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Foreword

Message from the Editor-in-Chief

This year I took over the running of the Review from Corey Krohman. It has been quite an eye-opener in terms of the work and effort required to organise such an endeavour and I can only offer my respect to Editors past and present who have contributed. I would like to thank the editorial team for their efforts on another very sizeable volume. I would also like to thank the staff who also make the North East Law Review possible: Professor Christopher Rodgers, head of school; and Dr Christine Beuermann and Ms Lida Pitsillidou whose work as staff liaisons has been invaluable. Thanks also go to Mr Richard Hogg for his graphic design work for the covers and Tiffany Kwok for the posters.

I hope readers of this volume will learn something about the substantive law, but also something about the communication of it. Law, like many things, throws up ideas, concepts, conflicts and, of course, solutions, but all of this is to naught unless it can be communicated. It is a difficult challenge to seek to persuade someone to take one's point of view, which is why the process of writing and editing is so painstaking. The text must explain, reason and carry the reader with it without distractions from errors. I am delighted to present the many articles which do just that.

Derek Whayman

Message from the Deputy Editor

I welcome our readers, both new and returning, to the latest volume of the North East Law Review. As has been the case in previous years, we are proud to present the finest articles produced by Newcastle Law School students over the last academic year. It is also with great pleasure that we are once again able to present a guest publication, this time from Calvin Walker of Northumbria University. It is my sincere hope that future volumes will continue to attract similar contributions from across the North East in the years to come and develop this forum for student achievement further still.

I too would like to join Derek in thanking all the members of staff who have kindly provided their time and expertise to aid in the publication of this volume, as their continued support has been invaluable. My thanks go also to the editorial team, without whom the continued existence of this student-led journal would not be possible. Particular thanks are also owed to Tiffany Kwok for her graphic design work this year. In the absence of her assistance with our poster campaign I would surely have found my own artistic skills to be somewhat lacking.

Michael Lamb

The Editorial Board would like to thank all of the staff and students from Newcastle University who have helped in the creation of this issue. Without their support, the North East Law Review would not be possible.

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Please note that the views expressed by the contributors in this journal are not necessarily those of the Editors or of the Review. Whilst every effort has been made to ensure that the information contained in the Review is correct, the Editors and the Review do not accept any responsibility for any errors or omissions, or for any resulting consequences.

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A HOBBSIAN ANALYSIS OF THE NEW GLOBAL SUPER-RICH

Calvin Walker*

1 INTRODUCTION

Thomas Hobbes' political theory is part of the social contract tradition, asserting that civil society owes its existence to a covenant between individuals to the effect that each will submit to the governance of a sovereign entity.¹ The theory, as expressed in his seminal work *Leviathan*, will be considered alongside a TED talk given by Chrystia Freeland entitled 'Rise of the New Global Super-Rich',² in which Freeland presents the global phenomenon of 'Economic Inequality' as the major social dilemma of our generation. Jean-Jacques Rousseau, a key figure in the social contract tradition, was critical of Economic Inequality in a number of his works. In light of his criticisms it is to be shown that Hobbes' political theory is flawed in its handling of the seditious influences of 'Pride' and Economic Inequality. It will also be argued that the implications Hobbes' theory has for the political power of the individual shows that it is fundamentally at odds with the political reality of our time, and is of limited utility as a solution to the problem Freeland describes.

2 HOBBS' THEORY AND AIMS

Hobbes was impressed by the scientific method entailed in geometry, which had a significant impact on his philosophical methodology; Hobbes' application of the scientific method to social theory arguably justifies his recognition as 'the inventor of social science as that term has been understood in the modern world.'³ In geometric terms we may define a circle as 'the figure produced by one end of a straight line moving continuously while the other end remains

fixed'.⁴ Hobbes would have us use comparable definitions in all endeavours; we come to understand a watch by taking it apart.⁵ A working definition of the state should therefore give us an idea of how it was produced from its constituent elements. The traditional frontispiece to *Leviathan* depicts an imposing, monarchical figure seemingly made up of a multitude of individuals; this is representative of the fact that, in Hobbes' conception, individual humans were the building blocks of 'Leviathan', a mortal god charged with the task of civil governance.⁶ Thus in order to understand what the state is we must understand how it could be produced from an uncivilised multitude of humans, and this in turn requires us to have an understanding of human nature. This is the task with which Hobbes concerns himself in *Leviathan*.

3 THE STATE OF NATURE

Hobbes reasoned that, without civil society, individuals would exist in the 'state of nature'; a condition entailing war of all against all.⁷ This war was not necessarily continuous battle, but rather a commonly known willingness to resort to combat where necessary.⁸ Hobbes was at pains to describe this state as being most abhorrent; the life of man was said to be 'solitary, poor, nasty, brutish and short'.⁹ Pre-political society is depicted in this way in order to demonstrate the importance of supporting civil government, as Hobbes sought to avoid anarchy, the dissolution of the state, at all costs.¹⁰ Hobbes did not regard his view as unduly pessimistic; he observed that in civil society, although there are myriad laws forbidding the likes of theft, when leaving their homes

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¹ Thomas Hobbes, *Leviathan* (first published 1651, OUP 2008) 114.

² Chrystia Freeland, 'The Rise of the New Global Super-Rich' *TED Talk* (June 2013)

<http://www.ted.com/talks/chrystia_freeland_the_rise_of_the_new_global_super_rich.html> accessed 18 November 2015.

³ D D Raphael, *Hobbes: Morals and Politics* (Allen & Unwin 1977) 18.

⁴ *ibid* 19.

⁵ Thomas Hobbes, *Of Man and Citizen (De Homine and De Cive)* (Bernard Gert ed, 3rd edn, Hackett 1998) 98.

⁶ Hobbes (n 1) 114.

⁷ *ibid* 84.

⁸ *ibid*.

⁹ *ibid*.

¹⁰ Raphael (n 3) 16.

individuals lock their doors to guard against intruders through fear of their property being stolen.¹¹ What, Hobbes asks, does this say of our view of our fellow man?¹²

Hobbes is often accused of taking a dim view of human nature. Rousseau in particular was keen to avoid the conclusion that man was naturally wicked, a conclusion he viewed Hobbes as reaching.¹³ Hobbes recognises a hierarchy of interests; he treats self-preservation as of primary importance, ahead of conjugal affection (ranking second), and the attainment of riches and means of living which is of tertiary importance.¹⁴ Hobbes asserts that individuals are born essentially equal in terms of physical and mental capabilities.¹⁵ This equality ultimately breeds an 'equality of hope in the attaining of our ends'¹⁶ and such ends correspond to our hierarchy. Given these equalities, Hobbes believed it inevitable that competition would ensue as there is a relative scarcity of goods; two individuals must naturally come to desire the same thing, but both could not possess it.¹⁷ In resolving the competition, one would tend to 'kill, subdue, supplant or repel the other'.¹⁸ Hobbes' reasoning in this regard does not seem so unrealistic. Rawls notes that the situation can arise even where our behaviour is reasonable and our wants modest: 'the point is: we don't have to be monsters to be in deep trouble'.¹⁹ It is through a desire for peace and a fear of death in this state of nature that leads men to ultimately seek civil association.²⁰

In the state of nature, there were three main causes for conflict: competition as described; a distrust of one another due to the known willingness to fight; and finally what Hobbes describes as 'Glory'.²¹ Glory is that which causes men to battle for the sake of reputation, rather than any tangible need.²² Hobbes

hereby recognises that a major aspect of human nature is a desire not only to be superior but to be viewed as such. Hobbes states that this glory may properly vain-glory where it is 'grounded on the flattery of others'.²³ Vain-glory for Hobbes is synonymous with Pride, and it is that passion 'whose violence, or continuance, maketh madness'.²⁴ Hobbes' view of Pride is clearly a negative one, something that contributes to the ills of the state of nature, and must therefore be controlled in civil society. It is important to bear this concept in mind, as it relates to the critique of Economic Inequality.

4 ECONOMIC INEQUALITY

Professor Raphael commented that great philosophy comes as a response to an 'important real-life problem'.²⁵ The problem Hobbes faced was civil war.²⁶ Chrystia Freeland presents 'surging income inequality', which I shall refer to as Economic Inequality, as the major social dilemma of our generation. Hobbes' continued relevance and utility will be gauged in relation to the problem as presented by Freeland.

In seeking to persuade us that 'we need a new New-Deal', Freeland's focus is on a phenomenon which she asserts to be global, but which is most apparent in the UK and the US. She observes a disparity in wealth between those at the very top, the 1%, and everyone else, the 99%. To evince the starkness of contrast between those at the top and those at the bottom, in the USA at least, Freeland adduces a statistic produced by Robert Reich in 2005. The statistic is to the effect that the combined wealth of two of the richest men in America, Bill Gates and Warren Buffett, was equivalent to the wealth of the bottom 40% of Americans. Aggregated, their wealth equalled that of

¹¹ Hobbes (n 1) 84.

¹² *ibid.*

¹³ Jean-Jacques Rousseau, *The Discourses and Other Early Political Writings* (Victor Gourevitch tr, 5th edn, CUP 2002) 151.

¹⁴ Hobbes (n 1) 226.

¹⁵ *ibid* 82.

¹⁶ *ibid* 83.

¹⁷ *ibid.*

¹⁸ *ibid* 66.

¹⁹ John Rawls, *Lectures on the History of Political Philosophy* (Samuel Freeman ed, Harvard University Press 2008) 51.

²⁰ Hobbes (n 1) 66.

²¹ *ibid* 83.

²² *ibid.*

²³ *ibid* 38.

²⁴ *ibid* 49.

²⁵ Raphael (n 3) 12.

²⁶ *ibid* 16.

120 million people.²⁷ Freeland also noted that the combined wealth of those currently on the Forbes 400 list, which details America's 400 richest individuals, has increased fivefold since 1992, whilst the middle class has seen no comparable growth,²⁸ a sign that the chasm seems only to widen. Freeland seems to have two principal concerns: first, that there is an evident risk of those at the top, whom she calls 'plutocrats', using their 'economic nous' to manipulate the system to their own ends; and second, that the lack of an 'economic rule that automatically translates increased economic growth into widely shared prosperity'²⁹ may lead to a 'dystopia in which a few geniuses invent Google and its ilk and everyone else is employed giving them massages'.³⁰ Freeland's principal concerns are to an extent embodied in the critique of Jean-Jacques Rousseau who, some 250 years earlier, also sought to point out the social ills caused by Economic Inequality.

Rousseau, too, was deeply concerned with the problems that could be caused by Economic Inequality; he remarked that 'as soon as it was found useful for one to have provisions for two, equality disappeared [and] slavery and misery were soon seen to sprout and grow together with the harvests'.³¹ Thus, for Rousseau, Economic Inequality has implications both for our happiness and our liberty. The focus here is on its effect on happiness.

5 ADVERSE EFFECT ON HAPPINESS

In order to appreciate the element of Rousseau's critique relating to happiness, the antithesis of which, misery, consists 'not in the lack of things, but in the needs which they inspire',³² we must understand his notion of '*Amour Propre*'. Rousseau does not appear to have created this term; it has indeed been reputed to be a piece of 'Hobbesian Psychology'.³³ The term, as

Rousseau uses it, is multifaceted: it is only that part which produces an 'ardour to be talked about'³⁴ and the 'frenzy to achieve distinction'³⁵ that is to be discussed here. The similarities between Hobbesian Pride and Rousseau's *Amour Propre* are substantial. Rousseau's concept relates to our nature: it is a passion that exists within us causing a desire to achieve recognition as superior to our peers³⁶ and he believed this desire to be the source of all our vices.³⁷ As has already been seen, Pride for Hobbes was a vicious influence of a like nature, which contributed to the harsh competitions in the state of nature.³⁸ Believing man to be naturally good, Rousseau viewed the *Amour Propre* as a predominantly unnatural passion; although he concedes that the root lies in the natural, pre-political condition, it is implicit in his river analogy that society exacerbates the *Amour Propre*:

[T]heir source, indeed, is natural; but they have been swollen by a thousand other streams; they are a great river which is constantly growing, one in which we can scarcely find a single drop of the original stream.³⁹

Rousseau further believed that the means by which we seek to satisfy our desire for recognition are largely determined by social institutions⁴⁰ for they shape the metaphorical riverbed. Professor Frederick Neuhaus comments that in this way Rousseau views human wants as extremely malleable.⁴¹ Rousseau's concern then is that, in a society which regards wealth as representative of status, it is very difficult for individuals to satiate their *Amour Propre* in the face of substantial disparities in wealth.⁴² The argument reduces recognition so that it is effectively a commodity. Since superiority is a relative concept, it is notionally impossible for everyone to be superior to their peers and thus there is a scarcity of the desired

²⁷ Freeland (n 2).

