the decision-making process when the older owner enters into a transaction. Within this category, the most obvious cause of vulnerability is impaired capacity, although this is not the only or necessarily the most prevalent issue, particularly in light of improved health and wellbeing in (especially early) old age. Another potential type of vulnerability, also falling within this category, relates to the impact of age on the ability to make economic decisions, and includes what the FSA have termed ‘financial capability’ as well as psychological research exploring the impact of age *per se* on healthy older people’s abilities to make decisions under uncertainty, to think strategically and to plan their futures. These issues are brought into sharp relief by the demands on older consumers following the ‘emancipation from traditional aging’<sup>3</sup> which has

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<sup>1</sup> See Chapter Three.

<sup>2</sup> See Chapter Four.

<sup>3</sup> C Phillipson, *Reconstructing Old Age* (London: Sage, 1998), p124; see Chapter Two.

made later life in the period of late modernity a time of increased choice (and so increased risk),<sup>4</sup> and which is brought into sharp relief by the inherent complexity of financial products that release housing equity.<sup>5</sup>

A third source of vulnerability in respect of financial decision-making relates to the risk of financial abuse of older owners, either by inappropriate targeting by financial product providers, or by family members or carers who exert pressure on the older person to enter into particular transactions. Finally in this category, a fourth cause of vulnerability relating to the decision-making process is rooted in the social and economic circumstances or contexts of the transaction. This type of systemic vulnerability stems from the pressures that older people are under to make choices which enable them to take individual responsibility for their old age, and to engage in effective life planning. The political and policy contexts have set the scene for increasing use of housing equity after retirement, while the tensions between the competing housing paradigms highlight the complexities of the choices that must be made. This ‘contextual vulnerability’ is distinct from considerations of capacity or consent inasmuch as it is external to the individual’s mental abilities or capacities, but does reflect the constraints that may shape these choices, particularly for marginal owners. This in turn locates the issue of contextual vulnerability within the realm of inequalities, in both financial resources and the social and cultural capitals which play a crucial role in determining the ‘winners’ and ‘losers’ in a risk society.<sup>6</sup>

The second category of vulnerability considered in this chapter shifts the focus away from the ‘point of sale’ of home equity transactions, towards the ‘point of crisis’, when bad outcomes result from decisions taken. In this context, the issue of vulnerability relates to the differential impact of adverse consequences on (certain) older consumers. In discussing the risks of equity release schemes, the Financial Services Authority have recognised that ‘What makes matters worse in this area is that these consumers tend to be elderly and vulnerable people who can ill-afford to be unnecessarily exposed to risk.’<sup>7</sup> This meaning of

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<sup>4</sup> See Chapter Three.

<sup>5</sup> See Chapter Three, section 3(b), where it was noted that the FSA’s 2007 review of products to finance retirement emphasised both the complexity of the decisions that older people need to make regarding the funding their terms of their old age and the specific complexity of equity release products, so that the detail of how the different products work is difficult to understand; see Financial Services Authority, *Finance in and at retirement – results of our review* (London: FSA, 2007); available online at [http://www.fsa.gov.uk/pubs/other/retirement\\_review.pdf](http://www.fsa.gov.uk/pubs/other/retirement_review.pdf).

<sup>6</sup> See discussion in Chapter One, section 3(b).

<sup>7</sup> Clive Briault, Managing Director of Retail Markets at the FSA, quoted at

vulnerability has also been recognised in the English courts: for example, in *R v Waveney DC ex parte Bowers*,<sup>8</sup> the Court of Appeal defined vulnerability (for the purposes of ‘priority need’ for local authority housing) as meaning ‘less able to fend for oneself so that injury or detriment will result where a less vulnerable man will be able to cope without harmful effects.’ The ‘impact’ dimension of vulnerability shifts the focus from the older owner’s ability to make choices at the point of sale, to consider how detrimental the consequences of choosing badly might be for an older owner, compared for example to a younger person who has greater opportunity to absorb risk, adjust to losses and recover from economic setbacks by earning more money.<sup>9</sup> These two dimensions of vulnerability (decision-making and impact) also map onto the two dimensions of risk: the probability that the harm will occur and the magnitude of associated losses or gains;<sup>10</sup> while decision-making vulnerability captures the likelihood of loss, the impact dimension denotes the value attached to the loss, or ‘the awfulness of getting the wager wrong’.<sup>11</sup>

The intersections between vulnerabilities and aging also raise politically and emotionally loaded connotations of ‘dependency’. While feminist (and some progressive property)<sup>12</sup> scholarship has attempted to de-bunk the negative connotations of ‘dependency’,<sup>13</sup> the labelling of populations as ‘dependent’ continues to carry a political subtext.<sup>14</sup> While it is recognised that dependency creates vulnerability, and both ‘dependent’ and ‘vulnerable’ subjects depart from the classical ‘rational subject’ of neoliberal economics and liberal legal theory, the characteristics which are presumed to set them apart as subjects differ significantly, with potential implications for claims to legal protection. Leonard described the ‘dependent subject’ as a pre-occupation of the New Right critique of the ‘culture of dependency’: a person who is reliant on state support, and in turn does not engage with the reproduction of capitalist social relations, for example, through their reduced ability to consume.<sup>15</sup> Dependent subjects do not display the neoliberal virtues of commitment to work,

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<http://www.fsa.gov.uk/pages/Library/Communication/PR/2005/054.shtml>

<sup>8</sup> [1983] QB 238.

<sup>9</sup> See discussion in Chapter Four, section 3.

<sup>10</sup> D Lupton, *Risk* (London: Routledge, 1999), p8.

<sup>11</sup> See J Steele, *Risks and Legal Theory* (Oxford: Hart Publishing, 2004), discussing ‘Pascal’s wager’, pp22-23.

<sup>12</sup> Chapter Four, section 5.

<sup>13</sup> See for example, MA Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004).

<sup>14</sup> See discussion below, section 7.

<sup>15</sup> P Leonard, *Postmodern welfare: Reconstructing an Emancipatory Project* (London: Sage, 1997), p50.

family responsibility and competition, and so attract social and moral opprobrium, which has sometimes been reflected in legal discourse.<sup>16</sup>

In other cases, dependency has been equated with vulnerability, and has given rise to protections for the older person: for example, a person who is old and homeless will be classified as ‘vulnerable’, which will usually mean being swiftly re-housed,<sup>17</sup> without the need to demonstrate incapacity. Clapham, Kemp and Smith have argued that this reflects the construction of older people as ‘dependent subjects’, who:

...have, for the most part, no direct relationship with the labour market [and] can be defined as deserving of assistance, in that the provision of state help would not be expected to inhibit the qualities of initiative and self-reliance which the undeserving homeless (those who could, theoretically compete in the labour market and provide for themselves) are deemed to lack.<sup>18</sup>

The discussion in Chapter Two highlighted the policy narratives which have increasingly constructed older people as active and responsible consumers in relation to care, through the shift from welfare provision to housing equity use, while the particular emphasis on older *owners* as consumers in the neoliberal environment was noted in Chapter Three. While age has been recognised as a factor which heightens vulnerability in the case of older homeless people for the purposes of local authority housing, it is through the lens of dependency, which is viewed by older people as an unattractive ‘label’, and which casts them, as a population group, as ‘non-subjects’, in diametric opposition to the ‘autonomous individualism’ that underpins the construction of older owners in neoliberal governance as self-providing consumers.<sup>19</sup> As the discussion in Chapter Five has indicated, the terms ‘autonomy’ and ‘dependence’ are heavily-loaded with political meanings which have been deployed to justify the dominant tropes of self-provision and self-responsibility. The

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<sup>16</sup> See for example, T Ross, ‘The Rhetoric of Poverty: Their Immorality, Our Helplessness’ (1991) 79 *Georgetown Law Review* 1499.

<sup>17</sup> D Hawes, *Older People and Homelessness* (Bristol: Policy Press, 1997), p9.

<sup>18</sup> D Clapham, P Kemp & S Smith, *Housing and Social Policy* (Basingstoke: Macmillan, 1990), p121; quoted in J Morgan, *Housing Law* (London: Blackstone, 1998), p276. Morgan goes on to note that ‘Customarily, people at or past retirement age were considered vulnerable on account of old age. The Code of Guidance suggests that authorities should look at whether age has made it hard for the applicant to fend for himself or herself, and that all applications [to be housed] from people over 60 should be looked at carefully’, J Morgan, *Housing Law* (London: Blackstone, 1998), p277.

<sup>19</sup> The social, economic and political contexts of financing retirement mean that housing equity transactions straddle a fluid boundary between private financial transactions executed by homeowners as consumers, and the realm of social welfare support for the care, pensions and housing needs of older people. However, older *owners* are constructed not as ‘dependent subjects’ but (despite their ‘market dependency’) as ‘independent’ and self-determining; see Leonard, above, pp53-54.

challenges of reconciling the realities of vulnerability within the dominant political framework are considered in section 7, below.

The analyses of vulnerabilities in this chapter provide a lens through which to evaluate the nature and extent of legal protections for older owners in housing equity transactions. This in turn provides a platform from which to think about the arguments for treating older owners (or older consumers) as ‘vulnerable legal subjects’. On the one hand, it has often been argued that the extension of ‘special protections’ to particular groups should be viewed with caution as it may have adverse implications of dependency, lack of capacity and lack of autonomy.<sup>20</sup> Fineman’s concept of the ‘vulnerable legal subject’ offers a fresh opportunity to move away from the (political) conflation of ‘autonomous individualism’ and independence (the autonomy/dependence dyad) to ‘develop a more complex subject around which to build social policy and law’.<sup>21</sup> Fineman has argued that this vulnerable subject ‘must replace the autonomous and independent subject asserted in the liberal tradition.’<sup>22</sup> This chapter seeks to take a ‘real measure’ of the vulnerabilities which (marginal) older owners may face in housing equity transactions, and to consider what how these vulnerabilities reflect on older owners as legal subjects. In doing so, the chapter draws on Fineman’s challenge to the normative framework of legal subjectivity to consider its implications for older owners in housing equity transactions. Specifically, the final section considers the critical potential offered by the discursive tropes of vulnerability and responsibility when analysing the justifications for law’s outlook on the housing equity transactions of older owners.

## **(2) Capacity**

While capacity provides the obvious starting point for any discussion of older people and vulnerability in financial transactions, it is important not to overplay the significance of questions of capacity in this context,<sup>23</sup> or to focus (as legal analysis often does) on

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<sup>20</sup> See for example, Green and Lim discussing women entering financial transactions, and arguing against special protections on the grounds that: “[w]e do not want always to be victims.”; K Green & H Lim, ‘Weaving Along the Borders: Public and Private, Women and Banks’, in S Scott-Hunt & H Lim (eds) *Feminist Perspectives on Equity and Trusts* (London, Cavendish, 2001), p98.

<sup>21</sup> MA Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1.

<sup>22</sup> *Ibid*, at 2.

<sup>23</sup> 78% of those aged 85 and older have no cognitive impairment at all; T Poole, *Housing Options for Older People* (King’s Fund, 2005), at 2; cited in J Herring, *Older People in Law and Society*, (Oxford: OUP, 2009), p52.

(in)capacity to the exclusion of other forms of vulnerability.<sup>24</sup> Nevertheless, questions of capacity do arise, and so this section considers the impact of the current law in this context. The law on capacity in England and Wales is currently set out in the Mental Capacity Act 2005, which sets out the default position, that a person is assumed to have capacity unless it is established that they do not, and that ‘A person is not to be treated as unable to make a decision merely because he makes an unwise decision.’<sup>25</sup> The Act goes on to provide that a person is mentally incapable if he is ‘unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.’<sup>26</sup> In these circumstances, the legislation empowers the court to make a declaration of incapacity and then either make an order through which the court makes the decision on the incapable person’s behalf, or authorise another person to make decisions on his or her behalf.<sup>27</sup>

Although reference is made to age in this Act, it is only in the negative sense that section 2(3)(a) prohibits establishing lack of capacity merely by reference to a person’s age. The criteria by which the inability to make a decision is judged are set out in section 3, and include: the ability to understand information relevant to decision; the ability to retain that information; the ability to use or weigh that information as part of the process of making the decision; and the ability to communicate the decision. It is interesting to note that section 3(4) provides that ‘The information relevant to a decision includes information about the *reasonably foreseeable* consequences of (a) deciding one way or another, or (b) failing to make the decision.’<sup>28</sup> In light of their unknown future needs, housing equity transactions may well have unforeseeable adverse consequences for older owners.<sup>29</sup> However, the capacity legislation clearly does not extend to difficulties in making decisions that result from the

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<sup>24</sup> See for example, the Report of the Irish Law Commission on ‘Vulnerable Adults and the Law’ (LRC 83-2006), available online at [http://lawreform.ie/\\_fileupload/Reports/Report%20Vulnerable%20Adults.pdf](http://lawreform.ie/_fileupload/Reports/Report%20Vulnerable%20Adults.pdf) which focused almost entirely on issues relating to capacity. Although the Consultation Paper preceding this report dedicated a full chapter to protections against financial abuse of vulnerable elders and abuse in property transactions [Law Reform Commission, *Consultation Paper on Law and the Elderly* (LRC CP 23-2003)], this was addressed in four pages of the final report, which made only one recommendation: that equity release schemes should be regulated under the statutory scheme for the financial services regulator. The Scottish Law Commission’s *Report on Vulnerable Adults* (Scot Law Com 158, Edinburgh: The Stationary Office, 1997) defined ‘vulnerable adults’ in terms resounding of incapacity, as ‘people aged 16 or over who are unable to safeguard their welfare or property and are (a) in need of care and attention due to age or infirmity, (b) suffering from illness or mental disorder or (c) substantially handicapped by a disability.’; vi.

<sup>25</sup> Section 1(4).

<sup>26</sup> Section 2(1).

<sup>27</sup> Section 16(2).

<sup>28</sup> Emphasis added.

<sup>29</sup> See discussion in Chapter Three, section 3(b).

nature and context of the transaction, but only those cases in which ‘The inability to make a decision [is] caused by an impairment of or disturbance in the functioning of the mind or brain’.<sup>30</sup>

The statutory definition of incapacity is relevant in cases where the Court of Protection has made a declaration, based on the ‘diagnostic test’ of inability to make decisions. Examples of the problems which may give rise to such an assessment include ‘psychiatric illness, learning disability, dementia, brain damage or even a toxic confusional state, as long as it has the necessary effect on the functioning of the mind or brain, causing the person to be unable to make the decision.’<sup>31</sup> In such cases, the court or another nominated person takes over decision-making relating to a range of issues, including health, welfare and financial affairs of the incapable person, and manages these decisions in the ‘best interests’ of the incapacitated person. This may include making orders or decisions relating to the use of housing equity to fund health and nursing care. The person making the decision will have to weigh the needs of the older person (across the competing housing paradigms or home, investment and inheritance) and balance the risks of the alternative options to make a choice in the best interests of the owner.<sup>32</sup> While these mechanisms are undoubtedly important in circumstances of medical incapacity, they are to some extent peripheral to the primary focus of this chapter, as the vulnerable person is not in fact making a decision themselves.

Older (and other) owners may also be deemed to lack legal capacity under the common law, and this can potentially invalidate extant transactions. In these cases, no order has been made under the Mental Health Act, so that the person is not under the control of the court but purports to make his or her own choices and decisions concerning financial transactions which use housing equity. In *Re MM (An Adult)*,<sup>33</sup> Mumby J indicated that the definition of incapacity in the Mental Capacity Act 2005 merely replicated the common law definition,<sup>34</sup>

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<sup>30</sup> Ministry of Justice, *Mental Capacity Act 2005, Code of Practice* (London: The Stationary Office, 2007), section 22.

<sup>31</sup> *Ibid.*

<sup>32</sup> It has been argued that the ‘best interests’ test is not unproblematic, but that there are tensions between the abstract concept and its everyday application which could have a negative impact on the implementation of the mechanisms for devolved decision-making; see for example, MC Dunn, ICH Clare, AJ Holland & MJ Gunn, ‘Constructing and Reconstructing ‘Best Interests’: An Interpretative Examination of Substitute Decision-making under the Mental Capacity Act 2005’ (2007) 29 *Journal of Social Welfare and Family Law* 117.

<sup>33</sup> [2007] EWHC 2003 (Fam), para 74.

<sup>34</sup> See J Herring, *Older People in Law and Society*, (Oxford: OUP, 2009), p54.

which was explained by Butler-Sloss LJ (in the context of capacity to consent to medical treatment) in *Re MB (Medical Treatment)*.<sup>35</sup> It arises when:

some impairment or disturbance of mental functioning renders the person unable to make a decision [because they are] unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question [and] the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision.<sup>36</sup>

A similar formulation was set out in *Masterman-Lister v Brutton & Co (No 1)*,<sup>37</sup> in relation to the capacity to litigate, when Kennedy LJ held that:

...the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision.<sup>38</sup>

Mr Justice Mumby added that these various tests are simply different ways of expressing the same ‘general theory’, which ‘applies, in principle, to all “problems” and to all “decisions”’.<sup>39</sup> The common law doctrine may be relevant where the older owner has already purported to enter a contract but then seeks to avoid the transaction on the grounds of incapacity: thus, while the legislation applies to ‘before the decision’ orders, the common law is likely to be invoked in ‘after the decision’ disputes.

If a person was acting under incapacity at the time he entered into a contract this renders the contract voidable at the hand of the incapable party,<sup>40</sup> provided that the incapacity was known to the other party at the time of the transaction.<sup>41</sup> It has been argued, and in the New Zealand decision of *Archer v Cutler* the court accepted, that a contract with a person acting under incapacity might be unenforceable even if the other party was not aware of the incapacity, where the contract itself could be viewed as ‘unfair’ or ‘unconscionable’.<sup>42</sup> This argument was rejected by the Privy Council in *Hart v O’Connor* (on appeal from the New Zealand

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<sup>35</sup> [1997] 2 FLR 426.

<sup>36</sup> *Ibid*, at 437.

<sup>37</sup> [2002] EWCA Civ 1889, [2003] 1 WLR 1511.

<sup>38</sup> *Ibid*, at para 26.

<sup>39</sup> *Re MM (An Adult)*, *op cit*, para 72; see also *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326, at paras [134]-[135].

<sup>40</sup> *Re Walker* [1905] 1 Ch 60.

<sup>41</sup> *Imperial Loan Co v Stone* [1892] 1 QB 599.

<sup>42</sup> *Archer v Cutler* [1980] 1 NZLR 386 at 398.