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

³¹ Rousseau, *The Discourses and Other Early Political Writings* (n 13) 167.

³² Jean-Jacques Rousseau, *Émile* (Barbara Foxley tr, Everyman's Library 1972) 45.

³³ Peter J Steinberger, 'Hobbes, Rousseau and the Modern Conception of the State' (2008) 70 J Pol 595, 597.

³⁴ Rousseau, *The Discourses and Other Early Political Writings* (n 13) 184.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Gourevitch tr, 12th edn, CUP 2012) 20.

³⁸ Hobbes (n 1) 83.

³⁹ Rousseau, *Émile* (n 32) 173.

⁴⁰ Frederick Neuhaus, 'Rousseau's Critique of Economic Inequality' (2013) 41 Phil & Pub Aff 193, 206.

⁴¹ *ibid.* 214.

⁴² *ibid.*

commodity and consequently competition for it.⁴³ Neuhouser points out that, even once superiority is obtained, the issue of ‘keeping up with the Joneses’ arises.⁴⁴ It is not enough to get ahead, one must ever increase their superiority lest they be surpassed by a competitor. One might conclude, as Bill Waterson’s Calvin did:

Everyone seeks happiness. Not me, though.
That’s the difference between me and the rest
of the world. Happiness isn’t good enough for
me. I demand euphoria.⁴⁵

The Dystopia so feared by Freeland would presumably be despised by Rousseau, as therein the notion of wealth as an indicator of status could not be more pronounced, and the frustration of the *Amour Propre* would be all the more severe.

The issue of frustrated *Amour Propre* is troubling for Rousseau due to his view of the role of the state. As a social contract theorist Rousseau, like Hobbes, notionally believed the state to have been constituted by the mutual covenant of individuals in a pre-political condition.⁴⁶ However, in contrast to Hobbes, Rousseau believed that the state itself was bound, by contract, to the individuals⁴⁷ and was obliged to facilitate their desires; facilitation comes through the ‘general will’ which looks always to the common interest.⁴⁸ This is repugnant to Hobbes’ doctrine. Hobbes maintained that, whilst its subjects had limited their freedom by covenant,⁴⁹ the Sovereign retained the freedom all men once had in the state of nature; it is not bound to its subjects as it is clear that individuals have no right of action as against the sovereign power.⁵⁰ It is submitted that whilst the frustration is not troubling for Hobbes in the same sense as for Rousseau, it is plainly troubling if we presuppose a link between *Amour Propre* and Hobbesian Pride, due to Pride’s inherently subversive role in Hobbes’ doctrine.

Although Hobbesian Pride does not explicitly have an unnatural element, as the *Amour Propre* does, the terms are clearly closely related and indeed are essentially synonymous, as Derathe suggested.⁵¹ It is thus contended that Rousseau’s critique shows that Economic Inequality is something a Hobbesian Sovereign should be deeply concerned with. Therefore, in so far as Hobbes’ doctrine fails to address this issue, it is flawed. Of course, if Economic Inequality is problematic here due to unchecked desires for recognition arising out of Pride, Hobbes could evade this criticism by adequately managing this subversive passion. Thus, additionally, it is contended that Hobbes’ method for dealing with Pride is undesirable; and its implications for the political power of the individual shows his doctrine to be at odds with the political reality of our time. These contentions form the ‘Theoretical Objection’ to Hobbes.

6 ECONOMICS IN *LEVIATHAN*

The economic views expressed in *Leviathan* are meagre. It has been said that they offer no theoretical or practical insights⁵² and that they are indeed rather ‘pedestrian’.⁵³ His most relevant views in relation to the issues raised by Freeland and Rousseau are the factors he considers likely to lead to the destruction of a Commonwealth. One such factor is described by Hobbes as a disease whereby:

[T]he treasure of the commonwealth ... is gathered together in too much abundance, in one, or a few private men, by monopolies, or by farms of the public revenues.⁵⁴

It is clear then that the vast wealth held by the likes of Bill Gates and Warren Buffett would in this way be viewed as undesirable by Hobbes. However, looking at other factors expressed in *Leviathan* tends to give the impression that Hobbes’ objection may be based on archaic considerations. For Hobbes, the wealth of a

⁴³ *ibid.*

⁴⁴ *ibid* 205.

⁴⁵ Bill Waterson, *There’s Treasure Everywhere* (Warner 1998) 34.

⁴⁶ Rousseau, *The Social Contract and Other Later Political Writings* (n 37) 49.

⁴⁷ Bertrand Russell, *History of Modern Philosophy* (Allen & Unwin 1961) 535.

⁴⁸ Rousseau, *The Social Contract and Other Later Political Writings* (n 37) 59–60.

⁴⁹ Hobbes (n 1) 114.

⁵⁰ *ibid* 118.

⁵¹ Steinberger (n 33) 597.

⁵² Aaron Levy, ‘Economic Views of Hobbes’ (1954) 15 *J Hist Ideas* 589, 590.

⁵³ *ibid.*

⁵⁴ Hobbes (n 1) 220.

town may be troubling when it becomes self-sufficient and is able to produce an army of its own.⁵⁵ Similarly, corporations may have such wealth as to effectively become lesser commonwealths in their own right. Hobbes takes a dim view of these, likening them to ‘worms in the entrails of a natural man’.⁵⁶ This appears to be the only explicit basis for concern; we may conclude that Hobbes’ only concern regarding disparity in wealth is that the vastly wealthy may have the means to raise an army, and thus rival the commonwealth’s might. It is submitted that the likelihood of corporations using their resources to raise private armies in the 21st century is remote. Bertrand Russell criticised Hobbes as being ‘vigorous, but crude, [wielding] the battle-axe better than the rapier’.⁵⁷ Here Hobbes’ position on disparities in wealth is seen to be crude in comparison to Rousseau’s position. Hobbes falls foul of dealing with the problems arising out of disparate wealth directly through economic policy. It remains to consider whether he adequately addresses the issue at its root.

7 PRIDE

For Hobbes, Pride is to be overcome by suppression; it is an element of man’s nature that is causative of conflict in the state of nature, and as such a Sovereign must stamp it out as it holds men in awe.⁵⁸ The problem with Hobbes’ solution is that, whilst theoretically possible, it is somewhat absurd to suggest that a Sovereign should simultaneously suppress pride whilst also, by its method of government and the social institutions it legitimises, exacerbate its seditious nature. Better to deal with the mere embers than to have to quell the flames. Rousseau has a somewhat more elegant solution to the problem of *Amour Propre*. Hobbes would have us taught to obey, but Rousseau preferred that we be taught to love. Rousseau believed the *Amour Propre* could be repurposed and turned into patriotism, a love for the state. In this way we might transform this vicious disposition into ‘sublime virtue’.⁵⁹ Here Hobbes is revealed to be of a more Machiavellian alignment; Machiavelli asserted that it is better, as a monarch, to be feared than to be loved as

the former is more conducive to obedience.⁶⁰ Machiavelli, like Hobbes, was reviled by his contemporaries. This Machiavellian thread in Hobbes distinguishes him from more liberal thinkers such as Rousseau and Locke.

Due to the apparent contradiction in Hobbes’ method for handling pride, when faced with Rousseau’s critique and given Rousseau’s more comprehensive solution, Hobbes’ method is shown to be undesirable. However, Hobbes’ method of handling pride through suppression plainly does not address the issue of frustrated desire, namely the desire to obtain a recognised standing as superior to others. Hobbes recognises that the state has a role as facilitator in that it offers ‘the removal of some of the circumstances that, if they are not removed, must frustrate Felicity’.⁶¹ Despite this, Hobbes grants individuals no right of redress as against the state for frustration of their happiness; the sole right the individual has against the state is the right to defend their lives.⁶² Moreover, this right is only granted on the basis that considerations of self-preservation were responsible for the formation of the social contract and we cannot be assumed to agree to anything that might bring us harm.⁶³

8 CONCLUSION

Thus Hobbes neither addresses the problem directly through economic provisions in his political theory, nor indirectly by adequately handling the root of the problem: Pride. Further, in allowing no political right of rebellion to an individual whose desires have been frustrated, Hobbes makes implications which do not sit well with current political reality.

It has been suggested that Hobbes took great care to ensure that any ‘seeds of a right of revolution’ that were in his doctrine, as expressed in his earlier works, such as *De Cive*, were removed from his theory in *Leviathan*.⁶⁴ Lopata highlights an important change in Hobbes’ doctrine, in relation to property, between the publications of these two works. *Leviathan* unequivocally states that individuals can in no

⁵⁵ *ibid* 221.

⁵⁶ *ibid*.

⁵⁷ Russell (n 47) 531.

⁵⁸ Hobbes (n 1) 83.

⁵⁹ Rousseau, *The Social Contract and Other Later Political Writings* (n 37) 20.

⁶⁰ Niccolò Machiavelli, *The Prince* (George Bull tr, 5th edn, Penguin 1999) 54.

⁶¹ Michael Oakeshott, ‘An Introduction to Thomas Hobbes’s *Leviathan*’ in Thomas Hobbes, *Leviathan* (Blackwell 1946) 39.

⁶² Hobbes (n 1) 199–200.

⁶³ *ibid*.

⁶⁴ Benjamin B Lopata, ‘Property Theory in Hobbes’ (1973) 1 *Pol Theory* 203, 211.

meaningful sense own property without the existence of a sovereign power,⁶⁵ whereas the doctrine expressed in *De Cive*, Lopata contends, appears to suggest that it is possible.⁶⁶ Lopata concludes that the motive for this alteration is to reduce the potential for rebellion.⁶⁷ This appears logical as Hobbes viewed the existence of property rights enforceable against a Sovereign as a major cause of commonwealth dissolution.⁶⁸ It must be borne in mind, then, in so far as the utility of his doctrine is doubted, that Hobbes' theory had the specific purpose of avoiding anarchy at all costs and the exclusion of rights against the Sovereign was viewed as necessary for this purpose.

The overwhelming consensus, as evinced by such political opinions as those expressed in the broadsides contained in 'The New Leviathan',⁶⁹ is that we are not inclined to submit to state authority unquestioningly:

Not everyone ... likes being a ward of the state.
More and more people, it seems, wonder how
the warders got their keys and force the rest of
us to accept their bidding.⁷⁰

The Sovereign-Individual dynamic is clearly no longer as Hobbes considered it to be. Rousseau's distinction between the 'ferocious spirit of Despotism' and the 'Paternal authority' is illustrative here; he believed the two could not be further apart.⁷¹ It is said that the latter 'looks more to the advantage of the one who obeys than to the utility of the one who commands'.⁷² We might rightly place Hobbes' Leviathan on the 'ferocious spirit' end of the spectrum, preferring as he did 'even the worst Despotism' to anarchy.⁷³ Hobbes

thus appears unduly authoritarian, and contrasts unfavourably with the current, more liberal trend.

Freeland contends that we need a new New-Deal, in order to address the phenomenon she describes. She states that the issue we are currently faced with is similar in scale and scope to the Industrial Revolution which, the world over, required tremendous social change before we could properly 'share the fruits of the ... revolution with the broad swathes of society'.⁷⁴ Her conclusion is that the phenomenon that faces us necessitates comparable change. It is submitted that Hobbes' theory is as an ineffective vehicle for such change as Hobbes asserted individuals had no right to question, or seek change in government.⁷⁵

Rousseau has shown us the undesirability of Economic Inequality, a phenomenon Freeland demonstrates to be prevalent in the present day; we have therefore looked to Hobbes' doctrine in *Leviathan* to see whether it provides a satisfactory solution. The *Leviathan* doctrine's handling of Pride has been shown to be both undesirable and repugnant to current political thought. Furthermore, it has been seen that its economic policies are incomprehensive and thus of limited utility. In so far as it has been asserted to be repugnant, some concession has been given on the basis that *Leviathan* was very much a product of an age 'closer in both time and temperament to the age of the Black Death than to our own'.⁷⁶ It has been argued, though, that its doctrine is not a suitable vehicle for the change that the Economic Inequality phenomenon necessitates, obsessed as it is with maintaining the political status quo.

⁶⁵ Hobbes (n 1) 215.

⁶⁶ Lopata (n 64) 207.

⁶⁷ *ibid* 212.

⁶⁸ Hobbes (n 1) 215.

⁶⁹ Roger Kimball, *The New Leviathan: The State Versus the Individual in the 21st Century* (Encounter 2012).

⁷⁰ *ibid* 16.

⁷¹ Rousseau, *The Discourse and Other Early Political Writings* (n 13) 177.

⁷² *ibid*.

⁷³ Russell (n 47) 536.

⁷⁴ Freeland (n 2).

⁷⁵ Hobbes (n 1) 224.

⁷⁶ Kevin D Williamson, 'Our Hobbesian Left' *National Review* (9 October 2013)

<<http://www.nationalreview.com/article/360721/our-hobbesian-left-kevin-d-williamson>> accessed 19 December 2013.

THE SUCCESS OF THE DOUBLE JEOPARDY PROVISIONS

*Benjamin Leach**

The double jeopardy rule precludes a second prosecution where the offence ‘is in effect the same, or is substantially the same’ as that of a previous prosecution; a successful plea of *autrefois acquit* is a complete bar to prosecution.¹ Ten years after commencement of Part 10 of the Criminal Justice Act 2003 (the ‘double jeopardy provisions’) loosening this rule, we may still pose the question put by Ian Dennis at the time of the Law Commission’s consideration of this controversial issue: ‘Is there a case for rethinking the double jeopardy rule?’² But with the law established and reportedly ‘working well’,³ we are in danger of losing sight of the principles and practical and economic concerns underpinning the rule. The objective of this article is therefore to highlight those principles and concerns, assess their recent developments in scope and shape, and consider whether the provisions – and their judicial application – can be reconciled with, and justified by reference to, those principles. At the outset, we may therefore adopt (and adapt, in light of the legislation) Dennis’ question: should the case of double jeopardy be reopened?

Michelle Edgeley constructs the debate as ‘a tension between ... truth and justice’.⁴ However, the conflict is perhaps more aptly described as between truth and procedural justice. In *R v Dunlop*,⁵ for example, it is hard to conclude that leaving Dunlop – a man who had, after his acquittal, admitted murdering

Julie Hogg⁶ – ‘untouchable on the murder charge’⁷ would result in substantive justice. It achieves, however, procedural justice in that the principle of finality is upheld. This principle was given greater weight in the Law Commission’s report⁸ following the emphasis given to it by respondents to its initial proposals.⁹ Finality, according to the Law Commission and many of its consultees, is intrinsically linked with ‘the principle of limited government and the liberty of the subject’,¹⁰ and, importantly, ‘that ... liberty ... is to be valued for its own sake’.¹¹ Furthermore, to return to Edgeley’s truth-justice distinction, liberty is, for some, to be valued above truth. This is observed in John Stuart Mill’s account of freedom of discussion,¹² in which he makes ‘liberty rather than truth paramount’.¹³ For Mill, liberty is of such overriding importance that, where there is no opposing view, such views (even if erroneous) should be artificially cultivated;¹⁴ indeed, ‘society was explicitly prohibited from promoting truth itself’.¹⁵ It is perhaps out of an attachment to this absolute view of liberty that some conclude that ‘the certainty of justice [must prevail] over the possibility of truth’.¹⁶ This argument may equally be characterised as upholding a procedural rule of law. Indeed, by the nineteenth century, the principle had been cemented as such¹⁷ and many opposed to any relaxation of the rule against double jeopardy invoke

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¹ *Connelly v DPP* [1964] AC 1254 (HL) 1035ff. *Autrefois* is French for ‘in the past’.

² Ian Dennis, ‘Rethinking Double Jeopardy: Justice and Finality in Criminal Process’ [2000] Crim LR 933.

³ Keir Starmer, ‘Finality in Criminal Justice: When Should the CPS Reopen a Case?’ [2012] Crim LR 526, 533.

⁴ Michelle Edgeley, ‘Truth or Justice? Double Jeopardy Reform for Queensland: Rights in Jeopardy’ (2007) 7 QUTLJ 108, 110.

⁵ *R v Dunlop* [2006] EWCA Crim 1354, [2007] 1 WLR 1657.

⁶ *R v Dunlop (William Vincent)* [2001] 2 Cr App R (S) 27 (CA) [10]–[12].

⁷ Starmer (n 3) 531.

⁸ Law Commission, *Double Jeopardy and Prosecution Appeals* (Law Com No 267, 2001) (LC267) paras 4.10–4.22.

⁹ Law Commission, *Double Jeopardy: A Consultation Paper* (Law Com CP No 156, 1999) (CP156).

¹⁰ LC267 (n 8) para 4.17.

¹¹ *ibid* para 4.12.

¹² John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin 1974) ch 2.

¹³ Gertrude Himmelfarb, ‘Editor’s Introduction’ in Mill (n 12) 32.

¹⁴ Mill (n 12) 99.

¹⁵ Himmelfarb (n 13) 32.

¹⁶ *The Amphill Peerage* [1977] AC 547 (HL) 569.

¹⁷ Herbert Broom, *A Selection of Legal Maxims* (R H Kersley ed, 10th edn, Pakistan Law House 1989) 217.

these principles of substantive justice and the rule of law.¹⁸

But these arguments of principle, although valuable, obscure the contextual practical and economic concerns and also the origins of the rule. On the latter point, it is worth noting that the principle was not enshrined ‘in any of the early English statutes’.¹⁹ The early rule against double jeopardy was also riddled with exceptions²⁰ and the law as it stood before 2005 was far from unqualified,²¹ most notably, that where the strict *autrefois acquit* rule is inapplicable (where the offence is not the same ‘both in fact and in law’),²² ‘there may ... be special circumstances which make it just and convenient’²³ not to stay proceedings as an abuse of process. As Jill Hunter notes on the origin of the rule, the only certainty ‘is that it is ... a matter of speculation’,²⁴ but the evidence suggests that ‘the fundamentality of the concept [is] questionable’²⁵ as is its link (historically) with liberty.²⁶ However, ‘shift[s] in values limits history’s utility in assessing the present law’, therefore history should not inhibit ‘evolution of the protection to reflect the changed philosophies and values’.²⁷ It is therefore necessary to view the rule in context, considering the present-day legal system and pervasive economic issues.

Firstly, as Chris Corns explains, ‘criminal proceedings under an adversarial system are not a search for the objective truth behind the allegations’.²⁸ This point fuelled Jerome Frank’s critique of adversarialism; indeed, Frank (writing within the American jurisdiction) argued that adversarialism serves to obscure truth, not procure it.²⁹ Frank’s

offered solutions are seen as cumbersome and costly,³⁰ and, as such, while the adversarial tradition pervades, protection of the accused to avoid wrongful *conviction* remains an uppermost concern.³¹

Another suggested justification for the rule against double jeopardy is to prevent ‘abuses of criminal procedure’.³² Although this may have originated out of different historical needs,³³ in modern times the rule provides important economic protection of the time, workload and resources of the court, the CPS and the police.

These justifications are omnipresent; they did not dissipate in the late twentieth century, paving the way for reform. Thus, the logical question is: what has changed? More importantly, are the provisions – and their application – justifiable with the persistent principles and concerns of criminal justice?

The first question may be answered by reference to the murder of Stephen Lawrence and subsequent events (which led to the Law Commission’s report),³⁴ representing many factors prompting reform:

- (i) advances in scientific evidence;
- (ii) weakening public confidence in the system;
- (iii) a desire to balance the system towards victims; and
- (iv) broadening conceptions of justice and of the rule of law.

Firstly, in *R v Dobson*, evidence resulting ‘from careful re-examination of available material using different

¹⁸ The National Council for Civil Liberties, ‘Liberty’s Response to the Law Commission Consultation Paper No 158: Prosecution Appeals Against Judges’ Rulings’ (January 2001) <<https://www.liberty-human-rights.org.uk/sites/default/files/jan-pros-appeals.pdf>> accessed 24 March 2015; LC267 (n 8) para 4.17.

¹⁹ Edgeley (n 4) 113.

²⁰ *ibid* 114.

²¹ Dennis, ‘Rethinking Double Jeopardy’ (n 2) 937.

²² *Connelly* (n 1) 1339–1340.

²³ *ibid* 1360.

²⁴ Jill Hunter, ‘The Development of the Rule Against Double Jeopardy’ (1984) 5 JLN 3, 4.

²⁵ *ibid* 3.

²⁶ *ibid* 14, 15.

²⁷ *ibid* 15.

²⁸ Chris Corns, ‘Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?’ (2003) 27 Crim LJ 80, 87.

²⁹ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press 1950) 80–102.

³⁰ Scott Veitch, Emiliios Christodoulidis and Lindsey Farmer, *Jurisprudence: Themes and Concepts* (2nd edn, Routledge 2012) 162.

³¹ See n 28.

³² *Connelly* (n 1) 1362.

³³ Hunter (n 24) 7–8.

³⁴ Secretary of State for the Home Department, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262, 1999) (*Macpherson Report*) ch 47, para 7.46 (recommendation 38); LC267 (n 8) paras 1.1–1.2.

techniques' was decisive.³⁵ This exemplifies how improving scientific techniques can reveal new evidence suggesting that an earlier verdict is 'unsafe'. Evidence given to the Home Affairs Committee indicates further scientific developments³⁶ that may reveal evidence justifying retrials.³⁷

The second and third points interrelate. If evidence strongly indicates that a previous acquittal was wrong, confidence in the system will be damaged³⁸ for both the victim and wider society.³⁹ Dennis uses the analogy of 'new evidence of innocence [calling] into question the legitimacy of conviction'⁴⁰ to make this case. He argues that '[a] retrial will resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in fact guilty'.⁴¹ This challenges Corns' account of the aim of criminal proceedings under adversarialism,⁴² but it is suggested that Dennis' depiction more closely mirrors the society's perception of the system's objective – an equally important consideration.⁴³ Hence, thirdly, governments have expended much effort rebalancing the system,⁴⁴ demonstrated by the Criminal Procedure Rules.⁴⁵ Whilst the Rules, which originally commenced on the same day as the double jeopardy provisions,⁴⁶ maintain the protection of defendants' rights,⁴⁷ crucial in an adversarial system,⁴⁸ they represent a shift in focus, introducing the overriding objective to deal with cases 'justly',⁴⁹ including 'acquitting the innocent and convicting the guilty'.⁵⁰

and 'respecting the interests of [amongst others] victims'.⁵¹ Starmer suggests that reform was 'inevitable once it was recognised that victims are ... real participants with both interests to protect and rights to enforce'.⁵²

Fourthly, we might challenge a purely procedural rule of law for not providing substantive justice. As Dennis argues, a legitimate verdict must be 'factually correct and morally authoritative';⁵³ in essence, both procedurally *and* substantively just. For this reason, a verdict reached on evidence obtained through torture⁵⁴ would (or certainly *should*)⁵⁵ be considered illegitimate (on *procedural* grounds); but is it not the case that a verdict, viewed subject to new evidence raising significant doubts, should also be treated as illegitimate (on *substantive* grounds)?⁵⁶ This view should not be seen as favouring truth over justice, but rather as recognising truth as a fundamental aspect of justice itself.⁵⁷

Having suggested justifications for both the rule and reform, it is necessary to examine if the two can be reconciled. If so, this would suggest that the provisions are practically and theoretically sound. If not, further reform or reversion to the common law rule may be needed. Finality was identified as a major challenge to reform;⁵⁸ it has been claimed that 'finality promotes confidence in judicial outcomes'⁵⁹ and that

³⁵ *R v Dobson* [2011] EWCA Crim 1255, [2011] WLR 3230 [50].