Court of Appeal).<sup>43</sup> Mr O'Connor, aged 83 and – unknown to the purchaser – of unsound mind, had agreed to sell some land to Mr Hart. The Privy Council held that, since Mr Hart was not aware of Mr O'Connor's incapacity at the time of the transaction, and there had been no unconscionable dealing, the agreement could not be set aside. Lord Brightman stated that:

...the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of 'unfairness' unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.<sup>44</sup>

The use of stark language ('lunatic') in delineating the scope of the capacity doctrine emphasises its extreme nature, and underlines the unattractiveness of self-identifying within this group. This principle seeks to strike a balance between the protection of the incapable person and the interests of the other party who had no knowledge of the incapacity, although it has been suggested that 'in most cases the latter interest will prevail'.<sup>45</sup> As such, this condition applies a significant limitation to the circumstances in which contracts can be avoided for incapacity, and demonstrates the 'defendant-sided' nature of this doctrine.<sup>46</sup>

The use of incapacity to invalidate the contracts by which financial transactions for home equity use are carried out is both limited and potentially problematic, for several reasons. For one thing, it is likely to come into play in only the more extreme cases of 'medical' vulnerability. In fact, as the following sections will indicate, many of the vulnerabilities which are likely to affect older people in home equity transactions are both less extreme and emanate from different sources, including factors which are 'external' to the person – for example, vulnerability resulting from the social context of the transaction. Heywood, Oldman & Means have criticised the tendency of social policy and practice to focus on 'a medical model of disability focusing on the functional limitations',<sup>47</sup> and contrast this with the social model of disability, which 'does not see the 'problem' as lying with the impairment

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<sup>43</sup> [1985] AC 1000. The burden of proving this knowledge rests on the person claiming incapacity; *Molton v Camroux* (1848) 2 Exch 487.

<sup>44</sup> *Ibid*, at 1027.

<sup>45</sup> TA Downes, *A Textbook on Contract* (London: Blackstone, 1993), p159.

<sup>46</sup> See P Birks & M Chin, 'On the Nature of Undue Influence' in Beatson & Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995), for discussion of the differences between 'claimant-sided' (responding to vulnerability) and 'defendant-sided' (responding to wrongdoing) protections; see further Chapter Ten.

<sup>47</sup> F Heywood, C Oldman & R Means, *Housing and Home in Later Life* (Buckingham: Open University Press, 2002), p28.

of the individual but within society itself.’<sup>48</sup> They argued that the role of society in creating the structured dependency of the elderly<sup>49</sup> is particularly evident in the case of suitable housing for older people. The emphasis on contextual factors in creating vulnerability might suggest that the social model of disability would offer more potential to align vulnerability as it is experienced by older people in the context of home equity transactions with capacity doctrine. A more contextual approach also enables vulnerability to be protected without necessarily treating the vulnerable person as a ‘victim’.<sup>50</sup> However, even with such a recalibration within the legal doctrine, it remains the case that ‘disability’ affects only a minority of older people. Any approach which sought to utilise the idea of ‘disability’ as a broader solution to the issues raised in this book would be both inappropriate and unattractive to the majority of older people.

In *Conceptualising Home*, I set out the reasons – both in principle and in practice - why arguments rooted in dependency or presumptions of incapacity are unattractive as a route through which to address gendered vulnerabilities in the context of financial transactions affecting the home.<sup>51</sup> In principle, arguments for legal protection which are based on incapacity are flawed where they rely on the assumption that age (or gender) can be equated with incapacity *per se*, and where they rely on a model of dependency which can be both inaccurate and have adverse practical implications. Legal discourse has long recognised a risk that ‘special treatment’ of a particular group of contractors might adversely affect the willingness of creditors to enter into contract with them,<sup>52</sup> with the suggestion that any incursion into the protection of the creditor would inhibit transactions and make it more difficult for that group of consumers to access much needed capital. This argument – though frequently made and implicitly accepted by the courts – has rarely been subjected to empirical scrutiny, despite the suggestion that there has been a ‘tend[ency] to over estimate heavily the effects of law’.<sup>53</sup> Nor is it universally accepted that the availability of credit is the

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<sup>48</sup> *Ibid.*

<sup>49</sup> That it is not that the individuals who are ‘disabled’, but society that ‘disables’ them.

<sup>50</sup> *Ibid.*, p29; see also M Oliver, *The Politics of Disablement* (London: Macmillan, 1990), and C Barnes, G Mercer & T Shakespeare, *Exploring Disability: A Sociological Introduction* (Oxford: Policy, 1999), contrasting the medical model and social model of disability.

<sup>51</sup> See L Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart, 2006), Chapter Eight, especially pp365-6, 401-7.

<sup>52</sup> *Ibid.*, p366; also discussion at pp88-92 of the complex relationship between creditor protections and the availability of credit.

<sup>53</sup> K Llewellyn, ‘What Price Contract? An Essay in Perspective’ (1930)40 *Yale Law Journal* 704 at 725.

most important measure of economic efficiency in credit markets;<sup>54</sup> and even within the efficiency model, there is a need to balance the ready availability of credit against disincentives for effective gate-keeping by creditors who may be induced to take unjustified risks where they are assured of legal protection of their interests in any event.<sup>55</sup>

This set of issues has important ramifications for the housing equity transactions executed by older owners. The policy arguments in support of greater home equity use by older owners include the strategic benefits of (safe) home equity use for local and central government; but barriers to older owners' willingness to spend their housing wealth include concerns about the complexity, riskiness and value for money of such schemes,<sup>56</sup> with the perception that they are 'very risky' the strongest factor against equity release.<sup>57</sup> The discussion in Chapter Four noted that the equity release industry has for many years been poised for market growth, but that building confidence in the sector – by addressing issues of mistrust – will be a crucial step in achieving that growth. In this context, the arguments for striking the balance between creditor protections and consumer protections on the side of the creditor (rather than providing special protections for potentially vulnerable consumers) are undermined by the importance – both for the industry and for the achievement of government policy – of building confidence in equity release products by providing adequate protection for vulnerable owners.

The arguments against 'special protections' for certain groups have also been extensively rehearsed in the context of undue influence, where the proposition that one party (often a woman) is particularly vulnerable to undue pressure has been viewed as problematic since, while it responds to a reality that women have sometimes been adversely affected by structural socio-cultural inequalities in relation to rights in the owned home, the connotations of female dependency and incapacity – whereby the woman has to 'fit herself within a

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<sup>54</sup> AJ Padilla & A Requejo, *The Costs and Benefits of the Strict Protection of Creditor Rights: Theory and Evidence* (Washington DC: Inter-American Development Bank, Research Network Working Paper #R-384, 2000); M Manove & AJ Padilla, 'Banking (Conservatively) with Optimists' (1999) 30 *Rand Journal of Economics* 324; M Manove, AJ Padilla & M Pagano, 'Creditor Rights and Project Screening: A Model of Lazy Banks' (Boston, MA, Mimeographed document, 1999); see generally Chapter Four for discussion of challenges to the 'efficiency' model of contract and property transactions.

<sup>55</sup> RA Posner, *The Economic Analysis of Law* (Boston: Little, Brown and Company, 1992), p440-1.

<sup>56</sup> K Rowlingson, 'Attitudes to housing assets and inheritance' *CML Housing Finance* Issue 10/2005, p1.

<sup>57</sup> *Ibid*, Chart 3; see Chapter Four, section 5.

stereotype of the down-trodden and uninformed housewife<sup>58</sup> - are unattractive. Similarly, in the case of older people, it has been noted that 'incapacity is often difficult to prove and represents a degrading method of protection.'<sup>59</sup> Relying on incapacity requires the older person seeking the protection of the law to demonstrate weakness or disempowerment; this form of protection echoes of paternalism, carries stigma, has negative connotations for personal dignity, denies the older person the opportunity to make choices, and appears to undermine their 'autonomy'.

The discussion of aging in place in Chapter Five emphasised the importance of maintaining control over decision making and preserving the older person's sense of personal autonomy in order to support wellbeing in later life,<sup>60</sup> including control over the home environment. It noted that the loss of the ability to make choices and of personal autonomy may have particularly adverse effects for older people, and so counter the aims of policies supporting 'aging in place'.<sup>61</sup> Any presumption that older people lack capacity would also potentially undermine their subjectivity within current legal/financial/risk frameworks by creating a stark choice between 'autonomous individualism' and incapacity. The blunt tool of setting an upper age limit on capacity to contract would present similarly stark alternatives, which would not only make it exceedingly difficult for older people to self-provide through housing equity transactions, but would overlook the heterogeneity of older people and discriminate against those who remain highly competent into advanced old age.<sup>62</sup>

Capacity doctrine offers an 'all or nothing' position between autonomy and no autonomy: characterising people as either able to choose (and so responsible for the outcomes of their choices) or unable to choose (and so 'dependent'); which relegates protection for vulnerable older people to claims based on incapacity, or disability, and does not address social or contextual vulnerabilities. The usefulness of capacity doctrine in this context is also limited

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<sup>58</sup> B Fehlbarg, 'The Husband, the Bank, the Wife and her Signature – the Sequel' (1996) 59 *Modern Law Review* 675 at 694.

<sup>59</sup> W C Rossiter, 'No Protection for the Elderly: The Inadequacy of the Capacity Doctrine in Avoiding Unfair Contracts Involving Seniors' (1999) 78 *Oregon Law Review* 807 at 808. See also MD Green, 'Proof of Mental Incapacity and the Unexpressed Major Premise' (1944) 53 *Yale LJ* 271; JE Rein, 'Clients with Destructive and Socially Harmful Choices – What's An Attorney to Do? Within and Beyond the Competency Construct' (1994) 62 *Fordham L Rev* 1101.

<sup>60</sup> JF Watkins & AF Hosier, 'Conceptualising Home and Homelessness: A Life Course Perspective' in GD Rowles & H Chaudhury, *Home and Identity in Late Life: International Perspectives*, (New York: Springer, 2005), p207; see Chapter Four, section 3.

<sup>61</sup> See Chapter Four, section 3; see also C Russell, 'Home, Identity and Belonging in Later Life: The Perspectives of Disadvantaged Inner-City Men', in Rowles & Chaudhury (ed), above, p237.

<sup>62</sup> **Reference to age discrimination**

by the medical model of incapacity, which does not capture the cause of vulnerability in many cases; and that in the context of financial transactions (where an order has not been made under the Mental Capacity Act 2005), parties who do not have knowledge of the incapacity at the time of the transaction are not affected by the fact that someone was acting under incapacity. There is clearly a wide field between capacity and incapacity, in which additional protections against vulnerability must be considered. The following sections consider three alternative perspectives on the vulnerabilities of older owners when entering into transactions: the relationship between age and economic decision making; the issue of targeting and financial abuse of the elderly; and the question of contextual vulnerabilities in housing equity transactions.

### **(3) Age, financial capability and economic decision-making**

While it is recognised that a minority of older people may be affected by impaired capacity, it is by no means the only source of vulnerability in the context of housing equity transactions. Another cause of vulnerability, which falls short of incapacity but which affects the ability to make economic decisions is related to financial capability. The subject of financial capability has been examined in some detail in recent years by the Financial Services Authority,<sup>63</sup> whose statutory objectives include promoting public understanding of the financial system. In 2003 it published the *National Strategy for Financial Capability*.<sup>64</sup> This initiative was a response to the increasing demands placed on individuals by the state to take responsibility for their own financial affairs, to plan ahead (particularly for retirement), and to choose financial products.<sup>65</sup> It sought to improve financial capability through education and information, particularly for specific populations identified as ‘vulnerable’.

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<sup>63</sup> See for example, Financial Services Authority, *Financial Capability in the UK: Establishing a Baseline* (London: FSA, 2006) available online at: [http://www.fsa.gov.uk/pubs/other/fincap\\_baseline.pdf](http://www.fsa.gov.uk/pubs/other/fincap_baseline.pdf) [*Establishing a Baseline*]; Financial Services Authority, *Levels of Financial Capability in the UK: Results of a baseline survey*, Consumer Research Report, No 47 (London: FSA, 2006) available online at <http://www.fsa.gov.uk/pubs/consumer-research/crpr47.pdf> [*Results*]; FSA, *Financial Capability in the UK: Delivering Change* (London: FSA, 2006) available online at [http://www.fsa.gov.uk/pubs/other/fincap\\_delivering.pdf](http://www.fsa.gov.uk/pubs/other/fincap_delivering.pdf); FSA, *The impact of life events on financial capability: Evidence from the BHPS*, Consumer Research Report No 79 (London: FSA, 2009) available online at <http://www.fsa.gov.uk/pubs/consumer-research/crpr79.pdf> [*Life events*]; FSA, *Financial Capability and Wellbeing*, Occasional Paper No 34 (London: FSA, 2009), available online at <http://www.fsa.gov.uk/pubs/occpapers/op34.pdf> [*Wellbeing*].

<sup>64</sup> [http://www.cfebuk.org.uk/pdfs/fin\\_cap\\_nat\\_strat.pdf](http://www.cfebuk.org.uk/pdfs/fin_cap_nat_strat.pdf)

<sup>65</sup> See Chapter Three for analysis of the implications of these demands for older people, and the role of housing equity transactions in the panoply of risk they create.

In 2006, the FSA carried out a ‘baseline survey’ to assess levels of financial capability in the UK population. It found that large numbers of people at all income levels lacked financial capability, and were unable to plan ahead or to make adequate provision for the future, for example by saving sufficiently for retirement. It also found that while younger people (under 40s) had less financial capability overall than older people,<sup>66</sup> the over-60s were particularly strong at making ends meet.<sup>67</sup> Although planning for the future was a particular weakness across the survey, older people were more capable of planning for the future than younger people. It is these strengths in two specific aspects of financial capability that likely informed the FSA’s decision not to focus on older people as a ‘vulnerable group’, despite the fact that the over-70s were much weaker than the general population at choosing financial products<sup>68</sup> - the specific capability which is most essential in housing equity transactions. The baseline survey also found that 21% of people who have already retired find their income insufficient to give them the standard of living they hoped to have.<sup>69</sup>

The general findings of financial capability survey indicated that many people take on financial risks without realising it because they have difficulty choosing products that meet their needs.<sup>70</sup> The FSA described capability in choosing financial products as requiring ‘an understanding of risk: both what risks they face, and the trade-off between risk and reward...complemented by a good general awareness of the types of financial products that can help them achieve their goals...’<sup>71</sup> The survey found that people in the UK both underestimated and over-estimated the risks they faced, sometimes taking risks without realising they were doing so, or over-estimating risks, for example purchasing insurance that they did not really need.<sup>72</sup> Many people took on inappropriate risks, as a result of poor choices, lack of awareness or failure to shop around for a good deal,<sup>73</sup> with over 4 million people having bought their most complex product without considering any other options.<sup>74</sup> The survey also

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<sup>66</sup> *Establishing a Baseline*, above, p18.

<sup>67</sup> *Ibid*, p10.

<sup>68</sup> *Ibid*, p8. The survey assessed capability on five components: making ends meet, keeping track of your finances, planning ahead, choosing financial products, and staying informed about financial matters.

<sup>69</sup> *Ibid*, p16. This in turn raised concerns about the financial problems that lie ahead for future generations of retired people, who are less likely to benefit from defined benefit pension schemes.

<sup>70</sup> *Establishing a Baseline*, above.

<sup>71</sup> *Ibid*, p17.

<sup>72</sup> *Ibid*, p4.

<sup>73</sup> *Ibid*, p5.

<sup>74</sup> *Ibid*, p18.

found that the vast majority of the general population (79%) relied on product information and/or non-independent advice when choosing the most complex product they had bought.<sup>75</sup>

The research also explored the reasons why people chose particular products, and found that only 34% were influenced by the product features, with 21% making their decision because of price, 12% because the product was recommended by someone else, 20% because of the provider or ease of purchase, and 13% because it was the only option they had considered.<sup>76</sup> Only slightly more than half of people (54%) had read the terms and conditions of products they bought in detail, and in 9% of cases the terms and conditions had not been read at all.<sup>77</sup> On the specific issue of product choice, the survey found that the very young had the lowest levels of financial capability, and although the oldest respondents scored below average the FSA decided that any strategies to raise financial capability with respect to product purchase should be targeted at people under 40.<sup>78</sup>

The baseline survey was followed by a series of follow-up reports, including an analysis of the impact of life events on financial capability, drawing on data from the British Household Panel Survey.<sup>79</sup> This research focused particularly on the impact of life stages on financial capability: for example, having a baby, becoming unemployed, divorcing or separating and retirement. The report found that retirement increased financial problems by 31%, due to reduced income, although it also found that those aged over 55 had higher than average financial capability, and that ‘the effect on financial capability of halving an individual’s income, while large, is smaller than the effects of age, divorce or separation, being a local authority tenant and being unemployed.’<sup>80</sup> Where financial capability research has considered age as a variable, it has been the broad brush measure that ‘on average financial capability increased with age’, and ‘that people aged below 45 have...below average financial capability, while those aged 55 and above have...above average financial

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<sup>75</sup> *Results*, above, [6.8.4], table 6.10.

<sup>76</sup> *Ibid*, [6.8.5], table 6.11.

<sup>77</sup> *Ibid*, [6.8.6], table 6.12.

<sup>78</sup> *Ibid*, [6.9.2]. Another measure of capability used in the survey was whether people complained and/or pursued remedies when they discovered that they had been mis-sold a product. Only 49% of those who felt they had been sold an unsuitable financial product complained to the provider, and 39% of those felt that the problem had been resolved, leaving 51% who took no action at all, and 81% who had not resolved the issue. These results were not disaggregated by age; *ibid*, [7.2].

<sup>79</sup> *Life events*, above.

<sup>80</sup> *Life events*, [8]

capability’.<sup>81</sup> To the extent that the level of generality adopted by the FSA project distinguished between more and less financially capable older people, it noted indications of a non-linear relationship, with less capability amongst the oldest age groups;<sup>82</sup> and that on the measure of ‘choosing financial products’, homeowners with mortgages scored considerably higher than local-authority and housing-association tenants, even after regression analysis to allow for differences in income and work status. The researchers suggested that this could be attributable to an ‘area effect’, with access to friends and family who are experienced in using financial products for advice enhanced the capabilities of older owners.<sup>83</sup> Crucially, these findings did not identify ‘older owners’ as a vulnerable population in relation to financial/decisional capability.

The FSA’s strategy in response to the low overall levels of financial capability across the population has included programmes to educate people and help them develop the skills that are needed to navigate through the demands of financial decision-making.<sup>84</sup> This reflects the neoliberal agenda of improving ‘citizenship’ by transforming ‘flawed’ consumers into ‘skilled’ consumers.<sup>85</sup> While the FSA indicated that the financial capability research would also be used to ‘help inform our wider regulatory work to help retail consumers achieve a fair deal’, its emphasis in this regard also reinforced the goal of greater self-reliance, ‘to develop more capable and confident consumers and to produce clear, simple and understandable information for consumers to use.’<sup>86</sup> To the extent that these aims are targeted at particularly vulnerable groups,<sup>87</sup> the focus has been on schools, Higher Education institutions, organisations that help young and often excluded adults (for example, new parents and former offenders were identified as vulnerable groups) and the workplace. The emphasis on

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<sup>81</sup> *Wellbeing*, above, [6.2].

<sup>82</sup> *Ibid.*

<sup>83</sup> *Results*, above, [6.9.3].

<sup>84</sup> See Financial Capability Targets 2009-10, online at [http://www.cfebuk.org.uk/pdfs/fc\\_targets.pdf](http://www.cfebuk.org.uk/pdfs/fc_targets.pdf). The Consumer Financial Education Body (CFEB) was established by the FSA to help consumers understand financial services and manage their finances better, see [www.cfeb.org.uk](http://www.cfeb.org.uk), and given statutory footing in the Financial Services Act 2010. The CFEB also hosts a website ‘Moneymadeclear’, which seeks to provide impartial information and tools to help people make financial decisions; <http://www.moneymadeclear.org.uk/>.