³⁶ Select Committee on Home Affairs, *Third Report: The Double Jeopardy Rule* (HC 1999–2000) (Minutes of Evidence) qq 29, 105.

³⁷ *ibid.*

³⁸ LC267 (n 8) para 4.5.

³⁹ Select Committee on Home Affairs (n 36) q 30.

⁴⁰ Dennis, 'Rethinking Double Jeopardy' (n 2) 945.

⁴¹ *ibid* 945.

⁴² See n 28.

⁴³ LC267 (n 8) para 4.5.

⁴⁴ Ian Dennis, 'Convicting the Guilty: Outcomes, Process and the Court of Appeal' [2006] Crim LR 955.

⁴⁵ Criminal Procedure Rules 2014, SI 2014/1610 (CrimPR).

⁴⁶ CrimPR 2005, SI 2005/384.

⁴⁷ CrimPR, e.g., rr 1.1(2)(c), (g)(iii).

⁴⁸ Corns (n 28) 87.

⁴⁹ CrimPR, r 1.1(1).

⁵⁰ *ibid*, r 1.1(2)(a).

⁵¹ *ibid*, r 1.1(2)(d).

⁵² Starmer (n 3) 534.

⁵³ Dennis, 'Rethinking Double Jeopardy' (n 2) 944.

⁵⁴ Dennis, 'Convicting the Guilty' (n 44) 955.

⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 3.

⁵⁶ Dennis, 'Rethinking double jeopardy' (n 2) 945.

⁵⁷ Edgeley (n 4) 130.

⁵⁸ LC267 (n 8) paras 4.10–4.22.

⁵⁹ Edgeley (n 4) 122.

inconsistent verdicts undermine the system.⁶⁰ However, as discussed, public confidence is equally damaged by allowing acquittals that have been cast into significant doubt to stand. Moreover, finality for the victim and society must also be important; therefore, ‘the insecurity and distress caused to victims if the acquittal is not reopened’⁶¹ should be considered. In short, finality is rightly given great weight but is not absolute⁶² – it must be balanced between both sides and against other interests. Finality has undoubtedly been adjusted,⁶³ but the narrow range of offences to which the provisions apply (the most serious such as murder, manslaughter, kidnapping and rape)⁶⁴ limits the number of defendants for whom this is the case, and the ‘new and compelling evidence’ exception,⁶⁵ occasionally used⁶⁶ and strictly applied by the courts,⁶⁷ ensures that it is usually the guilty for whom finality is undermined and who are subjected to fear of re-prosecution.⁶⁸ The judicial application of the provisions support this, recognising the continued importance of the rule against double jeopardy,⁶⁹ that it is still intact operating subject to exceptions,⁷⁰ and that the quashing of an acquittal is an ‘exceptional step’.⁷¹ This approach is important if the fundamental principles underlying the rule are to remain.

Indeed, this balancing of the rights of defendants, victims and society is essential and may be justified on utilitarian grounds. Interference with the rights of the accused, when justified by significant evidence, may

be necessary to protect the integrity of the criminal justice system and the freedom of society⁷² particularly where public safety is most at risk.⁷³ Referring again to Mill’s *On Liberty*, this ‘self-protection’, as Mill terms it, is the only ground on which his thesis permits derogation.⁷⁴

Finally, it was feared by some that the reforms would impact on a defendant’s right to a fair trial.⁷⁵ This legitimate concern poses a real challenge to the workability and justification of the provisions. A fair trial remains a fundamental right,⁷⁶ consequently, this is a factor that the courts must consider.⁷⁷ In particular, it should be stressed that the quashing of an acquittal does not predetermine a conviction or reverse the presumption of innocence,⁷⁸ and language that goes beyond the legislative framework in presupposing guilt⁷⁹ should be avoided so as not to undermine the fairness of a retrial or ‘usurp the function of the jury’.⁸⁰ Generally, the courts have taken a pragmatic approach, rejecting that a subsequent admission makes a fair trial impossible,⁸¹ holding it to be a ‘legitimate prejudicial effect’.⁸² Moreover, as Auld LJ argued in his review, ‘[a] criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth’.⁸³ This is again difficult to square with the adversarial tradition;⁸⁴ trials have consistently been referred to in sporting terms⁸⁵ and, as aforementioned, their truth-finding capacity has been

⁶⁰ Jill Hunter, ‘Abuse of Process Savages Criminal Issue Estoppel’ (1995) 18 UNSWLJ 151, 165.

⁶¹ Dennis, ‘Rethinking Double Jeopardy’ (n 2) 945.

⁶² *R v Andrews* [2008] EWCA Crim 2908, [2009] 1 WLR 1947 [28].

⁶³ *Starmer* (n 3) 533.

⁶⁴ Criminal Justice Act 2003, sch 5, pt 1.

⁶⁵ *ibid* s 78.

⁶⁶ *Starmer* (n 3) 533; CP156 (n 9) para 5.14.

⁶⁷ See, e.g., *R v Miell* [2007] EWCA Crim 3130, [2008] 1 WLR 627 [47]–[53]; *R v G(G), B(S)* [2009] EWCA Crim 1207, [2009] Crim LR 738 [8]; *R v B* [2009] EWCA Crim 1036, [2009] Crim LR 736; *R v Weston* [2010] EWCA Crim 1576 [25]–[41].

⁶⁸ CP156 (n 9) paras 5.14–5.15; LC267 (n 8) para 4.11.

⁶⁹ *G(G), B(S)* (n 67) [5].

⁷⁰ *Dunlop* (n 5) [1].

⁷¹ *G(G), B(S)* (n 67) [5].

⁷² HC Deb 26 October 2000, vol 355, col 151WH.

⁷³ Dennis, ‘Rethinking Double Jeopardy’ (n 2) 945.

⁷⁴ Mill (n 12) 68.

⁷⁵ LC267 (n 8) para 4.71.

⁷⁶ ECHR (n 55) art 6.

⁷⁷ Criminal Justice Act 2003, s 79(2)(a).

⁷⁸ *Dobson* (n 35) [15]–[16].

⁷⁹ *Andrews* (n 62) [38], [42], [47]; *Dunlop* (n 5) [22].

⁸⁰ *Dobson* (n 35) [20].

⁸¹ *Dunlop* (n 5) [26]–[27].

⁸² *ibid* [26].

⁸³ Lord Justice Auld, ‘Review of the Criminal Courts of England and Wales’ (2001) ch 10, para 154.

⁸⁴ *Corns* (n 28).

⁸⁵ *Frank* (n 29) 91–92.

challenged.⁸⁶ But perhaps as the system moves, as has been suggested, towards managerialism or, further still, inquisitorialism,⁸⁷ coupled with improvements in scientific evidence and the continued encouragement of diligent investigation,⁸⁸ the focus of the system will, to some extent, shift towards truth. In such a system, the double jeopardy provisions may fit more comfortably, but may, ironically, be called upon less.

If the provisions are indeed, as I have argued, justifiable and working well, is there a case for extending their scope? After all, wouldn't any 'manifestly illegitimate acquittal [damage] the reputation of the criminal justice system',⁸⁹ particularly for the victim? Limiting the scope to only the most serious offences⁹⁰ was justified by reference to finality,⁹¹ but economic arguments are also relevant. Allowing all investigations to stay 'live' forever would give false hope to victims and impose an impossible

burden on the various instruments of the criminal justice system.

It is therefore concluded that the double jeopardy provisions should not be repealed but should remain limited in its scope and use to maintain balance between the competing principles and concerns. In any event, any attempt to further extend the exceptions to the rule must be justified in line with these principles. Thanks to sparing use of the provisions⁹² (limited by their scope and the important procedural safeguard of the DPP consent)⁹³ and cautious judicial application, the fears of those opposed to reform have been largely unrealised. As such, to return to the question posed at the outset, and to borrow the language of the provisions themselves, there appears to be no 'new and compelling evidence'⁹⁴ to demand a rethink of the double jeopardy provisions.

⁸⁶ *ibid.*

⁸⁷ Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31 LS 519, 534.

⁸⁸ Criminal Justice Act 2003, s 79(2)(c). See also *Weston* (n 67) [58].

⁸⁹ LC267 (n 8) para 4.30.

⁹⁰ Criminal Justice Act 2003, sch 5, pt 1. See also Auld (n 83) ch 12, paras 58–63.

⁹¹ LC267 (n 8) para 4.35.

⁹² *Starmer* (n 3) 533.

⁹³ Criminal Justice Act 2003, ss 76(3), 76(4), 85; *Starmer* (n 3) 533.

⁹⁴ Criminal Justice Act 2003, sch 5, pt 1.

THE THEATRE AS A SUITABLE PLACE FOR JURISPRUDENTIAL REFLECTION

Alexander Maine*

1 INTRODUCTION

Throughout the evolution of the theatre, one of its key functions has been to portray the impact and interplay of gods, kings and the individual, and the implications that stem from this. As such it has proved itself to be a suitable place for jurisprudential discussion and to exhibit savagery through fantasy. From this, reasoned discussion is therefore dramatised in order to become entertaining, providing a requisite for cathartic savagery. As one of Shakespeare's seminal plays (despite his authorship continually being disputed), *Titus Andronicus* offers an explicit representation of savagery and constitutionalism through the manipulation of justice by the Emperor Saturninus.

2 TITUS ANDRONICUS

The play has overt themes of nobility, honour and revenge, set against the backdrop of the succession to the Roman throne, with Saturninus acceding as Emperor after his father's death. Titus sacrifices the son of the Goth Queen after their defeat in battle as punishment for the loss of his own sons, acting as a catalyst for the bloody revenge that follows. The play seeks to demonstrate the 'descent into imperial tyranny'¹ exhibited in arbitrary absolutist rule, where the king sets, and is above, law. This article will look at Shakespeare's theatrical representations of justice and the law, particularly the tense constitutional representation of the rule of law and Saturninus' relations with his subjects as a reflection of the uncompromisingly absolute Tudor monarchy.² The issues of natural law, early legal representations of morality and criminal acts will also be discussed, to come to the conclusion that theatre is indeed a place for jurisprudential reflection, but not reasoned discussion: savagery is a tool used for the dramatisation of legal reflection and the 'failure of

natural law to redress the shortcomings of imperial law'.³

3 THE DIVINE RIGHT AS LAW

Traitor, if Rome have law or we have power,
Thou and thy faction shall repent this rape.⁴

As Emperor, Saturninus proclaims this against his brother's betrothal to Titus Andronicus' daughter, Lavinia, in contempt of the Emperor's wishes to marry her. His statement demonstrates the nature of his rule: Rome has law and he has power over the law. The use of the collective pronoun 'we' denotes power over law relating to an inherited family birth-rite. This distinction between law and power foreshadows the bloody revenge that will follow throughout the play, particularly the lawless rape of Lavinia, Saturninus' arbitrary brutal enforcement of his power and Tamora's conspiring. This representation of the Emperor clearly emulates the Tudor imperial monarchy in relation to the 1534 and 1559 Acts of Supremacy, which recognised royal sovereignty exempt from the rule of a foreign Church and subject only to the will of God. This resonates in the Justinian principle that 'the will of the prince has the force of law'⁵ meaning that justice, and what is fair, have no place unless the prince believes it necessary. Here absolutist divine right theory is demonstrated, affirming monarchical power as derived from God.⁶ This creates tension between the ideals of morality and justice expounded by Marcus, Titus and Bassianus; characters who all fall victim to Saturninus and Tamora and represent natural law. The notion of revenge and retribution is also crucial to the statement: 'thy faction' connotes Bassianus' allies, thereby foreshadowing the revenge exacted on Lavinia later on. This metaphorical rape of honour with the literal

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¹ Jonathan Bate, *Shakespeare and Ovid* (OUP 1993) 21.

² Geoffrey R Elton, *The Tudor Constitution: Documents and Commentary* (2nd edn, CUP 1982) 12.

³ Paul Raffield, *Shakespeare's Imaginary Constitution: Late-Elizabethan Politics and the Theatre of Law* (Hart 2010) 22.

⁴ Shakespeare, *Titus Andronicus* 1.1.406.

⁵ *Justinian Institutes*, Book 1 Title 2, *De Iure Naturali, Gentium et Civili*.

⁶ Ian Ward, *Law and Literature: Possibilities and Perspectives* (CUP 1995) 65.

rape of a wife demonstrates that Saturninus jurisprudentially equates justice with ‘eye-for-an-eye’ revenge; as echoed when Saturninus is slain by Lucius: ‘meed for meed, death for a deadly death’.⁷ Thus we are aware of Shakespeare’s inherent linking of both savagery and the notion of justice, evident in the use of the word ‘repent’.

Through Shakespeare’s representation of the constitutional monarch in this way, as supreme and above the law, we see how he has used the theatre as a tool to reflect on the nature of governance and how power may be abused. The exhibited savagery acts as a divisive reflection of contemporary fears of the absolutist Tudor monarchy, which Tamora reflects upon:

King, be thy thoughts imperious, like thy name.
Is the sun dimm’d, that gnats do fly in it?
The eagle suffers little birds to sing,
And is not careful what they mean thereby,
Knowing that with the shadow of his wings,
He can at pleasure stint their melody.⁸

Tamora also seeks to emphasise the divine connotations of the Emperor by symbolically linking the ruler to the sun, both above and notoriously more powerful than all else, while juxtaposing his adversaries as insects. Furthermore, she refers to him as an eagle, connoting royalty and superiority. This also relates to Roman military symbolism of the Aquila standard, representing strength in battle. Saturninus can hear the protests of his subjects, yet is under no obligation to heed or take into account their complaints, demonstrable of ‘freedom to disregard the law because that was under the King’.⁹ This shows a lack of justice and accountability to his subjects; they are under the shadow of his wings and without any power of their own, their complaints can be ignored. ‘Pleasure’ has been used in order to highlight the ease at which Saturninus can enforce his will: his rule, though lawful through the principle of primogeniture, is inherently lacking in democratic justice. Thus we have evidence of Shakespeare actively using the

theatre as a tool to represent contemporary jurisprudential anxieties about the absolutist Tudor monarchy through the medium of savagery and proposed savagery; the stinting of melody representing the quelling of any civil unrest through Saturninus’ quasi-divinity.¹⁰

4 CONSTITUTIONALISING THE DIVINE RIGHT

Judicial usurpation is represented clearly when Saturninus declares Quintus and Marcus Andronicus to be guilty of the murder of Bassianus: ‘let them not speak a word: the guilt is plain’.¹¹ This encompasses a flagrant breach of the basic principles of natural justice, reliant on the principle of ‘hearing the other side’.¹² The refusal of this, as Raffield states, entails a denial of equitable judgment as to the complexities of the individual case. Shakespeare therefore uses this denial of equity and individuality to stress the imperial nature and constitutional supremacy of Saturninus. This can be viewed as a precursor to modern law and issues of limiting sovereignty through the implementation of international public law and the recognition of human rights, something which would have been inconceivable to the Tudor monarchs. Another example of Saturninus arbitrarily enforcing his power is shown in his execution of the clown in Act 4, Scene 4. The clown was carrying Titus’ message of revenge and was also on the way to the trial of his own uncle. This continues the play’s theme of judicial abnegation and usurpation, with the arbitrary application of unjust law and Saturninus’ ‘questionable legitimacy’,¹³ as the clown was prevented from attending the court of justice and instead was killed without legitimate reason, again as a result of absolute power. This is demonstrative of Saturninus’ abandonment of natural law principles, which Roman law significantly contributed to, which emphasises unity,¹⁴ equates equality with justice, denotes morality and ethical reasoning and inheres to rights infused by god.¹⁵ These principles contrast with Saturninus’ use of the law as he grants rights only to himself. Aaron the Moor, Tamora’s lover, reflects on the relationship of natural law and the emperor in order

⁷ Shakespeare (n 4) 5.3.65.

⁸ *ibid* 4.4.86.

⁹ Elton (n 2) 17.

¹⁰ Ward (n 6) 66.

¹¹ Shakespeare (n 4) 2.2.301.

¹² Raffield (n 3) 29.

¹³ *ibid* 21.

¹⁴ Alessandro Passerin d’Entrèves, *Natural Law – An Introduction to Legal Philosophy* (2nd rev edn, Hutchinson 1972) 22.

¹⁵ *Calvin’s Case* (1572) 7 Co Rep 1, 77 ER 377.

to represent the lack of morality and justice as a consequence of the events of the play and the schemes of revenge: 'Pray to the devils; the gods have given us over'.¹⁶

5 REFLECTION

In a society heavily reliant on religion, the gods' abandonment demonstrates how Saturninus' rule is devoid of divine justice and benevolence, emphasising the contrast between good and evil rule. The characters of the play may just as well pray to the devils as this is what they have been left with as their ruler. This strongly echoes Titus' proclamation 'Terras Astraea reliquit',¹⁷ meaning the goddess of justice, Astraea, has left the earth. In this we see one of the most divisive passages of the play in linking the theatre to jurisprudential and social reflection as Titus fires arrows to the heavens as a plea for divine justice to be reinstated. Throughout the passage, he informs his kinsmen that it will not be possible to find justice anywhere in the natural world, particularly not the ground or sea, implying that justice would only come from the gods, with the idea of heaven being in the air. The imagery of Astraea fleeing mankind's wickedness relates to Ovid's *Metamorphoses*; ascending to the heavens in order to find justice. It has been noted that Elizabeth I is often related to Astraea while the Emperor is potentially representative of her absolutist father, Henry VIII; a connotation which may represent Shakespeare's wishes to be in the monarch's favour. This comparison of Elizabeth and Astraea, both perceived to be just and virginal figures, and as part of this Astraea's flight reflecting Elizabeth's eventual passing demonstrates the constitutional dilemma and social anxiety over who would succeed the fair and just Elizabeth. This contrasts with the accession of Saturninus, resulting in an absolutist system, reflective of the reign of Henry VIII.

Astraea is fundamentally associated with femininity through her multiple representations in classical literature. Her feminine imagery is critically important to representations of the principle of female justice throughout the play via its lack of female characters or female assertiveness. As Astraea has fled from the earth, there is a void left in which Lavinia is violated and silenced, while Tamora is ultimately deceitful and lacking in natural morality; exacerbating

the lack of femininity, maternity, and justice. This serves to be divisive for the use of the theatrical imagery as a place for legal reasoning, through exhibiting savagery in order to portray a lack of justice.

6 RETRIBUTION AND SAVAGERY AS NATURAL JUSTICE

The rape of Lavinia is the play's most obvious savage criminal jurisprudential exhibit. This rape, as foreshadowed by Saturninus and committed in revenge by Chiron and Demetrius, serves to expose the unjust nature of the feud between Tamora and Titus. Marcus Andronicus laments Lavinia by assimilating her to Orpheus, who serves as a figure of classical natural morality and tragedy:

Or had he heard the heavenly harmony,
Which that sweet tongue did make,
He would have dropped his knife and fell
asleep,
As Cerberus at the Thracian poet's feet.¹⁸

Orpheus, (the Thracian poet) was the personification of natural harmony,¹⁹ while the silencing of Lavinia through her tongue being removed shows the abandonment of harmony and the flight of justice through the violation of femininity and the removal of her voice. This silencing also heavily corresponds with Tamora's statement of Saturninus stinting the melody of those beneath him. However a contrast is created as the act against Lavinia meant he cannot hear those beneath him sing, as they have been forcibly silenced. This, along with the earlier discussion of Saturninus' sentencing of Quintus, Marcus and the clown, demonstrates how Saturninus goes beyond even Tamora's assertions of what an Emperor may legally do, as a direct representation of tyranny and *ultra vires* royal action. The rape committed by Saturninus' stepsons is committed on both political and sexual motives; particularly the intense desire to seek revenge, much in the same 'eye-for-an-eye' manner employed by the Emperor, as they lost their brother. However the savage mutilation of Lavinia demonstrates the desire to silence justice and escape punishment. 'The politico-legal significance of the crime is that it is treated as a challenge to the moral and legal order itself, using the silenced, abused female

¹⁶ Shakespeare (n 4) 4.2.48.

¹⁷ *ibid* 4.3.4.

¹⁸ *ibid* 2.3.44.

¹⁹ Raffield (n 3) 32.

body as symbolic of the vulnerable state.²⁰ This exposition of savagery has been used incredibly violently when depicted on stage in order to shock the audience, and enrage them against the injustice. This is particularly prevalent as the end of the play is reached and Titus slaughters his own daughter in order to prove the rape happened and also to appease the sacrificial nature of the Roman law. This is evident as Titus asks Saturninus whether it was well done of Virginius to slay his own raped daughter:

Because the girl should not survive her shame,
And by her presence still renew his sorrows.²¹

Titus responds by claiming it is a strong and mighty reason to die, yet wretched for him to perform: this killing to preserve patriarchal honour was done because of Titus' staunch commitment to notions of honour, as a war-hero. Her vulnerability, as stated by Gurnham, is emphasised here as the reason for her death: she cannot stand the shame it would bring on her father. It is with this honour-killing that we see both Titus and Saturninus acting judicially, however Titus also proclaims spiritual judgment; sacrifice was central to law, religion and society at the time,²² particularly in this revenge. The image of Titus killing Chiron and Demetrius deliberately evokes images of the Eucharistic rite of receiving blood as Lavinia keeps it for the pie in which they will be baked and fed to their mother. As they are to be seen as receiving their just punishment, this image of Titus contrasts that of Saturninus. Saturninus evokes his divine image through his title and his prerogative, whereas Titus is seen to use his morality and justness, which coincidentally evoke savagery, as customary in both 16th Century England and 4th Century Rome.

This image of Titus as a natural law embodiment is characterised by his son stating: 'Father, and in that name doth nature speak'.²³ This at once relates him to divinity through the lexicon of religion and spiritual leaders, while there is also a direct reference to the relation of god through nature. This coincides with Titus' own words throughout the play evoking scenes of nature. The play is essentially concerned with the

effects of an absolutist enforcement of law on the honour of the physical embodiment of natural law, ultimately leading to his downfall. Here we see Shakespeare using savagery to jurisprudentially reflect on legal theory and different approaches to legal reasoning through spiritual representations.

7 A MORAL ALTERNATIVE AND THE WEAKNESS OF ITS DEPICTION

The theme of natural law has pervaded the theatre since the first Western depiction of a courtroom drama in Aeschylus' *Eumenides*, from the *Oresteia*. Here the goddess Athena brought a jury of 11 together to decide the fate of Orestes, who had killed his murderous mother with instruction from Apollo. The play aims to present natural law as divined from the gods and inherently moral, particularly in Athena's judgment. It exhibits two schools of legal reasoning: in the barbaric nature of the Chorus, demi-gods who demand a death for a death; and Apollo and Athena, who state that the gods' wishes are always to be just. The jury reconvenes with a tied judgment, in which case, as Athena states, Orestes should go free as equity should prevail. This shows the theatre being used to record the movement from arcane to democratic law, using moral reasoning over mysticism. It has been seen that Shakespeare was particularly inspired by these moral plays which serve to demonstrate how the theatre has been used as a place for reasoned discussion and to demonstrate to the audience how one should be just

This has notably arisen in the off-stage murders in *Macbeth* and the *Weird Sisters* emulating the Chorus.²⁴ However, as a play, *Eumenides* lacks entertainment for the reader. It lacks any notion of savagery as a Shakespearean play may have; therefore it does not create as big of an impact. This need for savagery, the human expectation and entertainment found in it, is explained in *Titus Andronicus* by Marcus Andronicus:

O, why should nature build so foul a den,
Unless the gods delight in tragedies?²⁵

This quote, said after the discovery of the pit in which Lavinia was raped, inherently explains the nature of Brenton's statement: the gods, and the audience,

²⁰ David Gurnham, 'Legal Authority and Savagery in Judicial Rhetoric: Sexual Violence and the Criminal Courts' (2011) 7 *Int JLC* 117, 121.