<sup>85</sup> See for example, Z Bauman, *Work, Consumerism and the New Poor* (Buckingham: Open University Press, 1998), p38, describing how those who make the wrong choice are stigmatised as ‘flawed’ consumers; and N Rose, ‘Community, citizenship, and the third way’ (2000) 43 *American Behavioral Scientist* 1395; J Flint, ‘Housing and Ethopolitics: constructing identities of active consumption and responsible community’ (2003) 32 *Economy and Society* 611; J Flint & R Rowlands, ‘Commodification, Normalisation and Intervention: cultural, social and symbolic capital in housing consumption and governance’ (2003) 18 *Journal of Housing and the Built Environment* 213, discussing the neoliberal agenda of enabling vulnerable citizens to become more self-responsible. See further, Chapter Four, section 5.

<sup>86</sup> *Establishing a Baseline*, above, p8.

<sup>87</sup> *Ibid*, p22.



younger people is justified inasmuch as they scored lowest on many of the measures of financial capability, although people aged over 70 were usually the next weakest group, with adults in middle-age usually scoring the highest levels of capability, and the over 70s were identified as particularly weak at choosing financial products.<sup>88</sup> Older people have not been identified as a vulnerable group for the purposes of the FSA's work on financial capability, although they can of course benefit from the support and advice offered by the FSA and the CFEB to the general population.

The financial capability agenda can be described as a 'pro-market' response,<sup>89</sup> directed towards improving consumers' abilities to make rational, informed choices as 'self-responsible' citizens. Yet, at the same time, the FSA itself has published a detailed review of behavioural economic literature which suggested that it is psychological rather than informational differences which account for the differences in financial capability, so that 'people's financial behaviour may primarily depend on their intrinsic psychological attitudes rather than information and skills or how they choose to deploy them.'<sup>90</sup> This report suggested that in light of their emphasis on information and education, the financial capability initiatives the FSA is employing could be expected to have a 'positive but modest impact.' This report argued that, to overcome the problems of financial incapacity,<sup>91</sup> institutional design and regulation, which take account of deep-seated psychological biases (procrastination, regret and loss aversion, mental accounting, status quo bias and information overload),<sup>92</sup> are likely to be much more effective than education.<sup>93</sup> Both the educational strategy<sup>94</sup> and providing generic financial advice<sup>95</sup> are very expensive, and the suggestion that

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<sup>88</sup> Although the detailed *Results* paper suggested that more work could be done to investigate what they describe as 'groups that are relatively unusual', for example, less capable older people, this seems to suggest that less capable older people are anomalous amongst older people, despite evidence of lower than average levels of capacity, particularly in choosing financial products, and especially amongst the over 70s; *Results*, above, [8.2].

<sup>89</sup> See P Cartwright, *Banks, Consumers and Regulation* (Portland: Hart, 2004), p62.

<sup>90</sup> FSA, *Financial Capability: A Behavioural Economics Perspective* (London: FSA, 2008), Foreword.

<sup>91</sup> *Ibid*, p4.

<sup>92</sup> See Chapter Three, Section 3(b) for discussion of loss aversion and status quo (eg endowment effect) biases in the context of older people and housing equity transactions.

<sup>93</sup> This claim also has significant implications for legal strategies which rely on information as a safeguard against adverse outcomes.

<sup>94</sup> In 2008, programmes to support personal finance education in schools included the Government's new £11.5m three-year programme My Money and the FSA's £16m Learning Money Matters programme.

<sup>95</sup> In 2009 the FSA launched a new £12m programme to deliver free advice on money matters including budgeting, money management and planning, which aims to help between 500,000 and 750,000 people across the North West and North East of England as part of the Money Guidance 'pathfinder' recommended by the Thoresen Review of generic financial advice; see also O Thoresen, *Thoresen Review of Generic Financial Advice* (London: HMSO, 2008), (Thoresen Report), [http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/thoresen\\_review\\_index.htm](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/thoresen_review_index.htm)

lack of information is not what really matters in financial capability underlines the limited value of this strategy. It also raises significant policy questions concerning the ‘gap’ that education and information cannot fill, and the extent to which alternative, protective measures are justified to bridge the chasm between expectations of financial capability in the neoliberal state and the realities of financial decision-making. The role of institutional design and regulation on housing equity transactions for older people is considered in more detail in Chapter Nine.

The specific impact of age on the psychological biases underpinning behavioural economics has been examined in a wide range of studies assessing the effect of aging on decision-making.<sup>96</sup> In one study that focussed on economic decisions, the researchers compared the results of experiments with healthy elderly individuals (highly educated relative to their age group, aged 70 to 95, average age 82), and younger students (also healthy and well educated, aged 18-26, average age 20), to ascertain their levels of confidence, ability to make decisions under uncertainty, differences between willingness to pay and willingness to accept, and strategic thinking. This study – which focused on economic decision-making behaviour rather than financial knowledge or skills - found that, contrary to the ‘widely held notion...that decision making faculties decline with aging’,<sup>97</sup> ‘older adults’ decision-making behaviour was similar to that of young adults. While the older subjects were found to have less over-confidence, the study did not find significant differences in the behaviours of younger and older subjects, so belying the common stereotype that older people are ‘conservative, dislike taking risk and are set in their ways’.<sup>98</sup> In experiments testing endowment effect and loss aversion, the study found no significant differences between the young and the old, and on strategic thinking they behaved similarly,<sup>99</sup> leading the researchers to argue that decision-making behaviour remains stable with age, and that ‘Aside from a minor propensity to make more confused responses on [one of the strategic thinking games],

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<sup>96</sup> S Kovalchik, CF Camerer, DM Grether, CR Plott & JM Allman, ‘Aging and Decision Making: A Comparison between neurologically healthy elderly and young individuals’ (2005) 58 *Journal of Economic Behaviour and Organisation* 79.

<sup>97</sup> *Ibid*, at 90.

<sup>98</sup> *Ibid*, at 80.

<sup>99</sup> These findings contrasted with the earlier findings of NL Denburg, A Bechara, D Tranel. AR Hines, AR Damasio, ‘Neuropsychological evidence for why the ability to decide advantageously weakens with advancing age’ (1999) 25 *Society of Neuroscience Abstracts* 32, which found that older adults had tendencies similar to patients with frontal-lobe damage.

there is no evidence of impairment in the reasoning and choices of the elderly population we studied on any of the areas of the survey.’<sup>100</sup>

This research suggests that healthy, well-educated older people do not experience a *decline* in economic decision-making resulting from aging *per se*. However, this does not mean that older people’s decision-making is *the same* as that of younger people, or that they may not be more vulnerable in financial decision-making as a result of other factors linked to the nature of the decision or the context in which it is made. Some recent psychological studies have emphasised the importance of age-related changes in deliberation, affect and emotion on decision-making,<sup>101</sup> reflecting what Posner described as the ‘knowledge shift’ from ‘fluid’ intelligence (the ability to analyse, solve problems, think deductively) to ‘crystallised’ knowledge (reliance on one’s own knowledge base, the accumulation of concrete experiences and interference of lessons from them, inductive abilities and ‘common sense’).<sup>102</sup> For example, Peters *et al* examination of the implications of “dual process theories”<sup>103</sup> (the theory that decision-making has both deliberative and affective dimensions) on older people found that while ‘age-related declines in the efficiency of deliberative processes predict poorer-quality decisions as we age...age-related adaptive processes, including motivated selectivity in the use of deliberative capacity, an increased focus on emotional goals, and greater experience, predict better or worse decisions for older adults depending on the situation.’<sup>104</sup>

Peters *et al* claimed that in identifying areas where older adults are vulnerable as well as those areas where they retain high levels of competence, it is important to recognise the interplay between the ‘rational’ bases of decision-making and the affective and emotional processes which are ‘fundamental to older-adult decisions.’<sup>105</sup> They cited several factors, for example, decline in deliberative processes leading to an enhancement in more ‘implicit and automatic forms of knowledge (eg affect) in decisions’,<sup>106</sup> to argue that ‘reliance on affect

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<sup>100</sup> Kovalchik *et al*, above, p90.

<sup>101</sup> See for example, E Peters, TM Hess, D Västfjäll, & C Auman, ‘Adult Age Differences in Dual Information Processes: Implications for the Role of Affective and Deliberative Processes in Older Adults’ Decision Making’ (2007) 2(1) *Perspectives on Psychological Science* 1-23; Q Kennedy & M Mather, ‘Aging, Affect, and Decision Making’ in KD Vohs, RF Baumeister, G Loewenstein (eds), *Do emotions help or hurt decision making? A hedgefoxian perspective* (New York: Russell Sage Foundation, 2007).

<sup>102</sup> RA Posner, *Aging and Old Age* (Chicago: University of Chicago Press, 1995), pp68-9.

<sup>103</sup> See for example, D Kahneman, ‘A perspective on judgment and choice: Mapping bounded rationality’ (2003) 58 *American Psychologist* 697–720.

<sup>104</sup> Peters *et al*, above.

<sup>105</sup> *Ibid*, at 2.

<sup>106</sup> *Ibid*.

will increase as people age, or at least increase relatively over reliance on more deliberative abilities that require greater conscious effort or do not help meet social goals.’<sup>107</sup> ‘Affect’ increases with experience over the lifespan as a particularly effective way of making decisions. Affective decision-making is particularly prominent in certain contexts: when the decision is complex or must be made under conditions of pressure.<sup>108</sup> The effect of declining cognitive/deliberative processes and increasing affective processes with aging mean that – depending on the context of the decision - older people’s decisions may appear better than younger people’s *in some cases*, and worse in others.<sup>109</sup> For example, older people may be more vulnerable to salespeople who use affective techniques to induce them into scams or deceptive or misleading transactions.<sup>110</sup>

The ways in which individuals make decisions, and what they choose, is highly contingent on the properties of the decision problem and on the characteristics of the individual decision-maker at the point that the decision is made. While older people may be better equipped than younger people to make decisions in familiar life situations or where they have past experience,<sup>111</sup> research suggests that they may make worse decisions ‘when complex or changing rules must be learned.’<sup>112</sup> It should not be assumed, however, that this necessarily decreases their overall decision making ability. Some studies have found that we all adaptively select decision-making strategies, and that older people prefer simple, less cognitively demanding strategies, that use less information.<sup>113</sup> As a result, they are likely to search for less information when making decisions compared to younger people. The logic of this strategy is also supported by research that has shown that the probability of a person selecting the optimal option declines as the number of options increases, and that this is more pronounced for older subjects.<sup>114</sup> These findings clearly undermine the application of the

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<sup>107</sup> *Ibid*, at 2.

<sup>108</sup> ML Finucane, A Alhakami, P Slovic & SM Johnson, ‘The affect heuristic in judgments of risks and benefits’ (2000) 13 *Journal of Behavioral Decision Making* 1.

<sup>109</sup> Peters *et al*, above, p7.

<sup>110</sup> These findings are valuable when considering the vulnerability of older people to financial abuse, see section 4.

<sup>111</sup> Peter *et al*, above, p16.

<sup>112</sup> *Ibid*, p17.

<sup>113</sup> R Mata, LJ Schooler & J Rieskamp, ‘The aging decision maker: Cognitive aging and the adaptive selection of decision strategies’ (2007) 22 *Psychology and Aging* 796.

<sup>114</sup> *Ibid*.

standard economic assumption that good decision-making results from having a wide range of choices supported by information to older people's decision-making.<sup>115</sup>

It is important to emphasise that these studies do not suggest that healthy older people lack capacity, or less able to make decisions than younger people. Rather, they demonstrate that the cognitive processes and behavioural biases that guide decision-making are *different* for older people. This means that assumptions adopted in legal reasoning, for example, that a 'rational man' would act in a particular way, are doubly challenged in the case of older owners: the standard critical argument that law must recognise realities of human subjectivity as evidenced in behavioural economics is compounded by the claim that the 'information paradigm' underpinning the liberal model of choice is particularly inept in respect of older adults.<sup>116</sup> The claim that increasing information is likely to adversely affect the quality of decision making for older people, with more options linked to worse choices, raises the concern that the standard liberal model of autonomy has created laws of general application that affect older people differently. In his book, *The Paradox of Choice: Why More is Less*,<sup>117</sup> Schwartz, who claimed that as options multiply, overwhelming our ability to sort an devaluate, 'choice' shifts from a liberating phenomenon to become debilitating or even tyrannical.<sup>118</sup> At this point, he argued, 'Having the opportunity to choose is no blessing if we feel we do not have the wherewithal to choose wisely'.<sup>119</sup> The behavioural research suggests that older people are likely to reach that point much quicker than younger people, so suggesting a further layer of constraint on the choices 'freely' made by older owners as liberal subjects: in addition to the reality of constraints on the actual range of available choices (for example, the product options open to a particular older owner to release equity), the capability of processing those choices that are available to make the 'right' decision presents a further challenge which, according to the behavioural findings discussed above, may be particularly problematic for older people.

These issues are brought into sharp relief when people are required to make decisions under conditions of uncertainty. With affect, or emotional processes, found to play a prominent

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<sup>115</sup> T Besedeš, CA Deck, S Sarangi, & M Shor, 'Age Effects and Heuristics in Decision Making' (January 25, 2009); available at SSRN: <http://ssrn.com/abstract=1332564>, p1.

<sup>116</sup> T Besedeš, CA Deck, S Sarangi, & M Shor, 'Age Effects and Heuristics in Decision Making' (January 25, 2009); available at SSRN: <http://ssrn.com/abstract=1332564> -

<sup>117</sup> B Schwartz, *The Paradox of Choice: Why More is Less* (New York: Harper Perennial, 2004).

<sup>118</sup> *Ibid*, p2.

<sup>119</sup> *Ibid*, p104.

role in risky choice, a range of studies have focused on the specific effect of normal aging on decision making under uncertainty or ambiguity, and under conditions of risk.<sup>120</sup> Kennedy and Mather have argued that older people are likely to be affected in decision-making for risk in various ways which adversely impact the effectiveness of their decisions, including ‘greater reliance on the affective heuristic, greater effort to maintain positive mood during the decision making process, greater attention to the emotional aspects of the decision making process, and positively biased memory for past decisions.’<sup>121</sup> Zamarian *et al* found that older people were better equipped to make good decisions under ‘risk’ (when the uncertainties can be predicted by well-defined or estimable probabilities so that the risk can be understood) than under ‘ambiguity’ (where the uncertainties are completely unknown and incalculable).<sup>122</sup> Older people were ‘more likely to make advantageous decisions when full information on the problem situation, the options’ probabilities and the associated gains and losses is given’; but had greater difficulty making good decisions when ‘the problem situation is poorly defined, information about risk is missing or conflicting, and they have to learn about the options’ utility by contingencies.’<sup>123</sup>

These findings suggested that for older people to make good decisions, for example, in relation to financial transactions, it is better not to have a large *quantity* of information but to have a smaller amount of more specific, precise information concerning the particular situation, the risks, and the associated gains and losses. A crucial question for this book is where responsibility lies for providing this type of qualitative information, which should ideally be contextually tailored to the needs, objectives and circumstances of the individual owner. Empirical studies suggest that where the information strategy applied to older people is the same as that for younger people; and where the amount and type of information is more appropriately tailored to the younger person’s needs (more choice, greater quantity of information), this is likely to disadvantage the older decision-maker.

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<sup>120</sup> See for example, Kennedy & Mather, above; L Zamarian, H Sinz, E Bonatti, N Gamboz & M Delazer, ‘Normal Aging Affects Decisions Under Ambiguity but Not Decisions Under Risk’ (2008) 22 *Neuropsychology* 645.

<sup>121</sup> Kennedy & Mather, above, p259.

<sup>122</sup> Zamarian *et al*, above.

<sup>123</sup> *Ibid*, p??? (end of article).

The issue of ‘difference’ in the effects of formally equal legal treatment has been extensively critiqued in feminist scholarship.<sup>124</sup> A fundamental principle of non-discrimination is that while like cases should be treated alike, unlike cases should be treated differently.<sup>125</sup> Yet, determining whether a particular difference is, or should be, legally significant presents dilemmas. When difference is recognised in law or policy, the meanings it imbues have (sometimes unintended) consequences.<sup>126</sup> We must be cautious about ‘labelling’ a person or group as ‘different’, particularly where such labels draw boundaries between normal/abnormal, or competent/incompetent people;<sup>127</sup> within law’s ‘bounded vocabulary’, labels provide a blunt tool to differentiate people, and may generate legal disability. Concerns regarding the unintended consequences of singling out ‘vulnerable’ groups for ‘special protection’, and so reinforcing the stereotype that they are less capable, led ‘equal treatment’ advocates within feminism to argue that equality requires equal treatment regardless of differential vulnerability,<sup>128</sup> because emphasising the differences of a particular social group can ‘underscore their incapacities and special needs as the defining feature of their social identities and, ultimately, place them in subordinate positions within both public and private spheres of social life.’<sup>129</sup>

An alternative strategy in pursuit of equality is to argue for ‘special treatment’ or a ‘positive action’ approach,<sup>130</sup> where differences between people mean that formal equality leaves them substantively unequal because they cannot live up to the accepted norm. ‘Difference’ sets

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<sup>124</sup> See, for example, M Minow, *Making All the Difference: Inclusion and Exclusion in American Law* (Ithaca: Cornell University Press, 1990).

<sup>125</sup> In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, Lord Nicholls, stating the principle of non-discrimination, claimed that ‘Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike’; para [9].

<sup>126</sup> ‘When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude, to distinguish – to discriminate’, Minow, above, p3.

<sup>127</sup> *Ibid*, p8.

<sup>128</sup> See for example, Wendy W Williams, ‘The Equality Crisis: Some Reflections on Culture, Courts, and Feminism’ (1982) 7 *Women’s Rights Law Report* 175, collected in KT Bartlett & R Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (Boulder, CO: Westview Press, 1991); C Smart & J Brophy, ‘Locating Law: A Discussion of the Place of Law in Feminist Politics’ in C Smart & J Brophy (eds), *Women in Law: Explorations in Law, Family and Sexuality* (London: Routledge & Kegan Paul, 1985); for discussion of the ‘sameness/difference’ debate, see JC Williams, ‘Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory’ (1991) 40 *Duke LJ* 296.

<sup>129</sup> V Jenness, ‘Engendering Hate Crime Policy: Gender, the “Dilemma of Difference” and the Creation of the Legal Subject’ (2003) 2 *Journal of Hate Studies* 73 at 89.