²¹ Shakespeare (n 4) 5.3.41.

²² Raffield (n 3) 43.

²³ Shakespeare (n 4) 1.1.374.

²⁴ Earl Showerman, 'Shakespeare's Greater Greek: *Macbeth* and Aeschylus' *Oresteia*' (2011) 3 *Brief Chronicles: The Interdisciplinary Journal of Authorship Studies* 37.

²⁵ Shakespeare (n 4) 4.1.59.

delight in the tragedies that happen on stage. This reference to the gods and nature shows us that despite the fate of Lavinia and the rest of the play being brutally savage, nature is inherently savage and therefore, so is law. The laws and morals of both Rome and Tudor England have changed rapidly to moral reasoning as known now; meaning that natural law would also encompass savagery in all its forms. The theatre is a place to exhibit the interplay between morality, law and savagery, through dramatising reality. This interplay between morality and savagery can be seen in the demise of Tamora and her sons: as the antithesis to the war-hero Titus, Tamora is a prisoner of war, married into her position by deceit. She is continuously devious and vengeful throughout, as a reaction to losing a war and her sons to Titus. Her lack of honour leads to her punishment and death: 'Eating the flesh that she herself hath bred'.²⁶ This unnatural punishment stems from her unnatural morality and ultimately entails her downfall and is repugnant but also fascinating to the audience. Here Shakespeare uses the play to warn the audience of the dangers of acting unlawfully and immorally.

8 CONCLUSION

It is evident that Shakespeare continuously used the theatre as a means of portraying political statement, as the media does today. It has become clear that Shakespeare and Brenton share the same sentiments about what the theatre should offer the audience, while Raffield argues that the theatre can, and should, be used to bring law to the audience and to improve their experience of it:

The rhetorical schemes of law and theatre operate upon their audience through the deployment and manipulation of images ... all are figurative devices or emblems which seek to confer divinity, mystery and legitimacy on the mundane business of law.²⁷

We see, therefore, how Shakespeare's manipulation of morality and divinity could only be achieved through the medium of the theatre. Theatricality and dramatisation allow for the representation of savagery and legality in a metaphorical bear-pit: we see the fundamental contrast between the reasoned discussion in the formal courtroom and the savage reflection on stage, allowing for the exploration of savagery within a legal setting.

²⁶ *ibid* 5.3.61.

²⁷ Raffield (n 3) 10.

HANDMAIDS, MARKETS AND FREE WILL: REFORMING THE LAW ON SURROGACY

Max Mugnaioni*

1 INTRODUCTION

The law governing surrogacy remains confused, incoherent and poorly adapted to the specific realities of the practice.¹

This article aims to reveal the truth within this statement. By elucidating an overarching ethical framework, it will be submitted that the law on surrogacy fails in aligning with this or any other coherent body of principles. Therefore, a proposal for reform will be posited based on establishing a market for surrogacy.

2 HANDMAIDS, MARKETS AND FREE WILL

The ethical defensibility of surrogacy rests on two overarching sets of norms: the deontological values associated with reproduction and the principles of freedom embodied in market capitalism. This article will proceed with the intention of positing a delicate balance between these concepts, one that prevents exploitation of women whilst safeguarding autonomy in a market setting.

The picture of surrogacy painted by works of science-fiction is often dark. In *The Handmaid's Tale*² Atwood represents the 'exploitative, dehumanizing elements of surrogate motherhood.'³ Because of mass infertility, Handmaids are forced surrogates for the elite. The novel satirically elucidates the feminist perspective on surrogacy 'as representative of male

control over reproduction.'⁴ As 'ambulatory chalices',⁵ women are defined by their biological function to reproduce, without regard for their agency. This *reductio ad absurdum* is effective in highlighting two primary ethical issues within surrogacy: the exploitation of women solely for their fecundity; and commodification.

Feminist concerns lie in the apparent perception that 'the womb is extractable from the woman as a whole person.'⁶ Stripped down, this vision of surrogacy is in conflict with the Kantian Categorical Imperative, in which moral conduct is achieved through appraising others as good in themselves and never treating as a means to an end.⁷ Understanding surrogacy as reducing women to a 'reproductive conduit'⁸ represents a significant violation of these tenets of morality. Atwood held a mirror up to surrogacy as 'exploitation of women for the benefit of men.'⁹ From this radical perspective, all surrogacy is unethical.

However, it is submitted that the representation of surrogacy in *The Handmaid's Tale* is not the 'cautionary tale' suggested.¹⁰ The critical distinction is that Atwood's puritanical regime imposed surrogacy with no consent from the Handmaids;¹¹ essential to the ethical functioning of surrogacy is respect for the free will of the actors. This was the primary focus of Kant

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¹ Kirsty Horsey and Sally Sheldon 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20 Med LR 67, 68.

² Margaret Atwood, *The Handmaid's Tale* (Random House 1996).

³ Karen Busby and Delaney Vun, 'Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers', (2010) 26 Can J Fam L 13, 14.

⁴ Horsey and Sheldon (n 1) 69.

⁵ Atwood (n 2) 196.

⁶ Andrea Dworkin, *Right-Wing Woman* (Harvard University Press 1983) 187.

⁷ Immanuel Kant, 'Groundwork for the Metaphysics of Morals' in Allen W Wood (ed), *Rethinking the Western Tradition* (Yale University Press 2002) 42.

⁸ Janice Raymond, 'Reproductive Gifts and Gift Giving: The Altruistic Woman' (1990) 20(6) Hastings Center Rep 7.

⁹ George J Annas, 'Death Without Dignity for Commercial Surrogacy: The Case of Baby M' (1988) 18 Hastings Center Report 21, 27.

¹⁰ Busby and Vun (n 3) 16.

¹¹ Atwood (n 2).

and Hegel.¹² The Categorical Imperative is not programmatic of correct moral judgment but exists to support autonomy.¹³ Therefore, surrogacy does not constitute a violation *per se*; it simply requires treating the surrogate as not only a means, but by also respecting her free will.¹⁴ This egalitarianism applies to surrogacy arrangements in two forms: 'the importance of procreative liberty,' where one has complete sovereignty on conception of family; and 'the freedom of occupational choice' to treat surrogacy as any other job.¹⁵ In utilitarian terms, surrogacy arrangements benefit all parties:¹⁶ the commissioning parents have the child they long for and the surrogate has performed an altruistic deed, which may result in financial recompense. This *consensus ad idem* is the crux of commercial surrogacy. However, this justification does not extend to complete market freedom, which may make surrogates privately tradable commodities. This is not ethical.

Yet, in reality the pieces of a market have come together. Demand for surrogacy has been 'proliferating' due to inflating infertility rates and established acceptance of homosexuality.¹⁷ This is met with willing supply and thus a market is established. Consenting surrogates offer gestational services to commissioning parents for a fee. This embodies idyllic free-market capitalism, but at what cost? If 'babies are subject to the law of supply and demand too',¹⁸ then it is probable that other market forces will come into play. Indeed, with the burgeoning UK demand and regulation that does not accommodate a domestic market, commissioning couples look to outsource and, so 'profit driven surrogacy clinics ... capitalise on globalisation'.¹⁹ The market for surrogacy, like any market, is behaving as economic theory would predict. Therefore, it is not illogical to fear other potent market

forces and the potential for unethical consequences. For example, as competition accelerates competitive pricing may drive the financial value of surrogacy down. Furthermore, and specific to partial surrogacy, a busy market may encourage 'product differentiation'. 'Women's attributes, such as height, eye colour, race, intelligence, and athletic ability will be monetized', thus, compounding the exploitation of women so criticised by feminists.²⁰ This does not build a strong case for combining surrogacy with the free market. However, this should not rule out some degree of market-alienation.

Michael Sandel explores the moral limits of markets.²¹ He attributes our sense of 'disquiet'²² towards marketisation of surrogacy to the notion that some moral values transcend the values of the market. There is, therefore, a danger of 'overcrowding'; 'commercial surrogacy substitutes market norms for some of the norms of parental love'.²³ Sandel fears the 'corruption'²⁴ of these deontological norms by giving free reign to market forces. In understanding that this can be precluded through the balancing of moral values within regulation, it becomes possible to map a different kind of market landscape. The current legal status of surrogacy will now be examined to explore how successful the law is at achieving this aim.

3 LEGAL FRAMEWORK

The UK's legal response to surrogacy is inconsistent, not only relative to the contention above, but on a general level. The 'absence of any regulatory umbrella'²⁵ has meant that the surrogacy framework consists of piecemeal adoption of legislation governing other areas of reproduction. The problem goes deeper than being outdated; the lack of congruency has fostered legal uncertainty and so the

¹² Georg W F Hegel, *Hegel's System of Ethical Life and First Philosophy of Spirit* (Henry S Harris and Thomas M Knox eds, first published 1803, State University of New York Press 1979) 236.

¹³ John Rawls, *Lectures on the History of Moral Philosophy* (ed Barbara Herman, Harvard University Press 2000) 166–7.

¹⁴ Emily Jackson, *Medical Law: Text, Cases, and Materials* (3rd edn, OUP 2013) 864.

¹⁵ Mrinal Vijay, 'Commercial Surrogacy Arrangements: the Unresolved Dilemmas' (2014) UCL JL & J 200, 209. See also Gillian Brock, 'Global Justice' in Catriona McKinnon (ed), *Issues in Political Theory* (OUP 2008).

¹⁶ Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin 2012).

¹⁷ Vijay (n 15) 201.

¹⁸ Margaret V Turano, 'Black Market Adoptions' (1976) 22 Catholic Law 48.

¹⁹ Iris Leibowitz-Dori, 'Womb for Rent: The Future of International Trade in Surrogacy' (1997) 6 Minn J Global Trade 329.

²⁰ Margaret Jane Radin, 'Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things' (Harvard University Press 2001) 144.

²¹ Sandel (n 16).

²² *ibid*.

²³ Elizabeth Anderson, 'Is Women's Labor a Commodity?' (1990) 19 Phil & Pub Aff 71, 92.

²⁴ Prince Saprai, 'Review Essay: Morality and the Market: Containing the Beast' (2013) Int JLC 279, 280.

²⁵ Jackson (n 14) 857.

structured market, suggested in theory, has no expression in reality.

The lack of a coherent legal framework may be attributed to an evolution in attitude towards surrogacy. The law was built on foundations of disapproval, viewing arrangements as ‘a sordid commercial bargain.’²⁶ Recommendations in the Warnock Report²⁷ took a similar tone and were codified in the Surrogacy Arrangements Act 1985.²⁸ The Act prohibited commercial surrogacy and contracts for it were made unenforceable.²⁹ Imposing no criminality on surrogates or the commissioning parents mitigated this condemnation, so that any child born was not ‘tainted by criminality.’³⁰ However, any third party providing a ‘matchmaking’ service for a fee is outlawed. The policy, therefore, appears equivocal and in subsequent legislation this is exacerbated. However, what seems clear is a desire to curtail the creation of a market. Vijay suggests this is because of ‘not yet fully formed’ public opinion and a desire to leave the door ‘ajar’.³¹

The Human Fertilisation and Embryology Acts 1990 and 2008 do very little in closing this door. No amendment was made concerning the commerciability of surrogacy and, because the legislation was not purpose built, its treatment of parentage only adds to the incoherence. Section 33 of the 2008 Act asserts that the woman who ‘has carried or is carrying the child’ will be the legal mother. This directly contravenes the intention of the parents and the surrogate. Section 54 of that Act offers a remedy for this through Parental Orders.³² These are court-made declarations that circumvent onerous adoption procedure so as to fast-track the process of replacing parentage where it was intended. Their inclusion suggests a shift in attitude; however, the gulf between policy and practice

reinforces uncertainty. The Act stipulates strict conditions concerning access to Parental Orders, designed to protect the welfare of the concerning parties. The most controversial of these is a prohibition on payments beyond those permitted by a court. Prohibiting this essential element of the market emits a message denouncing commercialisation. Yet, application by the courts suggest otherwise. In *Re C*, a surrogate was unlawfully paid £12,000, yet a parental order was issued.³³ A similar ruling was reported in *Re X and Y* where a surrogate received monthly payments on top of a one-off payment once the child was born.³⁴ The courts’ apparent disregard for the legislation reflects a practical attitude towards surrogacy as occurring in reality and requiring careful regulation. Furthermore, Hedley J expressed a need to hold moral values – ‘the welfare of any child’³⁵ – at the centre of adjudicating surrogacy, whilst also propping up prohibited market behaviour.

Furthermore, within this ‘regulatory vacuum,’³⁶ clinics have enacted their own policies only adding to the lack of coherence.³⁷ The ‘laissez-faire’ approach has created a paradox in that, through the haze, a policy has emerged vaguely discouraging commercialisation and yet, in reality, a market exists and is growing.³⁸ The most certain conclusion that can be drawn, therefore, is that there is a pressing need for reform.

4 A ‘NEW KIND OF MARKET’

The first section of this article concluded that an ethical marketplace for surrogacy is possible under certain conditions. However, the current legal framework fails to live up to these conditions and has fostered uncertainty. It is, therefore, prudent to suggest a wholesale rethink of surrogacy regulation to accommodate a ‘new kind of market’.³⁹

²⁶ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 445 (CA) 453 (Ormrod LJ).

²⁷ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984).

²⁸ Surrogacy Arrangements Act 1985.

²⁹ *ibid* ss 2–3, s 1B.

³⁰ Eric Blyth, ‘Children’s Welfare, Surrogacy and Social Work’ (1993) 23 *Brit J Social Work* 259, 265.

³¹ Vijay (n 15) 218.

³² *ibid* s 54.

³³ *Re C (Application by Mr and Mrs X under s 30 of the Human Fertilisation and Embryology Act (1990))* [2002] EWHC 157 (Fam), [2002] 1 FLR 909.

³⁴ *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

³⁵ *ibid* [24].

³⁶ Horsey and Sheldon (n 1) 68.

³⁷ Jackson (n 14) 841.

³⁸ Vijay (n 15) 217.

³⁹ Sandel (n 16) 59.

Surrogacy is a 'practice involving social and ethical questions of a different kind and order to other forms of assisted reproduction' and therefore requires its own regime.⁴⁰ Establishing a centralised authority in charge of all aspects of surrogacy will facilitate the implementation of the following reforms. As guardian of the market, it will oversee contractual agreements, regulate payment and review and inform those wishing to enter the market.

As in any market, principles of contract are essential to its successful functioning. Creation, regulation and execution of enforceable surrogacy contracts will effectively protect all parties.⁴¹ Opponents argue that it is 'unconscionable to force a mother to hand over the child after birth'⁴² but an equally unconscionable situation may arise when parents reject their child.⁴³ A binding contract would make clear the commitments of the parties and cover all possible circumstances. Alongside this proposal it seems logical to uphold the third tenet of contract law: consideration. Difficulty has arisen on how to define payment as 'compensation', 'reasonable expenses', 'non-commercial surrogacy' and 'commercial surrogacy'.⁴⁴ Standardising payment would go some way to remedying this, whilst also acting as a safeguard against exploitation.⁴⁵ Furthermore, opening the marketplace precludes surrogacy from going underground where exploitation is far more likely.⁴⁶

It has been made clear in this article that surrogacy is a complex, emotive and potentially destructive process. Therefore, screening prospective market entrants and informing parties on all aspects of the process is necessary. 'Rigorous approval'⁴⁷ of both the surrogate and the intended parents will minimise any party reneging on the contract, notwithstanding its

enforceability. These policies will have the result of limiting disputes, as has been seen in Israel where a very similar system to the above has already been implemented.⁴⁸ Furthermore, without access to sufficient information, surrogates 'cannot engage as active agents in the choice of commissioning parents'.⁴⁹ Therefore obliging parties to take part in some manifestation of education 'would ensure that people pursuing an activity as sensitive as surrogacy are fully informed of the potential risks'.⁵⁰

The current position of the law on motherhood is evidently incompatible with surrogacy. Because of the unique process of carrying a child for another, surrogacy merits an exception to section 33 of the 2008 Act.⁵¹ Horsey suggests adopting intention-based parentage, where 'commissioning parents should be automatically recognised as legal parents because they planned, initiated, and prepared for the birth of their prospective child'.⁵² This process will ensure clarity in the interests of all parties, particularly the child.

The US is an example of the compatibility welfare concerns and market values. The long existence of commercial surrogacy in the States has established a 'robust infrastructure of support'.⁵³ This establishment of an authority from which these policy emanate will act in creating a new kind of market where moral norms can live in harmony with market ones.

5 CONCLUSION

Surrogacy straddles two bodies of moral norms, those of market liberalism and the deontological values associated with human reproduction. The legal framework governing this area must accommodate both of these ideas in a way that guards agency and prevents exploitation. It is submitted that this is achievable through reform of the current framework,

⁴⁰ Horsey and Sheldon (n 1) 73.

⁴¹ Vijay (n 15) 230.

⁴² *ibid* 229.

⁴³ 'Thai Surrogate Baby Gammy: Australian Parents Contacted' *BBC News* (London, 7 August 2014) <<http://www.bbc.co.uk/news/world-asia-28686114>> accessed 3 December 2015.

⁴⁴ Mrinal Vijay (n 15) 227.

⁴⁵ *ibid* 234.

⁴⁶ Michael Freeman, 'Does Surrogacy Have a Future After Brazil?' (1990) 7 *Med LR* 1, 20.

⁴⁷ Jackson (n 14) 868.

⁴⁸ Rhona Schulz, 'Surrogacy in Israel: An Analysis of the Law in Practice' in Rachel Cook, Shelley D Sclater and Felicity Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Hart 2003) 35–53.

⁴⁹ Busby and Vun (n 3) 81.

⁵⁰ Jennifer Damelio and Kelly Sorensen, 'Enhancing Autonomy in Paid Surrogacy' (2008) 22 *Bioethics* 269.

⁵¹ Human Fertilisation and Embryology Act 2008.

⁵² Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22 *CFLQ* 449. See also Vijay (n 15) 234.

⁵³ Vijay (n 15) 212. See Semba and others, 'Surrogacy: Donor Conception Regulation in Japan' (2010) 24 *Bioethics* 348.

in order to create a 'new kind of market.' In doing so, at least in the event of mass infertility we will be beyond *Handmaids*.⁵⁴

⁵⁴ Atwood (n 2).

CARTELS AND THE CRIMINAL LAW

*Dimitrios Pittas**

Cartels have been a looming issue in the last few decades, alarming the competition authorities worldwide, who embrace its criminalisation as the salvation to the problem. Harding identified only nine countries criminalising cartels in 2006, currently spreading to more than thirty countries.¹ ‘Cartel is an agreement by a formal organisation of producers to coordinate prices and production.’² This article will examine the objectives and reasoning underlying the criminal regime, and then assess the suitability of criminalisation as a tool for effectively tackling the anti-competitive nature of cartel conduct against an optimal civil system, which could prove a better alternative within an adequately enforced regime. Eventually, the enforcement of the criminal system in the UK will be scrutinised, with regard to the previous law, and how the new legislation still fails to address the sensitive points underlying this issue, making trivial development and inevitably sustaining its under-enforcement.

To embed a system of criminalisation into domestic law, clear objectives and reasons should be discerned in its foundations to uphold its success and survival. Clearly ‘rehabilitation through incarceration’ and ‘incapacitation through incarceration’ are

inappropriate objectives.³ However, deterrence, which has been considered by both those supporting and against antitrust criminalisation, is a more appropriate goal; the emphasis should be on optimal deterrence.⁴ On a lower scale of significance, retribution constitutes an additional objective condemning the negative moral character, which has been expressed as equivalent to larceny or burglary,⁵ or viewed as ‘theft by well-dressed thieves’.⁶

It is equally significant to acknowledge the seriousness of cartel conduct, to justify the presence and objectives of criminalisation. Competition law concerns ‘the unrestrained interaction of competitive forces’.⁷ However, cartel behaviour signifies the antithesis of such freedom,⁸ thus banning it would be the cornerstone of competition law, since cartels constitute the ‘supreme evil of antitrust’⁹ and the ‘most egregious’¹⁰ violation of competition law.¹¹ Furthermore, cartels are costly to create and enforce, ‘without producing any countervailing benefits’,¹² justifying them as ‘cancers on the open market economy’.¹³ Moreover, approaching the harm principle from a utilitarian perspective, and

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¹ Christopher Harding, ‘Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels’ (2006) 14 *Crit Criminol* 181, 191; Gregory C Shaffer and Nathaniel H Nesbitt, ‘Criminalizing Cartels: A Global Trend?’ (2011) *Minnesota Legal Studies Research Paper* 11–26 <papers.ssrn.com/sol3/papers.cfm?abstract_id=1865971> accessed 15 January 2016, 5.

² Arthur O’Sullivan and Steven M Sheffrin, *Economics: Principles in Action* (Prentice Hall 2006) 171.

³ Peter Whelan, ‘Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’ (2013) 33 *OJLS* 535, 537; Charles B Renfrew, ‘The Paper Label Sentences: An Evaluation’ (1977) 86 *Yale LJ* 590, 592–593.

⁴ *ibid.*

⁵ Gregory J Werden, ‘Sanctioning Cartel Activity: Let the Punishment Fit the Crime’ (2009) 5 *ECJ* 19, 25.

⁶ Joel I Klein, ‘The War against International Cartels: Lessons from the Battlefield’ (26th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, 1999) <<http://www.justice.gov/atr/public/speeches/3747.htm>> accessed 12 November 2014.

⁷ Werden (n 5) 35.

⁸ *ibid.*

⁹ *Verizon Communications v Law Offices of Curtis V Trinko* (2004) 540 US 398, 408.

¹⁰ OECD, ‘Recommendation of the Council Concerning Effective action Against Hard Core Cartels’ (C(98)35/FINAL, OECD 13 May 1998) <oecd.org/daf/competition/2350130.pdf> accessed 15 January 2016.

¹¹ Alison Jones and Rebecca Williams, ‘The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?’ (2014) 2 *JAE* 100, 101.

¹² Mario Monti, ‘Fighting Cartels Why and How? Why Should we be Concerned with Cartels and Collusive Behaviour?’ (3rd Nordic Competition Policy Conference, Stockholm, 11–12 September 2000).

¹³ *ibid.*

particularly Mill's work,¹⁴ and Rawls' anti-utilitarian stance,¹⁵ it is suggested that the nature of the harm is ill-suited for the intervention of criminal law, as there are already highly effective agencies to tackle this issue,¹⁶ hence the rationale of harm alone is insufficient to justify criminalisation.¹⁷ However, when taking a 'backward-looking' stance, criminal law should take a strong moral or retributive stance against cartel offenders.¹⁸ The significance of 'comprehensibility' 'lends legitimacy to the cartel offence and helps to ensure political backing for criminal prosecutions'.¹⁹

Criminalisation can be justified as a measure to address cartel behaviour but its suitability for carrying out such function and effectiveness must be examined. The strongest argument in favour of criminalisation has been the impossibly high fines of a 150% minimum annual turnover necessary for sufficient deterrence, which would probably lead companies to bankruptcy.²⁰ Bankruptcy would entail undesirable social costs, as in the absence of perfect markets²¹ innocent employees, suppliers and communities would be negatively affected.²² Moreover, '[e]xperience supports [argument] that businessmen view prison as uniquely unpleasant'²³ and nothing has 'as great an effect as the threat of substantial incarceration in a US

prison'.²⁴ Additionally, enterprises can pay their executives' fines, considering that fines are insufficient to make the activity unprofitable,²⁵ and, where there are no personal penalties the executives' might engage in activities that are unprofitable to the company.²⁶

Criminalisation also strengthens leniency as nothing creates a 'greater incentive' than the prospect of incarceration, therefore providing a powerful destabilising effect.²⁷ Donald Baker also comments that apart from fear, 'the desire for revenge is more picturesque, but it is still very much present'.²⁸ Most importantly, criminalisation creates a moral stigma attaching to the offence, highlighting its intensity 'in singling out certain conduct for this treatment'.²⁹ This is possibly the strongest argument for societies not adopting a single system, but two distinct ones where the 'moral condemnation of the offender' would be expressed through the criminal process.³⁰ However, unlike the US, the UK has 'traditionally been tolerant, if not positively welcoming' such conduct.³¹ Hence 'what seems to distinguish the US is public willingness ... to treat individuals ... in cartels ... as serious criminals'.³² To avoid such undesirable conduct, one

¹⁴ John Stuart Mill, *On Liberty* (JW Parker & Son 1859).