<sup>130</sup> LJ Kreiger and PN Cooney, ‘The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women’s Equality’ (1983) 13 *Golden Gate University Law Review* 513; MA Fineman, ‘Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship’ [1990] 42 *Florida Law Review* 25.

some people apart from the normative model of liberal legal subjectivity.<sup>131</sup> While the unreality of the idealised liberal subject<sup>132</sup> is such that many consumers are likely to have difficulty living up to its norms (as illustrated by the FSA's findings on financial capability), marshalling this lack of capability to argue for additional protections along group difference lines runs a risk of reinforcing negative stereotypes, for example, concerning the capacity and capability of older people. Minow recognised this paradox in her observation that:

Law has treated as marginal, inferior, and different any person who does not fit the normal model of the autonomous, competent individual. Law has tended to deny the mutual dependence of all people while accepting and accentuating the dependency of people who are 'different'.<sup>133</sup>

Minow described the philosophical, legal and strategic questions of how and when society and law should recognise difference as generating 'dilemmas of difference': while recognising difference may reinforce negative connotations, and so threaten neutrality, equality and freedom,<sup>134</sup> ignoring differences 'may make them continue to matter in a world constructed with some groups, but not others, in mind.'<sup>135</sup>

Minow outlined three distinctive approaches to the issue of difference in law. The first she described as the 'abnormal person' approach, where categories are used to label people with different statuses (for example, capacity/incapacity). In this category, the difference is often seen as 'inherent' to the person, who is classified as 'abnormal'. Minow argued that 'The price of these legal categories has been borne disproportionately by the most marginal and vulnerable members of the society.'<sup>136</sup> The 'labelling' approach is problematic inasmuch as it tends to treat the difference as the private, internal problem of the different person, and by extension, it 'only hide[s] human responsibility for their treatment, [and does] not solve the problems of organising perceptions and responsibilities.'<sup>137</sup> Minow argued that if we are to achieve equality and justice for people who are identified as different from the norm, it is necessary to go beyond the 'abnormal persons' approach and - by examining assumptions about the sources of difference and debating the dilemmas that difference presents - explore

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<sup>131</sup> Minow noted that 'Especially troubling is the meaning of equality for individuals identified as different from the norm'; *ibid*, p9.

<sup>132</sup> Discussed in Chapter Four.

<sup>133</sup> Minow, above, p10.

<sup>134</sup> *Ibid*, p74.

<sup>135</sup> M Minow, 'Justice Engendered' (1987) 101 *Harvard Law Review* 10 at 12.

<sup>136</sup> Minow (1990), above, p10.

<sup>137</sup> Minow (1990), above, p10.



alternative options for addressing them.<sup>138</sup> Merely perpetuating assumptions about two classes of people fails to offer a way out of the dilemma of difference<sup>139</sup> and, for older people, could potentially reinforce negative stereotypes about capacity and capability to make decisions, with implications beyond the immediate context to other areas of decision-making for older people. In this way, what is intended as ‘benevolent prejudice’ can result in harmful consequences or even hostile prejudice.<sup>140</sup> Finally, the ‘abnormal persons’ approach offers an ‘either/or choice’ – as noted above, capacity or no capacity/autonomy or no autonomy – which may perpetuate inequality by including or excluding the person from the ‘norm’, without challenging the assumptions of the norm.

A second approach to difference employs a traditional rights paradigm to argue that equal rights for people with ‘real differences’ justifies different treatment. Minow argued that the rights approach, which challenges the exclusion of the ‘different’ person from the community inhabited by ‘normal’ people is also problematic in that while it permits different treatment for those who are ‘really different’, it preserves the ‘either/or’ construction of the problem.<sup>141</sup>

Minow argued that

When reformers seek to apply the language of rights, taking the rhetoric of equality and freedom literally, they encounter the dilemma that rights crafted for the norms reiterate the differences of those at the margin, and special rights crafted for those at the margin risk perpetuating the negative effects of difference.<sup>142</sup>

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<sup>138</sup> See Minow, above, Chapter Two.

<sup>139</sup> Minow also rejects Kennedy’s modified capacity test, which would focus not on the person’s general capacity, but on their ‘capacity-to-make-this-decision’ [D Kennedy, ‘Distributive and Paternalist Moves in Contract and Tort Law, with Special Reference to Compulsory Term and Unequal Bargaining Power’ (1982) 41 *Md L Rev* 563], on the basis that this still treats the matter as a ‘problem in a person – in a given situation - to be judged by another person’, Minow (1990), **p169??** Minow criticises Kennedy for being caught on the dilemma of individual autonomy, in that he cannot shift his focus away from the individuals to the relationships. While Kennedy recognises that many of the ‘traits of dependence’ result from social or contextual circumstances rather than intrinsic personal qualities, by preserving the separate individual as the focus of the difference, she claims that his approach offers no way out of the dilemma; *ibid*, pp170-171.

<sup>140</sup> ‘Labeling and stereotyping others as different carries consequences in private and even intimate settings as well as public ones. You have the power to label others ‘different’ and to treat them differently on that basis. Even if you mean only to help others, not hurt them, because of their difference, you may realise the dilemma. By taking another person’s difference into account – in a world that has made difference matter – you may recreate and re-establish both the difference and its negative implications. Any remedy for discrimination that departs from neutrality seems a new discrimination and risks a new source of stigma. Yet you cannot avoid trouble through ignoring difference; you cannot find a solution in neutrality. Ours is a world that has made difference matter. Being neutral about the past and ignoring someone’s difference assigns remaining burdens of difference to that person.’, Minow (1990), above, pp374-5.

<sup>141</sup> Minow (1990), **around 215??**

<sup>142</sup> Minow (1990), p224.

Another weakness of the rights approach, according to Minow, is its reliance on empirical ‘realities’ that are themselves situated within normative structures as sources of knowledge about differences between people.<sup>143</sup> In the case of older owners, a rights analysis could bolster the protections afforded to vulnerable parties in housing equity transactions, but the risk is that it would do so (or would be perceived as doing so) on the basis that they are ‘inherently’ weaker than the dominant group, rather than challenging the unreality of the idealised norm. As such, a rights-based remedy for discrimination risks creating new forms of discrimination and becoming a new source of stigma.

Minow argues that the route out of the ‘double-bind’ dilemma of difference is to focus not on the ‘different’ individual, but on the unstated norms and assumptions that characterise some people as conforming to the norm while others do not. ‘Difference’ depends on a relationship, on ‘a comparison drawn between people with reference to a norm’.<sup>144</sup> Since all differences are relational – if one person appears ‘different’, it is only because the other (in relation to whom they are different) meets the criteria of the dominant norm – Minow argued that responses to difference must adopt a ‘social relations’ approach. This approach sees difference as ‘a function of social relationships and invites a challenge to the patterns of relationships and knowledge that assign the burden of differences between people to only some people.’<sup>145</sup> From this perspective, ‘special treatment’ simply recognises that the ‘different’ person does not fit the assumptions of the norm against which she is judged, and ‘special rights’ create false dichotomies which are slanted against the person who is different. Minow argued that it is the norms themselves which must be evaluated, not simply accepted as neutral, if we are to achieve equality and justice in cases of difference, so that difference does not mean disadvantage.

The ‘social-relations’ approach rejects the construction of problems of difference in either/or terms. Rather, it is concerned with the relationships in which difference is manifest, the power that is expressed in the process of categorising people or problems, and the

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<sup>143</sup> ‘Rights analysis...assumes the existence of reliable empirical sources of knowledge about differences between people, and it presumes that such real differences can be discerned – or dissolved – upon scrutiny, without concern about the way in which the observer constructs what is “real”.’, (M Minow, ‘When Difference has its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 111 at 183).

<sup>144</sup> Minow (1990), above, p377.

<sup>145</sup> Minow (1990), above, p13.

institutional practices that determine a norm against which some people seem different.<sup>146</sup> By doing so, it forces the statement of norms that have remained implicit.<sup>147</sup> Once stated, Minow argued, these norms ‘become a subject for contest; alternative norms can be articulated and defended.’<sup>148</sup> By articulating these differences, ‘the social and institutional patterns that ignore this perspective themselves become questionable. The status quo no longer seems natural and inevitable but is revealed instead as a reflection of choices made and choices that can be remade.’<sup>149</sup>

Iris Marion Young illustrated this approach in relation to older people in her work on the ‘politics of difference’.<sup>150</sup> Young described one of the differences of aging as a form of ‘bodily difference’, and used the example of older people in the workplace to illustrate a case for ‘special rights’. She emphasised the relational basis of her approach to difference:

the circumstance that calls for different treatment should not be understood as lodged in the differently treated workers, *per se*, but in their interaction with the structure and norms of the workplace...in the relationship of bodies to rules and practices...the political claim for special rights emerges not from a need to compensate for an inferiority, as some would interpret it, but a positive assertion of specificity in different forms of life.<sup>151</sup>

This disjuncture between specific needs and the normative framework is crucial in determining the goals of legal strategies to address difference. Young asserted that ‘The goal is not to give special compensation to the deviant until they achieve normalcy, but rather to de-normalize the way institutions formulate their rules by revealing the plural circumstances and needs that exist, or ought to exist, within them.’<sup>152</sup> This reflects Minow’s argument that ‘difference’ can only exist with reference to a relationship between two persons, and ‘that their relationship in turn depends on other relationships embedded in the social, economic, and political structure of society.’<sup>153</sup>

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<sup>146</sup> Minow (1990), above, p215.

<sup>147</sup> *Ibid*, p218.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*.

<sup>150</sup> IM Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

<sup>151</sup> IM Young, ‘Difference and Policy: Some Reflections in the Context of New Social Movements’ [1987] 56 *University of Cincinnati Law Review* 535 at 547.

<sup>152</sup> IM Young, ‘Difference and Policy: Some Reflections in the Context of New Social Movements’ [1987] 56 *University of Cincinnati Law Review* 535 at 550.

<sup>153</sup> Minow, p169.

In the context of financial transactions, this strategy could amount to a rejection of the ‘norm’ of the consumer as an ‘autonomous individual’, for a more realistic model of legal subjectivity that takes account real, contextual vulnerabilities. Rather than branding older owners as ‘abnormal’ and so lacking capacity to contract; or seeking to ‘train’ the older person in capability so that they might better fit the model of ‘skilled consumer’, a social relations approach to difference might challenge the norms of the neoliberal model of autonomous, self-responsible consumer on the basis that these norms generate inequalities. Indeed, Minow made a similar argument concerning the need for a ‘difference’ approach to counter liberal individualism in the law of contract:

The conception of individual rights exemplified by classical contract law neglected patterns of unequal power – called private but reinforced by public authority – which defeated any ideal of free and equal relationships...Scholars have started to urge acknowledgement of people’s mutual reliance and dependence, and recognition of obligations growing from these relationships.<sup>154</sup>

These challenges to the liberal norm were discussed in Chapter Four, and are considered further in section 7, below. The advantages of the social relations approach as a strategy to respond to difference underline critiques of the dominant paradigms in private law and help to establish the case for a debate about the law governing financial transactions which challenges its unstated norms and assumptions, and seeks to generate more creative, more appropriate, and more equality and justice-oriented solutions. While Minow acknowledged that the limits to the relational approach become clear when relational strategies do not seek to challenge the dominant ideology of individualism, or are unsuccessful in displacing the dominant norm, she argued that opening up debate around these normative questions is crucial if we are to ‘think seriously about difference.’<sup>155</sup>

In the contexts of financial capability and economic decision-making, the source of the older owner’s ‘difference’ is clearly located within the normative liberal model rather than being ‘inherent’ to the older person. Indeed, in the case of financial capability, the difficulties that older people face in living up to the idealised expectations of financial/risk subjects, are not so very different from those experienced by the general population, but reflect a ‘capability gap’ that cuts across age. Behavioural research has clearly established, and it is widely

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<sup>154</sup> Minow (1990), above, p388.

<sup>155</sup> Minow (1990), above, p374. These issues are discussed further below in relation to Fineman’s ‘vulnerable legal subject’; see section 7.

recognised in critical legal discourses, that the norm on which the institutional expectation of financial capability rests is unrealistic for the population as a whole. Research into economic decision-making and age only reinforces the *extent* to which the dominant normative perspective generates inequalities for older people. Behavioural economics has challenged law's reliance on the 'information paradigm' in relation to consumers in general; evidence indicating that the information paradigm is *particularly* unhelpful for older people can be viewed less as 'difference' than as an exemplar of the unsuitability of this approach in law more generally.

#### **(4) Financial Abuse of Older People**

The particular vulnerabilities of older people to financial abuse has attracted considerable attention in recent years, from the scandals of UK telesales companies aggressively targeting older people for charitable donations they could not afford,<sup>156</sup> to the US case in which a charity specifically targeted older people because they were 'perceived as lonely, trusting and more polite, hence less likely to hang up before the telemarketer could make his pitch.'<sup>157</sup> The vulnerabilities of older people to sales-pressure were recognised and given specific legal protection in the US through the Senior Citizens Against Marketing Scams Act 1993,<sup>158</sup> enacted in response to evidence that the elderly are targeted for fraud more than any other group.<sup>159</sup> The source of this vulnerability is largely 'situational' rather than 'inherent': older people are more likely to live alone, with the result that they are more available to parties

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<sup>156</sup> 'Charity Call Centre Scandal: Shock hard sell tactics - Elderly? Sick? Hassle them for cash till they hang up..', Reported in The News of the World, 14 Feb 2010; available online at <http://www.newsoftheworld.co.uk/news/727531/SHOCKING-CHARITY-CALL-CENTRE-HARD-SELL-TACTICS.html>

<sup>157</sup> *United States v Smith* 113 F.3d 737, 741 (10<sup>th</sup> Cir. 1997). For discussions of financial scams, consumer frauds and distraction burglaries targeted at vulnerable older people, see B Alt & S Wells, *Fleeing Grandma and Grandpa: protecting against scams, cons, and frauds* (Westport, CT: Praeger, 2004); K Anders, *Elder Fraud: financial crimes against the elderly* (Denver, CO: National Conference of State Legislatures, 1999); CA Cohen, 'Consumer fraud and the elderly: a review of Canadian challenges and initiatives' (2006) 46 *Journal of Gerontological Social Work* 137; W Reiboldt & RE Vogel, 'A critical analysis of telemarketing fraud in a gated senior community' (2001) 13 *Journal of Elder Abuse & Neglect* 21; D Rosato & M Gallardo, 'Keeping the bad guys away from mom and dad' (2005) 35 *Money* 80.

<sup>158</sup> 18 U.S.C. section 2326 (1994 & Supp. III 1998).

<sup>159</sup> RA Starnes, 'Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties' (1996) 4 *Elder LJ* 201 at 202, 204 cited in W C Rossiter, 'No Protection for the Elderly: The Inadequacy of the Capacity Doctrine in Avoiding Unfair Contracts Involving Seniors' (1999) 78 *Oregon Law Review* 807, p810; see also J Roubicek, *Financial Abuse of the Elderly; a Detective's Case Files of Exploitation Crimes* (Ruby House Publishers, 2008), cataloguing cases of elder abuse; RJ Bonnie, RB Wallace, *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America* (National Academies Press, 2003), discussing the conceptual, methodological, and logistical issues needed to create a solid research base, as well as the ethical concerns that must be considered when working with older subjects.

seeking to take advantage and tend to be isolated in their decision-making. Peters *et al* suggested that ‘geographically dispersed families mean that older individuals may have limited access to knowledgeable and supportive family members’,<sup>160</sup> while recent statistics from the UK’s Financial Services Authority also suggest that older people are more likely to be targeted for, and are especially susceptible to, fraud, financial scams and other financial abuse, because they are the ‘most vulnerable’.<sup>161</sup>

There is no legal definition of ‘financial abuse’ in the UK, although various charitable and governmental bodies have sought to develop definitions in recent years in an attempt to capture the exposure of older people to various forms of abuse and mistreatment. The broad definitions that are typically used encompass acts which are crimes, civil wrongs, and in some cases not necessarily punishable in law. In 1993 the UK charity Action on Elder Abuse drafted a definition of ‘abuse’<sup>162</sup> as:

A single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.<sup>163</sup>

This definition ‘has at its heart the “expectation of trust” that an older person may rightly establish with another person, but which is subsequently violated.’<sup>164</sup> There is also a sub-definition of ‘Financial Abuse’: ‘stealing or defrauding someone of goods and/or property.’ Common examples include cases in which adult children attempt to justify their actions on the basis that they are simply obtaining their inheritance in advance, or where people misuse of powers of attorney. Age UK<sup>165</sup> add that financial abuse may also involve undue pressure to hand over money or sign over property.<sup>166</sup> While some (but not all) cases of financial

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<sup>160</sup> E Peters, TM Hess, D Västfjäll, & C Auman, ‘Adult Age Differences in Dual Information Processes: Implications for the Role of Affective and Deliberative Processes in Older Adults’ Decision Making’ (2007) 2(1) *Perspectives on Psychological Science* 1.

<sup>161</sup> See FSA Press Release, ‘Over 65s most likely to be targeted by share fraudsters, warns FSA’, 27 April 2009, available online at: <http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/055.shtml>.

<sup>162</sup> This definition was subsequently adopted by the World Health Organisation, is promoted by the International Network for the Prevention of Elder Abuse, and has been variously adopted in other countries throughout the world.

<sup>163</sup> See the website of Action on Elder Abuse, [http://www.elderabuse.org.uk/About%20Abuse/What\\_is\\_abuse%20define.htm](http://www.elderabuse.org.uk/About%20Abuse/What_is_abuse%20define.htm).

<sup>164</sup> *Ibid*.

<sup>165</sup> This UK charity was formed by the merger of Help the Aged and Age Concern.

<sup>166</sup> The issues surrounding ‘undue influence’ for older people are discussed in Chapter Ten. To be ‘financial abuse’, it is clear that there must be some degree of *mala fides* or bad faith on the part of the abuser. Age UK indicated that ‘crimes’ associated with financial abuse of older people include theft, undue influence (undue influence is not, of course a crime according to English law, but a private law ‘vitiating factor’ which may render a contract voidable at the suit of the unduly influenced party), or forgery. Section 4 of the Fraud Act 2005 prohibits a person from abusing a position in which they are expected to safeguard the financial interests

abuse incur criminal sanctions, Action on Elder Abuse claim that these criminal acts are not always prosecuted, either ‘because very often the perpetrator can be someone’s son or daughter’, or because ‘age prejudice means that other people assume it is not happening or that the older person is to blame.’<sup>167</sup>

In ‘No Secrets’,<sup>168</sup> a UK Government publication providing guidance on the development and implementation of policies to protect vulnerable adults from abuse, a ‘vulnerable adult’ was defined as someone:

who is or may be in need of community care services by reason of mental or other disability, age or illness; who is or may be unable to take care of him or herself, or unable to protect him or herself from significant harm or exploitation.<sup>169</sup>

This document describes financial abuse as a situation in which ‘a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented, or cannot consent’,<sup>170</sup> and later as ‘financial or material abuse, including theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits.’<sup>171</sup> The breadth of the category was also reflected in a report for the UK charity Help the Aged, which identified financial abuse as including the more subtle acts of ‘exerting undue influence to give away assets or gifts’, and ‘putting undue pressure on the older person in order to accept lower-cost/lower-quality services in order to preserve more financial resources to be passed on to beneficiaries on death.’<sup>172</sup>

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of another person. See Age UK, *Safeguarding older people from abuse*, (Factsheet 78, April 2010), available online at <http://www.ageuk.org.uk/Documents/EN-GB/FS78%20%20Safeguarding%20older%20people%20from%20abuse%20April%202010.pdf?dtrk=true>. The Mental Capacity Act 2005 does not specifically mention financial abuse, although protecting older people who lack capacity is implicit in the whole of the Act; the Explanatory Notes, mention it only once, in relation to the prohibition against bankrupts holding lasting power of attorney where the power covers property and affairs, in sections 10(2) and 13(8) and (9); see Explanatory Notes to Mental Capacity Act 2005, para 13; available online at [http://www.opsi.gov.uk/acts/acts2005/en/ukpgaen\\_20050009\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/en/ukpgaen_20050009_en_1).

<sup>167</sup> [http://www.elderabuse.org.uk/About%20Abuse/What\\_is\\_abuse\\_signs%20financial.htm](http://www.elderabuse.org.uk/About%20Abuse/What_is_abuse_signs%20financial.htm). This underlines the potentially adverse consequences of ‘special treatment’ which identifies older people are lacking capacity or cognitive awareness.

<sup>168</sup> Department of Health and Home Office, *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse*, (London: HMSO, 2000); online at: [http://www.dh.gov.uk/dr\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_4074540.pdf](http://www.dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4074540.pdf).

<sup>169</sup> *Ibid*, para 2.3.

<sup>170</sup> *Ibid*, para 2.6.

<sup>171</sup> *Ibid*

<sup>172</sup> G Crosby, A Clark, R Hayes, K Jones, N Lievesley, *Financial Abuse of Older People: A review of the literature carried out by the Centre for Policy on Aging on Behalf of Help the Aged* (London: Help the Aged, 2008), p11.

The risks associated with an older person's family or carers exerting undue influence or pressure were highlighted in *Hammond v Osborn*,<sup>173</sup> in which a substantial gift from a vulnerable older man to his carer was set aside on a finding of undue influence. Although the court did not consider that the carer's behaviour was sinister or amounted to 'abuse' (wrongdoing), it emphasised that the protections which the doctrine of presumed undue influence seeks to provide extend to intervention, on public policy grounds, where the relationship between the parties 'require it to be affirmatively established that the donor's trust and confidence in the donee has not been betrayed or abused.'<sup>174</sup> This focus on 'a relationship of trust and confidence' for presumed undue influence emphasises a distinction between acts which may be viewed as exploitative when carried out by a person in whom the older owner has reposed trust and confidence, but potentially not so when carried out by a stranger.<sup>175</sup> Yet, in other cases, definitions of financial abuse have looked beyond existing relationships to include 'stranger abuse',<sup>176</sup> which could include 'being persuaded to buy equity release products that offer very poor value for money.'<sup>177</sup>

The UK Study of Abuse and Neglect of Older People ('UK study') found that financial abuse was the second most common type of mistreatment of older people in the UK (after neglect), with 57,000 people over 66 reporting that they had experienced financial abuse in the previous year.<sup>178</sup> The risks factors for financial abuse included people who lived alone, people who were in receipt of services, people in bad or very bad health, older men (both men aged over 65, and then with significantly greater prevalence for men aged over 85), women who were divorced or separated, and women who had experienced loneliness.<sup>179</sup> Older people with lower quality of life or who suffered from depression also reported higher

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<sup>173</sup> [2002] EWCA Civ 885.

<sup>174</sup> *Ibid*, para ????

<sup>175</sup> This issue is considered in Chapter Ten, alongside the broader debates surrounding undue influence and older people.

<sup>176</sup> Brown's proposed definition of financial abuse included 'the intentional or opportunistic appropriation of the income, capital or property of a vulnerable person through theft, fraud, deception, undue influence or exploitation; including the hoarding of a vulnerable person's resources for future gain', H Brown, 'What is financial abuse?' (2003) 5 *Journal of Adult Protection* 3.

<sup>177</sup> Crosby *et al*, above, p20.

<sup>178</sup> The UK Study of Abuse and Neglect of Older People, carried out by the National Centre for Social Research (NatCen) and King's College London (KCL), was commissioned by Comic Relief and the Department of Health: M O'Keeffe, A Hills, M Doyle, C McCreadie, S Scholes, R Constantine, A Tinker, J Manthorpe, S Biggs, B Erens, *UK Study of Abuse and Neglect of Older People: Prevalence Survey Report* (xxx: xxx, 2007); available online at: <http://assets.comicrelief.com/cr09/docs/elderabuseprev.pdf>.

<sup>179</sup> *Ibid*, p6.



prevalence of financial abuse.<sup>180</sup> While over 50% of financial abuse was perpetrated by a son or daughter, and nearly 70% by a family member,<sup>181</sup> it was noted that this may be skewed by the high volume of help given by family members, rather than indicating that they are necessarily less trustworthy than non-family. Another study indicated that older people are more likely to experience financial abuse than other groups of ‘vulnerable’ adults.<sup>182</sup>

The argument for ‘special protection’ of older people in financial transactions was asserted in 2007 when the UK charity Help the Aged published proposals to address concerns that older people are not getting the financial services or advice they need.<sup>183</sup> These proposals included recommendations for a ‘new legal framework’ to combat the abuse of vulnerable adults, enforceable against the financial services industry, and argued that the FSA ‘should actively engage in issues relating to financial abuse and publish its own plans for prevention.’<sup>184</sup> The review noted that ‘At present older people are often denied access to financial products, regardless of their individual risk profile, and products targeted towards older people can be more costly than for people in other age groups’,<sup>185</sup> although it did not specify how this would be achieved beyond indicating that where previous legal interventions have been ‘patchy’ (across criminal and civil law), in future, ‘law’ should be more proactive in relation to financial abuse.<sup>186</sup> The strategy for achieving this goal – however, benignly - appeared to follow the ‘abnormal persons’ approach to difference, asserting that legal protections for older people ‘should be based on capacity rather than age’.<sup>187</sup> This is perhaps explicable, to some degree, by the emphasis on ‘physical and/or cognitive impairments’<sup>188</sup> (with connotations of ‘disability’) in its analysis of the sources of vulnerability.

This is to some extent borne out in a 2005 study of susceptibility of older people to ‘undue influence’, which identified a wide range of factors – both ‘inherent’ and contextual - which

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<sup>180</sup> *Ibid*, p52.

<sup>181</sup> G Crosby, A Clark, R Hayes, K Jones, N Lievesley, *Financial Abuse of Older People: A review of the literature carried out by the Centre for Policy on Aging on Behalf of Help the Aged* (London: Help the Aged, 2008), p9.

<sup>182</sup> P Cambridge, J Beadle-Brown, A Milne, J Mansell & R Whelton, *Exploring the Incidence, Risk Factors, Nature and Monitoring of Adult Protection Alerts* (Canterbury: Tizard Centre, 2006); cited in Crosby *et al*, *ibid*, p15.

<sup>183</sup> Crosby *et al*, above.

<sup>184</sup> *Ibid*, p5.

<sup>185</sup> *Ibid*, p7.

<sup>186</sup> *Ibid*, p10.

<sup>187</sup> ‘there is...a premise that older people require statutory protection because of the association of age with physical and/or cognitive impairments that increase vulnerability to abuse’, *ibid*, p10.

<sup>188</sup> *Ibid*, p10.

render people vulnerable to financial exploitation. These included advanced age (75+), being female, being unmarried, having suffered organic brain damage, cognitive impairment, physical, mental or emotional dysfunction (especially depression), recent loss of spouse or divorce, living alone, social isolation, being estranged from children, being financially independent with no designated financial carers, being in the middle or upper income brackets, taking multiple medications and frailty.<sup>189</sup> Other studies have placed greater emphasis on the contextual nature of vulnerability to financial abuse. Choi and Mayer found that financial exploitation was most common among older people and those who owned their own homes.<sup>190</sup> Starnes identified several factors which render older people more vulnerable to consumer fraud including living alone (with no-one to consult about questionable transactions); relying only on the information given by the sales-person; having a greater desire for social contact than younger members of the population; limited access to transport and lack of nearby family adding to social isolation; and (particularly for elderly widows who had allowed their husbands to take responsibility for family finances) lacking experience in financial matters.<sup>191</sup> The significance of *contextual* vulnerability has also been explicitly recognised in research on financial abuse of older people. For example, it has been suggested that ‘The fact that more women than men are identified as suffering abuse is likely to reflect the fact that women live longer than men and are consequently more likely to be living alone. It is their circumstances that make women vulnerable to abuse, not their gender.’<sup>192</sup>

Meanwhile, in the UK, social policies focused on older people have explicitly moved away from traditional ideas of vulnerability on the grounds that the label of vulnerability ‘can be misunderstood, because it seems to locate the cause of abuse with the victim, rather than in

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<sup>189</sup> RCW Hall, RCW Hall & MJ Chapman, ‘Exploitation of the elderly: undue influence as a form of elder abuse’ (2005) 13 *Clinical Geriatrics* 28; cited in Crosby *et al*, above, pp16-17.

<sup>190</sup> NG Choi & J Mayer, ‘Elder abuse, neglect, and exploitation – risk factors and prevention strategies’ (2000) 33 *Journal of Gerontological Social Work* 5.

<sup>191</sup> RA Starnes, ‘Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties’ (1996) 4 *Elder LJ* 201 at 204. Health problems, physical incapacity, and the suggestion that the older generation ‘are generally more trusting and willing to talk to strangers than younger individuals’ (*ibid*, p205) were also identified as compounding the ‘victimisation’ of older people by fraudsters. Rossiter argued that the same characteristics which leave older people vulnerable to fraud also make them ‘equally vulnerable to unfair contracts in which seniors are either pressured into unfair transactions, or volitionally enter into transactions harmful to their interests’, Rossiter, above, p810, adding that ‘Seniors are particularly vulnerable to unfair contracts because of their physical impairments, loneliness, and limited resources’, *ibid*, p821.

<sup>192</sup> Crosby *et al*, above, p19; see G Fitzgerald, *Hidden Voices: older people’s experience of abuse – an analysis of calls to the Action on Elder Abuse helpline* (London: Action on Elder Abuse in association with Help the Aged, 2004). McCreadie also found that older people living alone are at greater risk of financial abuse than those who live with others, C McCreadie, ‘Review of Research Outcomes in elder abuse’ (2002) 4 *Journal of Adult Protection* 3.

placing responsibility with the actions or omissions of others.’<sup>193</sup> This appeared to move away from the ‘abnormal person’ approach; however, the language of the prevailing policy approach is on supporting ‘well-being’<sup>194</sup> and ‘safeguarding’ older people<sup>195</sup> to maintain their status as autonomous individuals: ‘to retain independence, wellbeing and choice’.<sup>196</sup> The emphases on independence and choice reinforce the model of older people as autonomous ‘responsibilised’ consumers of care, and this is underlined by the proposed strategies, which typically have focused on information, advice and advocacy.<sup>197</sup> While this is positive in the sense that (in light of the adverse impact of harms for older people<sup>198</sup>) ‘prevention is better than cure’,<sup>199</sup> it tends towards an expectation of self-provision/self-protection model, which in turn is premised on the information paradigm.<sup>200</sup>

Many of the trading practices that would be likely to be viewed as ‘financial abuse’ are prohibited by regulations on commercial practices, for example, in the Consumer Protection from Unfair Trading Regulations,<sup>201</sup> which imposes a general duty on traders not to trade unfairly and to seek to ensure that they act honestly and fairly towards customers. While these regulations include potentially powerful enforcement mechanism - for example, fraud offences<sup>202</sup> - they are primarily ‘provider-facing’ in the sense that they do not provide direct redress for consumers, or affect the enforceability of the contract. These Regulations also clearly demonstrate a commitment to the information paradigm: for example, ‘undue influence’ is defined as ‘exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision.’<sup>203</sup> The gaps which

<sup>193</sup> Commission for Social Care Inspection, *The state of social care in England 2005-06*, (London: Commission for Social Care Inspection, 2006); quoted in *UK Study of Abuse and Neglect of Older People*, *op cit*, p11.

<sup>194</sup> For example, through the *No Secrets* guidance, above.

<sup>195</sup> See *UK Study of Abuse and Neglect of Older People*, above, pp8-9.

<sup>196</sup> Commission for Social Care Inspection, *The state of social care in England 2005-06*, (London: Commission for Social Care Inspection, 2006); quoted in *UK Study of Abuse and Neglect of Older People*, above, p11.

<sup>197</sup> For example, Cripps has argued that ‘rights-based strategies’, which seek to advise older people of their rights and support them in upholding them through an advocacy model, are more effective than other strategies in addressing elder abuse; D Cripps, *Rights Focussed Advocacy and Elder Abuse* (Adelaide: Aged Rights Advocacy Service, 2000); available online at:

<http://www.sa.agedrights.asn.au/pdf/Rights%20Focussed%20Advocacy%20and%20Elder%20Abuse.pdf>.

<sup>198</sup> See section 6, below.

<sup>199</sup> Crosby *et al*, above, p23.

<sup>200</sup> As the discussion in section 3, above, has indicated, there are risks in viewing more information as necessarily reducing the risks of adverse outcomes or facilitating good decision-making for older owners.

<sup>201</sup> See Chapter Eight, section 8.

<sup>202</sup> For an illustration of their application in a case involving two women aged 85 and 65, see *R v Gilbertson* [2009] EWCA Crim 1715.

<sup>203</sup> Regulation 7(3)(b).

this leaves in the protections for potentially vulnerable consumers are discussed further in Chapters Eight and Nine. Firstly, the following sections consider some alternative perspectives on the sources of vulnerabilities which, it will be argued, provide a stronger platform on which to rest critical analyses of the current legal frameworks.

### **(5) Contextual or ‘situational’ vulnerabilities: Charting a path between incapacity and autonomy**

One of the persistent difficulties with the use of ‘vulnerability’ as a basis for enhancing the legal protection afforded to older people is the way in which it has traditionally been presented as a ‘victim’ status, involving loss of capacity and/or autonomy. From this perspective, ‘real differences’ between people are portrayed as generating an ‘all-or-nothing’ choice: to be constructed as a ‘vulnerable person’ and so attract protection you must present as unable to make choices; alternatively you are cast as an autonomous consumer who can make choices, but who must be self-reliant and self-responsible for the outcomes of those choices. This choice is not neutral, but is heavily couched in socio-political subjectivities, and given effect within a framework of norms: it is a fundamental tenet of the liberal legal system that a person (an autonomous individual) has the right to make their own choices so long as they have ‘capacity’. This starting-point skews the normative structures that govern housing equity transactions towards autonomous individualism, notwithstanding the evidence that these are high-risk transactions, in which the complex decisions that many people (including, but not exclusively, older people) are required to make require a level of financial capability that – the evidence suggests - is not manifest in the general population.

In cultural understandings of ‘risk’, epitomised in the work of Mary Douglas,<sup>204</sup> the idea of being vulnerable or ‘at risk’ is increasingly associated with ‘victimhood’, and an awareness of the exposure that results from being part of a world system. Douglas argued that, particularly in the environmental context, the moral and political pressure that is brought to bear in relation to risk has largely been directed at large organisations rather than the individuals who experience the adverse effects when risk is realised. This socio-cultural approach emphasises the responsibilities (or attribution of blame) that flow from the creation

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<sup>204</sup> See, for example, M Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (London: Routledge & Kegan Paul, 1966); M Douglas, *Risk Acceptability According to the Social Sciences* (New York: Russell Sage Foundation, 1985); M Douglas, *Risk and Blame: Essays in Cultural Theory* (London: Routledge, 1992).

of risk.<sup>205</sup> In this frame, ‘Being “at risk”...entails being placed in the role of victim, threatened by risks imposed upon oneself by other agents, rather than being seen as bringing risk upon oneself through one’s own actions...The political pressure that is brought to bear in relation to risk disputes is largely against exposing others to risk’.<sup>206</sup> While the discussion in this book has noted that the orientation of much of the political and policy framework for housing equity transactions has been strongly tilted towards individual self-responsibility, this is countered, to some extent, by the growing reach and rigour of regulatory responses to a range of specific housing equity products.<sup>207</sup>

The tensions that exist between the individual responsibility of consumers and the responsibilities of the large organisations which profit from financial transactions have been brought into sharp relief by the global financial crisis which began in 2007, which has triggered a widespread review of regulatory practices and provided fertile ground for arguments that lenders must bear more of the responsibility for risk, particularly in the context of mortgage lending, for example, through more effective affordability checks, clearer product explanation and more stringent product regulation.<sup>208</sup> In this ‘moment’ of reflection, this book identifies a number of important questions to be resolved in respect of housing equity transactions. There are a number of strategies which might be adopted to address these questions. One set of strategies would work within the dominant framework to re-evaluate (1) how to strike an acceptable balance between protecting (potentially) vulnerable older people and respecting their ‘autonomy’; and (2) how to balance the responsibilities of older people as ‘autonomous consumers’ against the responsibilities of the financial providers who are actively seeking to encourage the growth of the equity release market. A second set of strategies, which in the first instance might also lend support to these re-balancing efforts, would raise broader challenges to the normative framework, for example, by critiquing the false dichotomy of autonomy/dependency,<sup>209</sup> or by challenging the institutional structures that create situational vulnerability for older people,<sup>210</sup> from compulsory retirement to the attenuation of the welfare state, the expectations of self-

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<sup>205</sup> D Lupton, *Risk* (Abingdon: Routledge, 1999), p45.

<sup>206</sup> *Ibid*, p47-48.

<sup>207</sup> Discussed in Chapter Nine.

<sup>208</sup> See for example, S Nield, ‘Responsible lending and borrowing: whereto low-cost home ownership?’ (2010) 30 *Legal Studies* 610.

<sup>209</sup> See discussion in Chapter Five, section 3.

<sup>210</sup> See below, section 7.

provision and the emergence of the dominant paradigm of housing as investment asset to spend, all of which have contributed to creating the risk environment.<sup>211</sup>

The association between age and vulnerability, with concomitant risks of ageism, is problematised by the tendency for law to focus almost exclusively on (lack of) capacity as the cause of later life vulnerability. Yet, neither incapacity nor lack of autonomy is the primary source of older owner vulnerability in financial decision-making. Rather, the research on financial capability, economic decision making and financial abuse suggests that contextual factors, from living alone to financial inexperience, from poor health to loneliness and social isolation are much more significant. There is clearly not a perfect relationship between advancing age and vulnerability, with many older people highly capable, competent, and often well-off. At the same time, there are also many marginal owner-occupiers, across the life-course, who experience social isolation, financial inexperience, poor health, loneliness and who have lower quality of life, all characteristics associated with vulnerability to financial abuse and a higher risk of entering into unfair contracts. The distinctive factors for older people are the changes to income patterns after retirement which create new types of financial pressure, and the policy context which pushes them towards equity release to fund a range of needs increases the likelihood that they may be required to make complex financial decisions under conditions of financial pressure, leaving (marginal) older owners with lower value properties at particular vulnerability to disadvantageous equity release transactions.<sup>212</sup>

In seeking to establish an acceptable mode of protection for vulnerable older people, ‘situational vulnerability’ is strategically valuable inasmuch as it does not rely upon stereotyping older people in need of legal protection as weak or incapable, but recognises that the circumstances of aging in the UK in the early twenty-first century may expose people to specific risks in respect of financial provision. Situational vulnerability not only leave the individuals at heightened risk of harms (the adverse impacts of which are discussed in section

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<sup>211</sup> Minow discussed the importance of addressing the impact of difference without losing sight of the larger patterns of power (see for example, the political construction of aging discussed in Chapter Two): ‘even when pursued fully, relational ideas carry risks for vulnerable people if the underlying patterns of power remain unchanged. Defining procedures and policies that acknowledge people’s mutual needs for one another may exacerbate the dependence of those who have historically been more dependent without remaking the underlying social arrangements that produced the pattern...Developing a method of attending to relationships without losing sight of larger patterns of power will be critical to those who want to redress the legal treatment of difference.’, Minow, above, p229.

<sup>212</sup> In addition to the question of whether a low-value loan justifies the transaction costs, there is a higher risk of mis-selling to less-well-off people in lower value properties, R Terry & R Gibson, *Obstacles to Equity Release* (York: Joseph Rowntree Foundation, 2006).

6), but contributes to market failure. When a sufficient sector of consumers are not focused on value for money, do not ‘shop around’, or enter transactions while experiencing difficult financial or emotional situations that impair their ability to assess the transaction against alternatives,<sup>213</sup> this undermines the competitiveness of the market, with adverse consequences across the sector. The prelude to FSA regulation of ‘sale and rent back’ transactions, discussed in Chapter Nine, exemplified this risk, and triggered the highest-level of FSA intervention in financial transactions to date. It is also important to recognise that situational vulnerability itself is not randomly distributed but is related to income patterns, differential opportunities to accumulate housing wealth, levels of cultural capital and financial capability, and the success with which people have planned for retirement across their life course. These contexts are crucial in shaping the ‘rational choices’ that individuals make as autonomous consumers’, so that:

‘In a world of individualised risk, responsibility and choice, some individuals are likely to be worse off in old age not because they make less rational decisions than others in similar situations, although this might sometimes be true, but because the context of their retirement planning is very different.’<sup>214</sup>

Those who are worse off are also most vulnerable to the adverse impacts of ‘bad’ transactions. The arguments for rooting any legal response to ‘difference’ in the differential impact of adverse outcomes for older people are considered in section 6, below.

Another strategy that might follow from an acknowledgment of the situational vulnerability of (marginal) older owners concerns the balance of responsibility between older consumers and the providers with whom they contract. While contract law tends to be shaped by the ‘underlying assumption that individuals are by and large best placed to look after their own affairs’,<sup>215</sup> with legal intervention justified only in those ‘marginal cases where the assumption does not work’,<sup>216</sup> its assumption of individual self-responsibility’ exists in tension with the outlook of consumer regulation, particularly when (as has recently been the

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<sup>213</sup> See Office of Fair Trading, *Sale and rent back – An OFT Market Study* (OFT 1018), (London, OFT, 2008), para 5.18, 5.21, 5.26; available online at [http://www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/oft1018.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft1018.pdf).

<sup>214</sup> K Strauss, ‘Re-engaging with rationality in economic geography: behavioural approaches and the importance of context in decision-making’ (2008) 8 *Journal of Economic Geography* 137 at 151.

<sup>215</sup> M Richardson, ‘Contract law and distributive justice revisited’ (1990) 10 *Legal Studies* 258. Richardson explained that ‘the law cannot afford to protect people from themselves. It is simply too costly in terms of the effects on others...’, *ibid*, p262.

<sup>216</sup> *Ibid*.

case) renewed arguments are advanced for ‘responsible lending’, a concept that can be viewed as inherently ‘person related and need oriented.’ Howells argued that:

It seeks to place into the contract paradigm a concern to respect the needs of the poor consumer and the position she finds herself in. It also requires of creditors an ethical standard...and requires them to acknowledge their responsibilities towards clients whom they dominate economically socially and psychologically.<sup>217</sup>

These motivations can be found, to varying degrees, in the regulatory regimes that govern housing equity products and transactions.<sup>218</sup> Williams summarised the situational risks inherent to equity release transactions when she claimed that:

Today’s equity release industry has been built around a strong recognition that it is a product area where there has been past abuse and where, without appropriate safeguards, there are serious risks to both borrowers and lenders. These concerns flow out of a number of issues:

- Potentially vulnerable customers
- Potentially complex family dynamics around inheritance
- Complex products not least in illustration and understanding terms and where house price dynamics can produce unexpected outcomes
- Limited number of specialist brokers with full understanding of the market, risks and alternatives and relatively high commission payments
- A regulatory regime that has taken some while to get fully into place
- Taken together, a market place where risks for all parties are seen by some to be too high.

Counterbalancing this, the simple reality is that households have a major asset, their home, which many need to access.<sup>219</sup>

While this account clearly demonstrates the case for regulatory intervention, the context reflected also raises broader normative questions about vulnerability in financial transactions, with implications that go beyond the defined remit of a regulatory regime. These questions are considered in section seven, below.

## **(6) Vulnerability and adverse impact: The measure of harm**

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<sup>217</sup> G Howells, ‘Poor consumers in credit markets’ in P Cartwright (ed), *Consumer Protection in Financial Services* (The Hague: Kluwer, 1999), p257.

<sup>218</sup> See Chapter Nine.

<sup>219</sup> P Williams, *Please Release Me! A Review of the equity release market in the UK, its potential and consumer expectations* (London: Council of Mortgage Lenders, 2008), p25.



A further, distinctive aspect of situational vulnerability concerns the impact, or measure of harm, that a person would suffer if a transaction leads to adverse outcomes. The particular vulnerability of older people to the adverse impact of bad financial outcomes was captured in a 2007 study on financial abuse for Help the Aged, which claimed that:

Financial exploitation has a devastating effect on older people. Not only can a comfortable lifestyle disappear, but also older people do not have the time or opportunity to recover financially. In addition, such a profoundly disturbing experience can be a life-threatening event ‘characterised by fear, lack of trust and the onset, often, of acute and chronic anxiety.’<sup>220</sup>

It has often been recognised that older adults, who are no longer income-generating, are more vulnerable both to the practical effects of financial set-backs, and to the physical, emotional, psychological consequences of having made a bad decision which has led to financial loss. The UK government explicitly acknowledged this in its ‘National Strategy for Housing in an Aging Society’, noting that, while homeownership has delivered substantial financial rewards for well-off older people, for marginal owners ‘there is also the prospect of the consolidation of poverty. For those who have missed out on life’s chances, for whatever reason, those chances become fewer in old age, and the opportunities to replenish meagre resources diminish.’<sup>221</sup>

In addition to the limited opportunities that older people are likely to have to earn more money after retirement to make up for losses (or to use the terminology of insolvency, to make a ‘fresh-start’), psychologists have noted that while ‘poor decisions early in life may be remedied by learning from mistakes and making better decisions in the future...as one ages, diminished physical capacity and less time can translate into reduced opportunities to recover from the ‘normal’ ups and downs of everyday decision outcomes.’<sup>222</sup> This fundamentally undermines the liberal argument that agents of normal capacity will ‘win more than they lose’, and so can ‘take the rough with the smooth’.<sup>223</sup> Rather, it indicates an additional source

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<sup>220</sup> Crosby *et al*, above, p5.

<sup>221</sup> Department of Communities and Local Government, *Lifetime Homes, Lifetime Neighbourhoods: A National Strategy for Housing in an Aging Society* (Wetherby: DCLG, 2008), p33.

<sup>222</sup> E Peters, M Finucaine, DG MacGregor & P Slovic, ‘The Bearable Lightness of Aging: Judgment and Decision Processes in Older Adults’ in PC Stern & LL Carstensen (eds) *The Aging Mind: Opportunities in Cognitive Research* Washington DC: National Academy Press, 2000), 144.

<sup>223</sup> T Honoré, *Responsibility and Fault* (Oxford, Hart Publishing, 1999), p9; see also discussion in J Steele, *Risks and Legal Theory* (Oxford: Hart Publishing, 2004), p94.

of vulnerability linked to limited opportunities to recoup financial losses. This is especially pertinent where it is housing equity, which may represent the older person's main form of saving, accumulated over a lifetime of work<sup>224</sup> that has been lost. The multiple functions of the family home – as housing, investment and inheritance – also mean that losses associated with this particular asset are likely to be particularly keenly felt. Finally, the experience of financial victimisation also has specific impacts on older people, including psychological impacts (emotional distress, loss of self confidence, depression, thoughts of suicide and self-harm),<sup>225</sup> social isolation, deteriorating physical health, loss of independence, financial loss and adverse impacts on relationships with family and friends.<sup>226</sup> Whether the incident is resolved also has a bearing on the abused person's resilience,<sup>227</sup> as do their personal circumstances and characteristics, including their beliefs and norms, whether they were living alone, health and previous life experiences.<sup>228</sup>

As the discussion of 'dilemmas of difference' in section three has shown, a crucial question in analyses of differential vulnerabilities, and the strategies with which we seek to address them, is which differences matter, and in which contexts. This section considers whether, both for individual equality and justice, and for the collective interest, the particular impact of adverse housing equity transactions on older owners is a difference that matters. The idea that particular types of harms, or harms which particularly affect certain groups, justify specific legal intervention was explored in Robin West's work on 'gendered harms'.<sup>229</sup> West identified a phenomenon of differentiated harms, experienced by women which have little or no counterpart in men's lives.<sup>230</sup> She argued that:

Women suffer harms in this culture that are different from those suffered by men. And partly because they are different, they often do not 'trigger' legal relief in the way that harms felt by men alone or by men and women equally do. As a result

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<sup>224</sup> S Moskowitz, 'Saving Granny from the Wolf: Elder Abuse and Neglect - the Legal Framework' (1998) 31 *Connecticut Law Review* 77.

<sup>225</sup> A Canadian study also reported that 29% of those who had been financially abused reported 'wishing their life would end', compared with only 8% in the rest of the sample; E Podnieks, 'National survey on abuse of the elderly in Canada' (1992) 4 *Journal of Elder Abuse and Neglect* 5; cited in Crosby *et al*, p14.

<sup>226</sup> A Mowlam, R Tennant, J Dixon & C McCreadie, *UK Study of Abuse and Neglect of Older People: Qualitative Findings* (2007); available online at: [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_078333](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_078333).

<sup>227</sup> Or in Kirby's terminology, their 'assets': "...advantages, coping mechanisms, or resources that cushion us when we are facing misfortune, disaster and violence."; Fineman, *op cit*, p13, citing P Kirby, *Vulnerability and Violence* (2006).

<sup>228</sup> UK Study, *op cit*, section 7.1, 7.2.

<sup>229</sup> For an introduction to West's concept of 'gendered harms', see R West, *Caring For Justice* (New York: NYU Press, 1997), Chapter Two.

<sup>230</sup> *Ibid*, p100.

women are doubly injured: first by the harm-causing event itself, and second by the peculiarity or non-existence of the law's response to those harms.<sup>231</sup>

While West's analysis of harm, and her argument for a relational jurisprudential concept of harm, is based on women's experiences and relies heavily on women's bodily and biological differences, her general approach – which critiques the focus of economic instrumentalism on the preference satisfaction of rational men and the avoidance of transaction costs, and its failure to recognise social harm – can be usefully extended to capture the 'invisibility' of the harms that older owners suffer in adverse housing equity transactions, and to posit the argument that greater legal intervention is required to avoid or rectify these harms. West argued that, where difference renders women vulnerable to special types of harm, equality and justice demand that the legal culture recognise and respond to these differences.

From one perspective, while aging obviously presents different issues and different examples of differential harms compared to gender, the disproportionately adverse impact of bad financial transactions on older people are derived, in part at least, from the impact of the 'aging body' on opportunities to work and generate financial resources.<sup>232</sup> Another approach might highlight the fact that, in light of their longer life-spans, aging issues *are* women's issues,<sup>233</sup> similarly, in light of constraints on income and capacity to accumulate wealth and assets throughout the life course, which combine to make women more likely than men to be poor, issues relating to vulnerability in financial transactions in old age are also women's issues.<sup>234</sup> Longer life-spans mean that women are more likely than men to have ongoing health and personal care needs,<sup>235</sup> face the medical, social, cultural, economic and legal issues associated with aging, often without a partner, while their greater propensity to live alone places older women at higher risk of victimisation in financial transactions.<sup>236</sup> The harm of adverse housing equity transactions impacts disproportionately on older people because they are likely to have significantly less opportunity (in terms of remaining lifetime and ability to

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<sup>231</sup> *Ibid*, p96, 99.

<sup>232</sup> See above, section 3.

<sup>233</sup> Women constitute the majority of older people, nearly twice as many of the over 80 cohort, and four to five times as many centenarians; see Chapter One, section 2(a).

<sup>234</sup> See Chapter One, section 3(b).

<sup>235</sup> While women live longer than men, older women tend to have poorer health, greater levels of disability and are at greater risk of institutional care; S Arber & J Ginn, 'Gender Dimensions of the Age Shift' in ML Johnson (ed) *The Cambridge Handbook of Age and Ageing* (Cambridge: Cambridge University Press, 2005); E Schroeder-Butterfill & R Marianti, 'A framework for understanding old age vulnerabilities' (2006) 26 *Ageing and Society* 9.

<sup>236</sup> Older women are almost 250 per cent more likely to live alone, compared to older men; see Chapter One, section 2(a).

generate new financial assets after retirement) to recover from financial loss compared to their younger counterparts; and this harm is likely to be disproportionately (although not exclusively) experienced by women.

Indeed, West used the example of ‘grossly unjust contractual bargains’ to illustrate her discussion of the ways in which legal culture legitimates harms, so causing the harmed individual to lose consciousness of himself or herself as ‘harmed’.<sup>237</sup> Noting that in a market-led political and economic framework ‘contract law enforces wise and unwise contracts against ‘losers’ and winners equally’,<sup>238</sup> she argued that:

The larger culture justifies this outcome with a sort of harsh, Emersonian, ethic of self-reliance: we have to learn to take our lumps, it’s the price of freedom. *Legal* culture, however, goes one step further: the harm is not simply justified, it is *legitimated*, which means in effect that the harm disappears.<sup>239</sup>

The role of legal culture in legitimating, and so obscuring, the harms that result from adverse housing equity transactions also has particular resonance in light of the documented reluctance of older people to pursue legal remedies when they suffer losses in financial transactions.<sup>240</sup> West demonstrates how this view is perpetuated by a legal culture shaped according to the rational precepts of law-and-economics, which have imported the political ideology of ‘market individualism’ into contract and property law,<sup>241</sup> and which demand that: ‘If the contract was “free” then all parties *must*, by definition, have gained. There is, in effect, no loser in a market economy, where one invariably consents to only what one wants and one only wants what will benefit one. No one’s actually been harmed.’<sup>242</sup> Indeed, to the extent that the vulnerable party themselves subscribe to the dominant norms, West argues that they will ‘eventually view themselves as not only not entitled to legal relief, but as not

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<sup>237</sup> West (1995), above, pp151 *et seq.*

<sup>238</sup> West (1995), above, p151.

<sup>239</sup> West (1995), above, pp151-2.

<sup>240</sup> Research into financial abuse of older people has reported that it can be difficult to detect because the victim is reluctant to report; because they are embarrassed to admit that they have made a poor decision; because of stigma and loss of personal dignity; because they do not know where to turn for help or do not have the mobility to access help; because they consider the situation to be their own fault or part of the normal risk of transacting; or because they do not realise that an actionable wrong has taken place; see for example, JI Kosberh & D Nahmiash, ‘Characteristics of Victims and Perpetrators and Milieus of Abuse and Neglect’ in LA Baumhover & SC Beal. (eds), *Abuse, Neglect and Exploitation of Older Persons: Strategies for Assessment and Intervention*, (London: Jessica Kingsley, 1996); CL Dessin, ‘Financial Abuse of the Elderly’ (1999) 36 *Idaho Law Review* 203 at 211-213.

<sup>241</sup> See Chapter Four for discussion of the dominant of these values in the construction of private law’s subjects.

<sup>242</sup> West (1995), above, p152.

harmed. Their acquiescence in the larger system is thereby secured.’<sup>243</sup> From this perspective, the risk of fostering ageism where older people are identified as ‘different’ in the negative sense of being unable to live up to the ‘norms’ attendant to being a ‘market actor’, (and which the older person has internalised as required from a ‘market actor’, so that failure to live up to the ideal is experienced as a failure in personal identity), are clear. Yet, when the experience of specific harms ‘fades from view’ - because they result from differences that are not ‘discriminatory’ within a model of formal equality law, so that law and legal culture do not recognise the harm - West cautioned that ‘Those harms become, in effect, nor harms at all, but rather, the result of well-functioning private and cultural markets, free of pernicious and inefficient state intervention. They become something to celebrate rather than worry over.’<sup>244</sup>

The particularly harmful impact of adverse financial transactions for older people has been recognised in the laws of some US states, which have provided particular protections for older people in the event of bankruptcy. Bankruptcy laws provide a classic example of the liberal legal idea that people can take the rough with the smooth, weather financial failures and then start again with a clean sheet – a ‘fresh start’ – the aim of which is to allow debtors to discharge their debt through bankruptcy and continue their lives free of debt.<sup>245</sup> The inaptness of the philosophy of bankruptcy, which aims to give ‘the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt’,<sup>246</sup> is discussed in Chapter Seven. The specific harms which result when older people experience adverse financial transactions are ignored by a model which relies on ‘future earnings as the key to rehabilitation’.<sup>247</sup> bankruptcy is clearly a law of general application that affects older people differently to younger adults. This difference is recognised when specific provision is made for older owners in bankruptcy proceedings, by allowing them to retain additional ‘exempt’ property

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<sup>243</sup> West (1995), above, p152.

<sup>244</sup> West (1995), above, p153.

<sup>245</sup> See for example, Insolvency Service, *Bankruptcy: A Fresh Start* (Consultation Document), March 2000, available online at [http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/con\\_doc\\_archive/consultation/freshstart/foreword.htm](http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/freshstart/foreword.htm); I Livshits, J MacGee & M Tertilt, ‘Consumer Bankruptcy: A Fresh Start’ (2007) 97 *The American Economic Review* 402.

<sup>246</sup> *Local Loan Co v Hunt* 292 US 234 at 244 (1934).

<sup>247</sup> JAE Pottow, ‘The Rise of Elder Bankruptcy Filings and Failure of US Bankruptcy Law’, University of Michigan Law School Empirical Legal Studies Center Working Paper 17 (2010), p22; available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669298)

(for example, ‘homesteads’) with which to make their ‘fresh start’, compared to younger bankrupts.<sup>248</sup>

A claim to difference that is rooted in the differential impact of adverse financial transactions after retirement avoids ageist stereotypes based on individual physiological traits or ‘inherent’ characteristics: it is a form of situational vulnerability, inasmuch as the difference does not reside in the person but in the circumstances they are placed in; it is based not on an ‘essentialised’ image of the older person, but on the broader political, social and demographic contexts which shape participation in housing equity transactions. Indeed, an emphasis on the impact of adverse transactions has the potential to be as universal as aging itself,<sup>249</sup> while also exhibiting ‘across-category sameness’ with other (younger) marginal owners who are likely to face particular difficulties in recovering from financial setbacks. Similarly, while the ‘non-financial’ impacts for older owners, resulting from the experience of adverse transactions, have been identified in targeted studies, the Financial Services Consumer Panel’s definition of ‘consumer detriment’ recognised that as a general group, consumers may experience non-financial detriment from adverse financial transactions, including ‘social exclusion, confusion, stress and anxiety and associated health consequences, irrespective of whether a financial loss has occurred.’<sup>250</sup> Focusing on impact or harm raises new critical possibilities for an understanding of vulnerability that challenges dominant norms of legal subjectivity, and through which aging can (in light of the specific social, political, demographic and policy drivers towards housing equity transactions) be viewed as a paradigmatic illustration of more universal sources of vulnerability affecting (particularly marginal) owners across the life-course; of the inappropriateness of the idealised model of the autonomous legal subject in context of complex financial transactions; and of the universal vulnerability of the human condition.<sup>251</sup>

## **(7) Re-thinking responsibility for ‘vulnerable legal subjects’**

The socio-economic and political environments of aging in the early twenty-first century mean that, increasingly, many older owners will have no choice but to engage with some

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<sup>248</sup> Examples include California, Colorado, Hawaii, Maine and New York; see Chapter Seven, section 3(b).

<sup>249</sup> Minow recognised that aging is universal in the sense that it will happen to us all, making it easier to see, than in many cases of ‘difference’, that ‘we could be like them’; Minow (1995), above, p385.

<sup>250</sup> See J Wells & M Gostelow, *Financial Services and Later Life: A Scoping Project for the Financial Services Consumer Panel*, para 1.3; available online at [http://www.fs-cp.org.uk/publications/pdf/fscp\\_laterlife0609.pdf](http://www.fs-cp.org.uk/publications/pdf/fscp_laterlife0609.pdf).

<sup>251</sup> See below, section 7.

form of risk in relation to the use (or not) of home equity after retirement. While the risks associated with spending housing wealth, and the outcomes of housing equity transactions, can be both positive and negative – with positive aspects relating to lifestyle, better quality of life and avoiding poverty in old age – this book argues that the necessity for many older homeowners to participate in the credit market in one way or another, and to negotiate the risks associated with market participation, presents new questions for legal analysis. The expectation that home owners will accumulate housing wealth during their lives to spend on welfare after retirement, and that they demonstrate individual responsibility as ‘active subjects’ under neoliberal governmentality, provide important context for analysis of the ideas of responsibility and vulnerability as they are applied to older people in the current political and policy landscape.

While the dominant themes in political and policy discourse concerning housing equity transactions reflect a particular construction of the older owner as a reflexive risk subject, ‘free’ to negotiate choices as an autonomous consumer, the extent to which the general population – and, by extension, older owners – are likely to be able to effectively plan for (and finance) their futures is related to the social and cultural resources at their disposal, and their financial and legal capabilities when it comes to understanding complex products.<sup>252</sup> The gap between the idealised neoliberal consumer, and the reality of high-risk transactions which leave marginal older owners (and other marginal owners) vulnerable to adverse outcomes, highlights the potential for injustices and inequalities within the dominant (neo)liberal normative domain of housing equity transactions. The relationship between socio-economic inequality (marginality) across the life-course and heightened exposure to risk in housing equity transactions has also been clearly established. Furthermore, as West’s concept of harm reveals, the dominance of a particular normative framework can inhibit law’s ability to recognise and remedy these adverse outcomes; indeed, where ‘victims’ themselves internalise the norms, they may not recognise, or pursue legal recompense for, harms they have suffered.

Representing this type of inequality within the dominant liberal norms that have shaped English ‘private’ law is not straightforward. Liberal legal theory emphasises the values of autonomy and choice, with the positive ‘entrepreneurial’ aspects of risk-taking in relation to

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<sup>252</sup> See Chapter One, section 3(b); Chapter Three, section 2(a).

house purchase tending to characterise legal perspectives on these transactions, which are anchored in the typically non-market interventionist approaches of property law and contract as ‘private’ law domains. Yet, this model of consumers in domestic property transactions as ‘responsible risk-takers’ has been challenged by the recent global financial crisis, which has demonstrated how risks in the financial system can potentially impact on *all* consumers, calling into question the ‘overly optimistic view of self-regulating markets’.<sup>253</sup> Indeed, even before the ‘credit crunch’, the relationship between risk, responsibility and regulation had emerged as an important theme in UK policy,<sup>254</sup> with the growing reach of the Financial Services Authority (FSA) demonstrating the use of (albeit ‘light-touch’) regulatory approaches as a response to the risks associated with financial transactions. Since the financial crisis, the UK government has made an explicit commitment to a more responsible regulatory regime.<sup>255</sup> This section argues that this process, and other responses to vulnerability in housing equity transactions, is usefully informed by re-conceiving the norm of (older) owners as (self-responsible) consumers towards a more realistic concept of older (and potentially other marginal) owners as ‘vulnerable legal subjects’.

The (co-)existence of competing characterisations of the consumer as a legal subject, with implications for the nature and extent of legal interventions in ‘private’, market transactions, has been recognised in a range of legal contexts. For example, Dyal-Chand contrasted US mortgage law’s paradigm of the ‘ignorant borrower’ with credit card law’s ‘enlightened borrower’.<sup>256</sup> While mortgage law recognised ‘situational vulnerability’,<sup>257</sup> leading to specific and meaningful substantive legal protections, the ‘enlightened borrower’ (read ‘autonomous consumer’) of credit card law attracted only the procedural protections of the

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<sup>253</sup> RP Malloy, ‘Mortgage Market Reform and the Fallacy of Self-Correcting Markets’ (2009) 30 *Pace Law Review* 79.

<sup>254</sup> Better Regulation Commission, *Risk, Responsibility and Regulation: Whose Risk is it Anyway?* (London: Cabinet Office, 2006).

<sup>255</sup> See ‘Statement to the House of Commons by the Financial Secretary to the Treasury, Mark Hoban MP, on Reforming the Institutional Framework for Financial Regulation’, 17 June 2010; online at [http://www.hm-treasury.gov.uk/statement\\_fst\\_170610.htm](http://www.hm-treasury.gov.uk/statement_fst_170610.htm); HM Treasury, *A new approach to financial regulation: judgment, focus and stability* (Cm 7874), (London: TSO, 2010); online at [http://www.hm-treasury.gov.uk/d/consult\\_financial\\_regulation\\_condoc.pdf](http://www.hm-treasury.gov.uk/d/consult_financial_regulation_condoc.pdf).

<sup>256</sup> R Dyal-Chand, ‘From Status to Contract: Evolving Paradigms for Regulating Consumer Credit’ (2005) 73 *Tenn L Rev* 303.

<sup>257</sup> Dyal-Chand explained that the use of ‘ignorant’ in US mortgage law discourse was not intended to be pejorative, but to reflect the relative lack of sophistication of mortgage borrowers compared to lenders; their relative inexperience in this type of transaction; their ‘choicelessness’ in many circumstances, and the likelihood that they may be overreached.



‘information paradigm’,<sup>258</sup> despite being drawn from the same constituency of borrowers. In a similar vein, Hunter and Nixon’s analysis of judicial attitudes towards owners (‘autonomous consumers’) and tenants (‘vulnerable subjects’) facing actions for financial default in English courts revealed the significance of these characterisations for judicial interpretations of statutory provisions,<sup>259</sup> resulting in a higher risk of eviction for the owner relative to tenants.<sup>260</sup>

Yet, while the paradigm of autonomous consumer clearly leaves the owner exposed to heightened risks, the basis of any claim to legal protection poses a dilemma: how can a claim to legal protection, recognising the realities of situational vulnerability, avoid falling into the trap of perpetuating ageist stereotypes? This section proposes that the resolution to this dilemma can be found in feminist critiques of the core content of the ‘autonomous consumer’ model (with its roots in the contested concepts of ‘rational choice’, ‘consent’ and ‘autonomy’); in the realisation that the ‘differential’ vulnerability experienced by marginal older owners in fact reflects a ‘sameness’ with other marginal or ‘vulnerable’ populations; and in the universal and inevitable nature of aging. While the dominant normative framework presents autonomy/capacity (within the liberal legal meaning of the term)<sup>261</sup> and dependency/vulnerability as opposite poles, challenges to the assumptions that underpin the conventional ‘autonomous consumer’ model provide a way out of this dilemma.

Feminist scholarship has long recognised the conflict between autonomy and welfare/protection in the context of contracts and the market,<sup>262</sup> and the problematic nature of the economic conception of ‘rational choice’. Hadfield captured the ‘dilemma’ of choice in her claim that while feminists seek to overcome the historical subjugation that has deprived women of autonomy and choice, they remain anxious ‘that autonomy and choice through contract and the market are traps that will only further ensnare women in disadvantage and

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<sup>258</sup> R Dyal-Chand, ‘From Status to Contract: Evolving Paradigms for Regulating Consumer Credit’ (2005) 73 *Tenn L Rev* 303; ‘The regulatory focus was on the adequacy of the disclosure made to the borrower about the terms of the lending contract, rather than on directly protecting the borrower from loss of collateral’, *ibid*, p315.

<sup>259</sup> C Hunter & J Nixon, ‘The Discourse of Housing Debt: The Social Construction of Landlords, Lenders, Borrowers and Tenants’ (1999) 16 *Housing, Theory and Society* 165. For discussion of the implications of social constructions of older owners as autonomous consumers, see Chapter Two, section 3.

<sup>260</sup> For a detailed analysis of the significance of the identity of both borrower/tenant and lender/landlord in eviction cases, see S Bright, ‘Dispossession for Arrears: The Weight of Home in English law’ in L Fox O’Mahony & JA Sweeney (eds) *The Idea of Home in Law: Displacement and Dispossession* (Farnham: Ashgate, 2011).

<sup>261</sup> See Chapter Five, section 3.

<sup>262</sup> See for example, GK Hadfield, ‘The Dilemma of Choice: A Feminist Perspective on *The Limits of Freedom of Contract* (1995) 33 *Osgoode Hall LJ* 337.

degradation'.<sup>263</sup> The legal, economic, and political subject of 'rational economic man',<sup>264</sup> the norms of liberal market individualism,<sup>265</sup> and the conception of the 'autonomous individual' that has been adopted by liberal institutions,<sup>266</sup> have all been widely criticised in feminist analyses on the basis that they are based on unrealistic portrayals of human subjectivity that reinforce privilege and perpetuate inequality. 'Rational choice', while widely regarded as the legitimate basis for liberal approaches in classical and neoclassical contract law,<sup>267</sup> is heavily contested as an epistemological concept<sup>268</sup> and as an explanation for human motivation.<sup>269</sup> Claims that individuals are rational (that they take purposive action, have consistent preferences and are utility maximising), self-interested and individualist are challenged by behavioural evidence of 'imperfect rationality'.<sup>270</sup> Feminist and critical contract scholarship has often demonstrated that choices are not necessarily shaped by the drive to maximise wellbeing or autonomy.<sup>271</sup> The argument that 'choice' can be regarded as synonymous with

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<sup>263</sup> *Ibid.*, p338.

<sup>264</sup> See, for example, GJ Hewitson, *Feminist Economics: Interrogating the Masculinity of Rational Economic Man* (Cheltenham: Edward Elgar, 1999); MA Ferber & JA Nelson (eds), *Beyond Economic Man: Feminist Theory and Economics* (Chicago: University of Chicago Press, 1993); MA Fineman & T Dougherty (eds), *Feminism Confronts Homo Economicus* (Ithaca, NY: Cornell University Press, 2005).

<sup>265</sup> Hadfield described a 'deeply felt concern that market relations, contract relations, reflect an impoverished and destructive view of human relationships. The market and contracts, it is thought, squeeze out from human interaction qualities of love, care, responsibility, duty, fellowship, and community', Hadfield (1995), above, p340.

<sup>266</sup> For a discussion of the competing meanings of 'autonomy' in liberal (private law) legal theory, in psychology and in feminist 'relational' theory, see discussion in Chapter Five, section 3.

<sup>267</sup> See for example, R Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); R Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981), chs 3 & 4; R Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions: Part 1' (2000) 16 *Journal of Contract Law* 1; and discussions in Chapter 4 sections 3, 4(a) & 5. For a critique of this approach, see for example GK Hadfield, 'A Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualisation of Rational Choice in Contract Law' (1998) 146 *University of Pennsylvania Law Review* 1235.

<sup>268</sup> See, for example, PK MacDonald, 'Useful Fiction of Miracle Maker: The Competing Epistemological Foundations of Rational Choice Theory' (2003) 97 *American Political Science Review* 551; J Friedman (ed) *The Rational Choice Controversy: Economic Models of Politics Reconsidered* (New Haven, CT: Yale University Press, 1996).

<sup>269</sup> BA Pescosolido, 'Beyond Rational Choice: The Social Dynamics of How People Seek Help' (1992) 97 *American Journal of Sociology* 1096; AK Sen, 'Rational Fools: A Critique of the Behavioural Foundations of Economic Theory' in H Harris (ed) *Scientific Models and Man* (Oxford: OUP, 1979); MR Somers, "'We're No Angels": Realism, Rational Choice and Relationality in Social Science' (1998) 104 *American Journal of Sociology* 722; R West, 'Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner' (1985) 99 *Harvard Law Review* 384.

<sup>270</sup> Behavioural economics has established that 'Individuals make mistakes. They suffer from imperfect information and imperfect rationality, and consequently might fail to make choices that maximise their preferences. Few people question the truth of this proposition', O Bar-Gill, 'The Behavioural Economics of Consumer Contracts', in RA Epstein & O Bar-Gill, *Consumer Contracts: Behavioural Economics vs. Neoclassical Economics* (NYU School of Law, NYU Law and Economics Working Papers, Paper 91, 2007), p1; available online at <http://lsr.nellco.org/nyu/lewp/papers/91>.

<sup>271</sup> West (1985), above.

‘autonomy’ is challenged by evidence that even ‘free’ choices can sometimes be harmful to welfare, and so *reduce* the legal subject’s autonomy.<sup>272</sup>

One of the risks for older owners entering housing equity transactions is that the exercise of autonomy might reduce their (future) welfare, for example, where the product is inappropriate or poor value for money, or where the option taken is not suitable to the needs, objectives and circumstances of the older person. As such, the relationship between autonomy and welfare in this context is not fixed but fluid. This perspective has significant implications for arguments concerning legal intervention, since it posits that ‘endorsing autonomy does not imply choosing the market over regulation or ignoring actual welfare in favour of deference to private ordering...’<sup>273</sup> Once autonomy is de-coupled from choice and welfare, the relevant question is not how law can promote autonomy (in the belief that welfare will automatically follow), but how ‘various institutions might be coordinated so as to promote both autonomy and welfare’,<sup>274</sup> taking account of the risks to the various parties to the contract and the relative impact of harms (including non-financial harms) on each party.<sup>275</sup> Through this process, law can be seen to have a role in ‘structur[ing] the relations that establish the preconditions for truly autonomous choice’;<sup>276</sup> that is, for choices that genuinely enhance well-being *and* promote autonomy.

The development of a legal strategy that pursues both well-being and (the broader meaning of) autonomy is usefully supported by feminist critiques of the conventional conception of rational choice, which emphasise the tensions between the narrow, abstract, economic and legal concept of autonomy and the situational realities of inequality.<sup>277</sup> To the extent that the enforcement of contracts is justified by principles of voluntariness and informed choice, arguments for non-enforcement must ‘demonstrate a defect in the circumstances of choice: a failure of voluntariness or an absence of adequate information’.<sup>278</sup> If enforceability turns on

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<sup>272</sup> Hadfield, above, p341; considering M Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA: Harvard University Press, 1993). For discussion of the differences between ‘choice’ and ‘autonomy’, see Chapter Five, section 3.

<sup>273</sup> *Ibid*, p348. Hadfield argued that ‘In many cases, when close attention is paid to the actual relationship between a particular goal such as autonomy or welfare and a particular instrument, such as contract law, it is possible to use a multi-pronged approach so as to vindicate multiple values.’, *ibid*.

<sup>274</sup> *Ibid*.

<sup>275</sup> *Ibid*, p349.

<sup>276</sup> *Ibid*, p349.

<sup>277</sup> Gillian K Hadfield, ‘A Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualisation of Rational Choice in Contract Law’ (1998) 146 *University of Pennsylvania Law Review* 1235.

<sup>278</sup> *Ibid*, p1247, 1248.

establishing voluntary and informed choice, the inquiry undertaken by a court when petitioned to intervene is shaped around fact of choice, not the wisdom or consequences of the choice that was in fact made, or the question of whether the choice in fact enhanced or reduced the claimant's autonomy or welfare.<sup>279</sup> Hadfield argued that a better juristic understanding of 'rational autonomous choice' would require reasons beyond the fact of contemporaneous choice when the contract was made to justify the enforcement of obligations,<sup>280</sup> to recognise the complexities of what it means to choose and the evolving nature of the parties' rational choice(s).

The conventional commitment to contractual enforcement based on consent, resting on the belief that respecting the rational choices of 'autonomous consumers' is morally justified because it fosters autonomy and increases individual and societal wellbeing has also been criticised on the basis that it 'rests on a severely inadequate picture of human nature and human motivation.'<sup>281</sup> In her critique of the moral value which Posner attached to consent, West argued that the rational, autonomous consumer paradigm 'defines the problem of victimisation out of existence'<sup>282</sup> by allowing the experiences of 'wealth-maximising winners' to shape the normative context in which we judge the enforceability of transactions:

Posner teaches us that when the risk of a loss is voluntarily assumed, the ultimate suffering of that loss is consensual and we consequently need concern ourselves no more with losers in the market than with those in a lottery.<sup>283</sup>

West argued that legal theories based on rational choice minimise, trivialise and ignore the differences between 'winners' and 'losers', describing the theoretical step of 'dismiss[ing] losers on the basis of a facile judgment that they consented to play the game'<sup>284</sup> as 'morally indefensible'. Rather than viewing the 'failure' of these losers as a matter of individual responsibility, West argued that, in circumstances where the assumption of risk is not

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<sup>279</sup> Hadfield (1998), above, p1248.

<sup>280</sup> For example, reliance on a policy interest in the protection of the convention of contractual choice, *ibid*, 1251. The 'expressive' approach advocated by Hadfield would distinguish between different types of contract depending on whether the contract was framed as a deliberate trade in future risk allocation (in which case contract choice could be collapsed with contemporaneous choice); in other cases, choice would (only) be the starting point for the enforcement of contractual obligations.

<sup>281</sup> West (1985), p391, critiquing Posner's theory of rational choice, see Posner, above; RA Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 *J Legal Studies* 103; RA Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman' (1980) 9 *J Legal Studies* 243; RA Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 *Hofstra L R* 487.

<sup>282</sup> West (1985), p391.

<sup>283</sup> *Ibid*, p409.

<sup>284</sup> *Ibid*, p410.

rational, justified, morally appealing and so worthy of respect, the community has a moral responsibility to intervene.

This community responsibility is underlined, in the case of housing equity transactions, by the extent to which the decision to spend housing equity is embedded in social contexts and political and policy agendas.<sup>285</sup> While the idea of rational, self-interested, utility maximising, autonomous individuals is compelling,<sup>286</sup> the reality of decision-making is that it does not involve isolated choices, but is embedded in social contexts; decision-making subjects are not ‘isolated and ever-consciously rational’, but social and pragmatic.<sup>287</sup> This portrait of the legal subject as part of an ongoing relational dynamic, who operates within a social network rather than as an atomised individual,<sup>288</sup> echoes a fundamental tenet of relational feminism<sup>289</sup> and enables us to recognise the reality of social context without diminishing the actor’s agency.

The proposition that ‘thinking’ and decision-making are not isolated but contextual and situated underpins arguments for contextual approaches to law and legal theory.<sup>290</sup> Minow and Spelman argued that, in addition to its case-by-case relevance, contextual analyses also signal patterns of difference from the dominant norm, and thus ‘expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written.’<sup>291</sup> They argued that since all rules must be shaped against some context,<sup>292</sup> the ‘default’ choice of context ‘implies a preference for one set of analytic categories rather than another’;<sup>293</sup> for example, for ‘autonomous individualism’ over group-based claims for legal protection or social justice.

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<sup>285</sup> See Chapters One, Two and Three.

<sup>286</sup> ‘it matches the world view of most people living in advanced capitalist democracies, which includes the ultimate importance of agency (whatever structural constraints may exist); the conjoint nature of modern society, autonomy, and rational thinking; and the everyday notions of the inescapable need to balance pros and cons’, Pescosolido, above, p1100. The impacts of social structure and context in decision-making theory are recognised in the ‘social organisation strategy’, which identifies social interaction as the primary building block for decision-making.

<sup>287</sup> *Ibid*, p1103.

<sup>288</sup> *Ibid*.

<sup>289</sup> See discussion of ‘autonomy’ in Chapter Five, section 3.

<sup>290</sup> ‘Thinking is something particular people do as they try to resolve specific problems in specific situations’, M Minow & EV Spelman, ‘In Context’ (1989) 63 *S Cal L Rev* 1597 at 1600.

<sup>291</sup> *Ibid*, p1601.

<sup>292</sup> *Ibid*, p1605.

<sup>293</sup> *Ibid*, p1605.

Considering legal subjects in context is also crucial when reasoning about the morality of legal intervention (or non-intervention) in respect of risks or harms. Gilligan argued that ‘Only when substance is given to the skeletal lives of hypothetical people is it possible to consider the social injustice that their moral problems may reflect and to imagine the individual suffering their occurrence may signify or their resolution engender.’<sup>294</sup> In the context of housing equity transactions, a contextual approach would seek to capture the specific vulnerabilities of the older owner (including situational vulnerabilities such as the impact of adverse transactions) within the legal frameworks that regulate the creation, content and enforcement of obligations, so that law can seek to ‘capture the complexities of [the] moral and political situations and thereby address [the] moral and political dilemmas more responsively and responsibly.’<sup>295</sup> A crucial question, of course, is which contexts should matter. Minow and Spelman argued that:

in many contemporary political and legal discussions, the demand to look at the context often means a demand to look at the structures of power, gender, race, or class relationships, or the effects of age and physical vulnerability on people’s abilities to protect themselves...against the backdrop – the context by default – created by Western liberal legal and political traditions that emphasise as ideals individual freedom, equality, universal reason, and abstract principles.<sup>296</sup>

One aim of this analytical move is to challenge false claims of universality, and so expose the role of power in controlling definitions of difference to work in the favour of the dominant group, thereby providing a basis for critical scrutiny of difference based on gender, race, class or age.<sup>297</sup>

In attempting to re-think the question of who bears responsibility for losses resulting from adverse transactions, and when the ‘mistakes’ that individuals make merit legal intervention,<sup>298</sup> one approach is to focus on those cases which are likely to result in a substantial welfare loss. For example, where the neoclassical approach to law and economics relies on the assumptions that consumers who ‘lose’ in an individual transaction will learn from their mistakes and from those made by others, a contextual analysis recognises that this

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<sup>294</sup> C Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1982), p100.

<sup>295</sup> Minow & Spelman, 1615.

<sup>296</sup> *Ibid*, 1651.

<sup>297</sup> *Ibid*.

<sup>298</sup> O Bar-Gill, ‘The Behavioural Economics of Consumer Contracts’, in RA Epstein & O Bar-Gill, *Consumer Contracts: Behavioural Economics vs. Neoclassical Economics* (NYU School of Law, NYU Law and Economics Working Papers, Paper 91, 2007), p1; available online at <http://lsr.nellco.org/nyu/lewp/papers/91>.

is not universally true. An older owner who experiences an adverse housing equity transaction is likely to have little time and no opportunity to recover the losses and re-engage in the market to repeat the exercise, thus limiting their ‘intrapersonal learning’,<sup>299</sup> while ‘interpersonal learning’ amongst marginal and older consumers is inhibited by a range of factors including social isolation, being less likely to complain and lack of access to a wider community with financial capability/experience in the area of specialised housing equity products.<sup>300</sup> Bar-Gill argued that consumer learning is further inhibited by the different uses that individuals may put to the same product,<sup>301</sup> also underlining the need for contextual understandings of the needs, objectives and circumstances of the individual consumer in the particular transaction.<sup>302</sup>

Contextual analyses do not rely on demonstrating that the individual who has suffered a loss lacked capacity to consent, was ‘weak’ or incapable, but locate the grounds for enforcing the contract, or not, in a real measure of the transaction, including situational vulnerabilities (marginality or inequality) affecting consent, and the welfare consequences of enforcement (the impact) for that person. The inadequacy of ‘consent’ as a basis for individual responsibility, and the moral argument for a shift away from individual (self-) responsibility, towards a more community oriented framework when dealing with serious social needs, have also been central themes of Fineman’s work on autonomy,<sup>303</sup> dependency,<sup>304</sup> and most recently vulnerability. Fineman is critical of the rhetorical use of privatisation (‘self-responsibility’) as a solution to complicated social problems which reflect persistent inequality and poverty.<sup>305</sup> As the discussion in previous chapters has show, the political and

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<sup>299</sup> Bar-Gill argued that how quickly consumers learn depends on the individual’s ‘intrapersonal’ context, including how frequently the product is used and how frequently the risk materialises; and on the ‘interpersonal’ context, *ibid*, pp5-6.

<sup>300</sup> For discussions of the limitations of ‘interpersonal’ learning, see sections 3, 4 & 5 above.

<sup>301</sup> Bar-Gill, above, p2. Bar-Gill reinforced his claims concerning the significance of consumer mistakes by highlighting sellers’ strategic responses to these mistakes, evidenced in the continual emergence of new types of product. In the case of housing equity transactions, one of the limitations of the regulatory approach flows from the emergence of new types of product, targeted at older owners and structured to fall outside the current parameters of the FSA’s regulatory umbrella; see Chapter Nine, section 4(a).

<sup>302</sup> See Chapter Nine for discussion of circumstances in which tailoring advice to the needs, objectives and circumstances of the owner have formed part of the provider’s responsibility in certain housing equity transactions. Bar-Gill also argued for disclosure mandates that address not only objective product attributes, but the consumer’s individual use of the product, *ibid*, pp4-5.

<sup>303</sup> Fineman, like many other feminist scholars, has critiqued the idealisation of the values of independence, autonomy and self-sufficiency for the liberal subject as ‘empirically unrealistic and unrealizable’, M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1 at 11.

<sup>304</sup> See for example, MA Fineman, ‘Contract and Care’ (2000) 76 *Chicago-Kent Law Review* 1403; MA Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004).

<sup>305</sup> Fineman (2000), above, p1405.

policy moves that have transferred responsibility for financial provision in old age onto private individuals, through self-provision and specifically through housing equity release, provide a paradigmatic example of the ways in which the state has asserted ‘that the private market can better address historically public issues than can the public government’.<sup>306</sup> Fineman criticised the weight attached to ‘consent’ as the justification for self-responsibility within this ‘private’ market, and as ‘the basis for withholding public (or other) aid from someone in a needy position’.<sup>307</sup>

The argument may be phrased as getting what one ‘asked for’ or as the justice of having to ‘lie in the bed’ that one has ‘made’. The idea is the individual circumstances are the result of individual choices, freely made, and, therefore, that consequences, even if negative, are justified.<sup>308</sup>

Within this rhetoric, the state and the market avoid responsibility for inequalities by holding the individual to be ‘self-responsible’ not only for their specific contractual choices, but for the ‘life circumstances’ they find themselves in, thus ignoring the significant role of contextual or situational vulnerabilities, as well as the policies that constraining individual choices by ‘funnel[ing] decisions into prescribed channels and...operat[ing] in a practical and symbolic manner to limit, or practically eliminate, options’.<sup>309</sup>

Fineman argued that the idealised paradigm of the autonomous self-responsible consumer is given effect as a dominant norm by the ‘public’ support of private contracting through the legal system.<sup>310</sup> Yet, to the extent that housing equity transactions have come to serve an essential public function in society – enabling self-provision for financial well-being after retirement in an economic and policy landscape where this is increasingly necessary – the ways in which they are supported by legal institutions is a crucial pillar in the administration of justice, particularly for those older owners who are already vulnerable due to existing inequalities. If the institutions of the state (including law) are to play a role in supporting the policy drive towards equity release after retirement, they must be responsive to the consequences of these transactions,<sup>311</sup> including thinking seriously about the responsibilities of the market and the state for the risks inherent to such transactions.

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<sup>306</sup> *Ibid*, p1405.

<sup>307</sup> *Ibid*, p1419.

<sup>308</sup> *Ibid*.

<sup>309</sup> *Ibid*, p1419.

<sup>310</sup> *Ibid*, p1424.

<sup>311</sup> This responsibility is recognised in the context of FSA regulation of some housing equity transactions; see Chapter Nine.



Fineman's most recent work on 'vulnerable legal subjects'<sup>312</sup> provides a valuable critical framework for conceptualising this shift from older owner as autonomous consumer to consumers as vulnerable legal subjects. Traditional legal analyses (utilising the reasoning paths offered by property law and contract) have long been trapped in the autonomy/capacity dilemma, where the only alternative to being an autonomous consumer taking responsibility for one's own choices, was incapacity.<sup>313</sup> Fineman's 'vulnerable legal subject' offers the possibility of shifting from the restrictive domain of autonomy/capacity, to a new paradigm of vulnerability/responsibility. It challenges the rhetoric of non-intervention, the 'idealisation' of contract and the 'reification of individual choice'; and accepts the potential for the broader socio-economic and political contexts in which parties (eg older owners) make decisions (to enter housing equity transactions) to perpetuate inequality. Fineman's strategy is rooted in the human experiences of 'real-life subjects',<sup>314</sup> and seeks to move beyond the 'sameness of treatment' response to inequality to emphasise the particular vulnerabilities of older owners as a category of consumer, and so to devise appropriate responses to 'past circumstances and future obligations' – that is, to the circumstances, needs and objectives which drive these transactions and which can render older owners vulnerable in this context, as well as to the impact of the transaction on their future wellbeing.

Finally, by negotiating the 'theoretical and empirical pitfalls' that arise from the heterogeneity of identity groups – including the relative privilege enjoyed by some members of the group – Fineman's theory seeks to offer a 'universal' strategy to address vulnerabilities. Applying the idea of universality to the context of housing equity, it is possible to recognise that while sources of vulnerability are to some extent specific to older owners they are not experienced by *all* older owners, but tend to be concentrated amongst marginal owners; and that younger, marginal, owners are also exposed to similar vulnerabilities due to their inequalities. Since the vulnerability approach emphasises the *possibility* of harm, its approach is universal in the sense that 'Constant and variable throughout life, individual vulnerability encompasses not only damage that has been done in the past and speculative harms of the distant future, but also the possibility of immediate

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<sup>312</sup> As articulated in M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

<sup>313</sup> This dilemma is particularly clear in the context of 'undue influence' doctrine; see Chapter Ten.

<sup>314</sup> Fineman (2008), above, p10.

harm.<sup>315</sup> This susceptibility to harm is conceptualised as fundamental to the human condition. Fineman argued that

We are beings who live with the ever-present possibility that our needs and circumstances will change. On an individual level, the concept of vulnerability (unlike that of liberal autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe.<sup>316</sup>

Re-conceiving older owners as vulnerable subjects offers an alternative way out of the dichotomy of autonomy and dependence. Fineman claimed that her new understanding of vulnerability, which is not bound to ideas of ‘victimhood, deprivation, dependency, or pathology’<sup>317</sup> but describes ‘a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility’,<sup>318</sup> is ‘freed from its limited and negative associations [to become] a powerful conceptual tool.’<sup>319</sup> This ‘vulnerable legal subject’ also resonates with the concept of risk, with its universal character ‘understood as a state of constant possibility of harm.’<sup>320</sup> In this respect, vulnerability is both universal and particular, ‘experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command’, and clearly present in the differential exposure to risk for older owners, especially where transactional vulnerabilities are ‘situational’ or ‘impact-based’.

This chapter’s analyses of older owners in financial transactions has revealed the distinctive vulnerabilities that housing equity transactions, and the risks they carry, engender for older owners; and also the importance of grounding any claim to ‘difference’ in situational vulnerabilities such as the differential impact of adverse financial transactions on (marginal) older people (as opposed to specific claims that older people lack autonomy or are incapable of contracting). This reflects the ‘life-course’ approach of the vulnerability thesis: while the lived realities of human subjects involve a range of ‘possible stages’ within the ‘normal’ lifespan, the adult liberal subject reflects only one such stage,<sup>321</sup> whereas ‘human reality

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<sup>315</sup> *Ibid*, p12.

<sup>316</sup> *Ibid*.

<sup>317</sup> *Ibid*, p8.

<sup>318</sup> *Ibid*.

<sup>319</sup> *Ibid*, pp8-9.

<sup>320</sup> *Ibid*.

<sup>321</sup> *Ibid*, pp11-12. ‘The vulnerable subject approach does what the one-dimensional liberal subject approach cannot: it embodies the fact that human reality encompasses a wide range of differing and interdependent abilities over the span of a lifetime. The vulnerability approach recognises that individuals are anchored at each

encompasses a wide range of differing and interdependent abilities over the span of a lifetime'.<sup>322</sup> Fineman's approach places particular emphasis on the responsibilities of the state<sup>323</sup> to 'ensure that institutions and structures within its control do not inappropriately benefit or disadvantage certain members of society.'<sup>324</sup> The remaining chapters of this book take forward the call for more responsive and responsible responses to vulnerability by applying the discursive tropes of vulnerability and responsibility to consider the extent to which English law has responded to the vulnerabilities of older owners in housing equity transactions. The remaining chapters consider how the axes of legal analyses could be re-calibrated to reflect the realities of older owners' vulnerabilities, and the responsibilities of credit providers (as agents of financial market institutions) and legal institutions (as organs of the state) in respect of the risks of adverse transactions. Where the liberal approach emphasises the individual responsibility of the consumer, this analysis argues that the state, through legal institutions, bears responsibilities in respect of vulnerable older owners to ensure that they are treated equitably.<sup>325</sup>

## **(8) Conclusions**

The socio-economic and political environments of aging in the early twenty-first century mean that, increasingly, many older owners have no choice but to engage with some form of risk in relation to the use (or not) of home equity after retirement. The expectation that home owners will accumulate housing wealth during their lives to spend on welfare after retirement, and demonstrate individual responsibility as 'active subjects' under neoliberal governmentality, provide an important context for analysis of the ideas of responsibility and vulnerability as they are applied to older people in the current political and policy landscape. The dominant themes in liberal discourses reflect a particular construction of the older owner as a reflexive risk subject, 'free' to negotiate choices as an autonomous consumer. Yet, the extent to which the general population – and, by extension, older owners – are likely to be

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end of their lives by dependency and the absence of capacity...Constant and variable throughout life, individual vulnerability encompasses not only damage that has been done in the past and speculative harms of the distant future, but also the possibility of immediate harm. We are beings who live with the ever-present possibility that our needs and circumstances will change. On an individual level, the concept of vulnerability (unlike that of liberal autonomy) captures this present potential for each of us to become dependent based upon our persistent susceptibility to misfortune and catastrophe', *ibid*, p12.

<sup>322</sup> *Ibid*, p12.

<sup>323</sup> In the broad sense which includes the 'organised and official set of linked institutions that hold coercive power, including the ability to make and implement mandatory legal rules', *ibid*, p6, footnote 14.

<sup>324</sup> *Ibid*, p20.

<sup>325</sup> *Ibid*, p7.

able to effectively plan for (and finance) their futures is clearly linked to the social and cultural resources at their disposal, as well as to their financial and legal capabilities to understand complex products.

The ‘autonomous consumer’ paradigm has been challenged by the recent global financial crisis, which has demonstrated the injustices that can result from assumptions of self-responsibility in relation to risky financial transactions, and has called into question the ‘overly optimistic view of self-regulating markets’.<sup>326</sup> Even before the ‘credit crunch’ which started in 2007, the relationship between risk, responsibility and regulation had emerged as an important theme in UK policy,<sup>327</sup> with the growing reach of the Financial Services Authority (FSA) providing an example of use of (albeit ‘light-touch’) regulatory approaches as a response to the risks associated with financial transactions. Since the financial crisis, the UK government has made an explicit commitment to a more responsible regulatory regime,<sup>328</sup> opening up the field of analysis for the prospect of re-conceptualising ‘owners as consumers’, including in particular, ‘older owners as consumers’, as ‘vulnerable legal subjects’.

One of the prominent features of the latest housing market and general economic recessions is the impact of harms that begin with individual default and consumer losses for society as a whole, and the welfare budget in particular. It is with an eye to these wider social costs that – while recognising the costs and risks of regulation/legal intervention – we need to scrutinise carefully the circumstances in which the scale and scope of potentially adverse impacts justify these costs and risks, and support a moral argument that such costs and risks as must be borne are distributed equitably across the state, the market and the individual, rather than falling to the ‘self-responsibility’ of the consumer. This book argues that the differential impact of adverse outcomes on older owner is one such circumstance, not least because the ‘externalities’ (for example, the requirement of financial support from family, friends or the state) are particularly evident.

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<sup>326</sup> RP Malloy, ‘Mortgage Market Reform and the Fallacy of Self-Correcting Markets’ (2009) 30 *Pace Law Review* 79.

<sup>327</sup> Better Regulation Commission, *Risk, Responsibility and Regulation: Whose Risk is it Anyway?* (London: Cabinet Office, 2006).

<sup>328</sup> See ‘Statement to the House of Commons by the Financial Secretary to the Treasury, Mark Hoban MP, on Reforming the Institutional Framework for Financial Regulation’, 17 June 2010; online at [http://www.hm-treasury.gov.uk/statement\\_fst\\_170610.htm](http://www.hm-treasury.gov.uk/statement_fst_170610.htm); HM Treasury, *A new approach to financial regulation: judgment, focus and stability* (Cm 7874), (London: TSO, 2010); online at [http://www.hm-treasury.gov.uk/d/consult\\_financial\\_regulation\\_condoc.pdf](http://www.hm-treasury.gov.uk/d/consult_financial_regulation_condoc.pdf).

The remaining chapters of this book focus in more detail on the nature and extent of legal interventions in the creation, content and consequences of housing equity transactions. While it is necessary that any case for legal intervention in commercial activities must be ‘market-specific’<sup>329</sup> – justified by reference to typical patterns of knowledge, skills, risks and costs between parties to a specific type of transaction – this chapter has identified some of the overarching and intersecting themes which cut across the different types of transaction by which older owners may seek to leverage their housing wealth. There is also a wide spectrum of possible legal interventions, which apply at different stages of the transaction (creation, duration, enforcement), and with varying degrees along a spectrum running from minimal interference<sup>330</sup> to bars against enforcement, and encompassing procedural and substantive, common law and regulatory initiatives. Finally, the method utilised to access funds in retirement – from conventional secured and unsecured borrowing to bespoke equity release products – anchors the transaction in a particular legal context that shapes the underlying norms that will govern the relationship. As the following chapters will demonstrate, these ‘default’ norms are also significant in determining the likely success of arguments based in the concepts of vulnerability and responsibility.

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<sup>329</sup> Bar-Gill, above, p40.

<sup>330</sup> Bar-Gill described disclosure mandates as ‘the mildest form of legal intervention, legal intervention that facilitates rather than obstructs the efficient operation of markets’; *ibid.*