¹⁵ John Rawls, *A Theory of Justice* (Belknap 1971).

¹⁶ Bruce Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (2012) 32 LS 369, 371–385.

¹⁷ *ibid.*

¹⁸ Angus Macculloch, 'The Cartel Offence: Defining an Appropriate "Moral Space"' (2012) 8 ECJ 73, 80.

¹⁹ Andreas Stephan, "'The Battle for Hearts and Minds': The Role of the Media in Treating Cartels as Criminal' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011) 381, 393.

²⁰ Wouter PJ Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, In Particular Imprisonment?' (6th Competition Law and Policy Workshop, Florence, 1–2 June 2001).

²¹ Wouter PJ Wils, 'Is Criminalization of EU Competition Law the Answer?' (Amsterdam Center for Law and Economics (ACLE) Conference, Amsterdam, 17–18 February 2005).

²² John C Coffee, "'No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 MLR 386, 401–402; Reinier H Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 Yale LJ 857, 882–883.

²³ Donald I Baker and Barbara A Reeves, 'The Paper Label Sentences: Critiques' (1977) 86 Yale LJ 619, 621–622.

²⁴ Thomas O Barnett, 'Seven Steps to Better Cartel Enforcement' (11th Annual Competition Law & Policy Workshop, Florence, 2 June 2006) <<http://www.usdoj.gov/atr/public/speeches/216453.pdf>> accessed 14 November 2014.

²⁵ Werden (n 5) 32.

²⁶ Coffee (n 22) 399–400; Cindy R Alexander and Mark A Cohen, 'Why do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost' (1999) 5 J Corp Fin 1, 22.

²⁷ Barnett (n 24).

²⁸ Donald I Baker, 'The use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 Geo Wash L Rev 693, 708.

²⁹ Grant Lamond, 'What is a Crime?' (2007) 27 OJLS 609, 631.

³⁰ Paul H Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 BU L Rev 201, 202–208.

³¹ Julian Joshua, 'Can the UK Cartel Offence be Resuscitated' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011) 145.

³² Donald I Baker, 'Punishment for Cartel Participants in the US: A Special Model?' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011) 27.

should therefore create sufficient moral content in the offence.³³

On the other end of the spectrum, criminalisation has a downside that could tilt the balance of this debate, mainly regarding the costs of criminalisation and its potential inefficiencies. Criminalisation involves longer, more complex and costly procedures, a higher standard of proof that could frustrate its purpose, higher social costs under Type I errors (i.e. false positives) possibly deterring businessmen undertaking legal activities, higher direct costs of prisons and negative externalities for cartelists that acquire 'tougher methods' to secure their secrecy.³⁴ From a moral viewpoint, the criminalisation of morally neutral conduct can be perceived as unjust or counterproductive by unfairly labelling offenders as criminals, thus undermining the morality of criminal law and weakening its deterrence.³⁵ Such conduct 'decriminalizes' criminal law and can result to a change of people's attitude towards it.³⁶ Consequently criminal law should target conduct attracting the moral opprobrium of society.³⁷

Upon weighing the two ends of the scale, criminalisation of cartel conduct provides a strong deterrent practically and morally to illegal behaviour. However, it must first be compared to a successful civil system and its necessity will be questioned.

It is pivotal to vet this proposition through the lens of an optimal civil law system, considering whether such a system would be able to obtain the same goals

as the criminal regime with lower costs. Hence optimal fines, leniency and further solutions and sanctions shall be contemplated to this end. Firstly, the assumption that fines are socially cost-free is accepted, as they represent mere transfers of money,³⁸ although their efficiency is impeded in both the US and EU, on bankruptcy concerns. Nevertheless, this should not be accepted unequivocally, as bankruptcy could increase long term competition through *ex ante* general deterrence in other industries.³⁹ Additionally, other more aggressive owners could buy the bankrupt firm and promote competition.⁴⁰

Regardless of the possible bankruptcy benefits, there is ample room for further improvements and alternatives in the civil law. First and foremost, leniency could draw in a broader range of actors with no residual claim in the firm who could prove catalytic in fraud detection,⁴¹ with incentives of reputation, liability avoidance and reward.⁴² Additionally, a well-enforced and well-designed leniency programme would have an 'improved prosecution effect',⁴³ a 'protection from punishment effect' for undercutting cartelists,⁴⁴ an increase in the 'risk of being undercut and denounced'⁴⁵ and a 'rewards for employees' effect'.⁴⁶ However, critics hold that this would promote an environment of mistrust and uncertainty with negative corporate effects.⁴⁷ Further optimal fine solutions would include the payment of fines by selling control shares, thus retaining the firm's producibility,⁴⁸ prioritisation of sanction or damage liabilities,⁴⁹

³³ Whelan (n 3) 542.

³⁴ Paolo Buccirossi and Giancarlo Spagnolo, 'Optimal Fines in the Era of Whistleblowers. Should Price Fixers still go to Prison?' (2005) Lear Research Paper 24 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=871726> accessed 19 November 2015.

³⁵ Stuart P Green, 'Why it's a Crime to Tear a Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences' (1997) 46 Emory LJ 1533, 1536.

³⁶ Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 359.

³⁷ Geneva Richardson, Anthony I Ogus and Paul Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon 1982) 14–15.

³⁸ Buccirossi and Spagnolo (n 34) 12.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Alexander Dyck, Adair Morse and Luigi Zingales, 'Who Blows the Whistle on Corporate Fraud?' (2010) 65 Journal of Finance 2213.

⁴² Jones and Williams (n 11) 124–125.

⁴³ Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 Int J Industrial Org 347.

⁴⁴ Giancarlo Spagnolo, 'Divide et Impera: Optimal Leniency Programs' (2004) CEPR Discussion paper, 30 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=716143> accessed 15 January 2016.

⁴⁵ *ibid.*

⁴⁶ Cecile Aubert, William Kovacic and Patrick Rey, 'The Impact of Leniency Programs on Cartels' (2006) 24 Int J Industrial Org 1241.

⁴⁷ Terry M Dworkin and Janet P Near, 'A Better Statutory Approach to Whistle-Blowing' (1997) 7 Business Ethics Quarterly 1.

⁴⁸ Buccirossi and Spagnolo (n 34) 37–38.

⁴⁹ Yeon-Koo Che and Kathryn E Spier, 'Strategic Judgment Proofing' (2008) 39 RAND Journal of Economics 926.

extension of liabilities to debt-holders⁵⁰ and imposing minimal asset requirements.⁵¹ Alternative improvements in sanctions would entail broadening the array of civil sanctions like disqualification and punitive injunctions for corporations,⁵² and most significantly this would address the issue of enforcement insufficiency, as probability of detection ‘probably does more to deter antitrust violations than all the fines and incarceration imposed’.⁵³ This possibly explains the US’ success, considering that private enforcement accounts for more than half of the violations uncovered.⁵⁴

Certain conclusions can be drawn from the aforementioned remarks regarding strengthening the civil system with an emphasis on enforcement insufficiency, which, regardless of the system, would still dwindle its foundations. Hence, the UK’s act of endorsing the criminalisation of cartel behaviour can be seen as frivolous or even calamitous in view of a poorly enforced civil structure.

A well-enforced criminal law could, nevertheless, balance the feeble civil foundations of anti-cartel law. Therefore the enforcement of criminal law shall be evaluated in light of the previous regime and any developments or problems that may have been conferred or created.

The previous regime was heavily criticised, mostly on the dishonesty requirement,⁵⁵ and the new regime must now be reviewed in light of any solutions it

provides and its future success. The inadequacy of the old law is clearly reflected in the mere three cases that have been prosecuted: the *Marine Hoses Cartel* case,⁵⁶ which had already been prosecuted by the US; Virgin Airlines,⁵⁷ which ‘ignominiously collapsed’,⁵⁸ and very recently Mr Snee and other directors.⁵⁹ This can be contrasted with the UK Government’s ambition prior to the legislation, in a ‘world class competition regime’, which would prosecute six to ten cases a year.⁶⁰ The Government concluded that the most weakening factor of the offence was the requirement of ‘dishonesty’.⁶¹ The problem is found in the *Ghosh* test,⁶² as jurors would be unlikely to have any ‘pre-existing instincts’ for this type of conduct, or could be swayed by defence arguments such as lack of personal benefit for the defendant or justifications for his actions.⁶³ This problem can be attributed to the drive for criminalisation, which did not result from a bottom-up ‘moral outrage’ process, but rather a ‘top-down’ forward-looking process.⁶⁴ However, it is by no means clear that the dishonesty requirement is the reason behind the UK’s failure of enforcement, but rather the Government’s inadequacy to clarify ‘why criminalisation is necessary and appropriate’.⁶⁵ This point is justified on the basis that condemnation under dishonesty presupposes a pre-existing sense of moral stigma,⁶⁶ evident in Williams’ ‘bootstraps’ problem, which seeks the hardening of the moral opprobrium

⁵⁰ Yolande Hiriart and David Martimort, ‘The Benefits of Extended Liability’ (2008) *RAND Journal of Economics* 562.

⁵¹ Steven Shavell, ‘Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment-Proof Problem’ (2005) 36 *RAND Journal of Economics* 63.

⁵² Brent Fisse, ‘Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011) 313.

⁵³ Robert H Lande and Joshua P Davis, ‘Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) 42 *USF L Rev* 879, 880.

⁵⁴ *ibid.*

⁵⁵ Enterprise Act 2002, s 188(1).

⁵⁶ (COMP/39.406) [2010] 4 CMLR 148.

⁵⁷ OFT Press Release, ‘OFT withdraws criminal proceedings against current and former BA executives’ (10th May 2010, 47/10).

⁵⁸ David Corker, ‘Opinion: Criminal Cartel Offence Revision’ (2014) 13 *Comp LJ* 262, 263.

⁵⁹ Competition and Markets Authority, ‘Supply of Galvanised Steel Tanks for Water Storage: Criminal Investigation (Case CE/9623/12)’ (14 September 2015) <www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage> accessed 15 January 2015.

⁶⁰ Corker (n 58) 262.

⁶¹ Department for Business Innovation & Skills, ‘Growth, Competition and the Competition Regime: Government Response to Consultation’ (BIS March 2012) para 7.8.

⁶² [1982] QB 1053 (CA).

⁶³ Jones and Williams (n 11) 114.

⁶⁴ *ibid* 108.

⁶⁵ *ibid.*

⁶⁶ *ibid* 114.

through the criminalisation of cartels.⁶⁷ However, ‘a poorly designed cartel offence is not only damaging to the competition regime, but is also damaging for the coherence and reputation of criminal law.’⁶⁸

The new law, introduced by the Enterprise Regulatory Reform Act 2013, s 47, removes the dishonesty requirement from the Enterprise Act 2002, s 188. In its place it inserts three new exclusions in s 188A⁶⁹ and two new defences in s 188B.⁷⁰ The three exclusions tackle the secrecy element of cartels by disclosing the relevant information to the public. From the defences, the first one relates to the intention of the individual. The second is a novel questionable defence of obtaining professional legal advice, formulated without any guidance from the Government on its interpretation and implementation, leading to issues as to the competency of the lawyer and level of information given and the principle of confidentiality.⁷¹ Moreover, the application of the offence seems dangerously broad, as ‘dishonesty’ was not replaced, and it could therefore encompass benign ventures, or deter pro-competitive arrangements.⁷² Most significantly, it makes little attempt to identify the reprehensible conduct of the offence,⁷³ which is vital if ‘an anti-cartel culture is to “evolve” to the point that it is natural to view cartel activity as a serious crime’.⁷⁴

The most significant actions to be taken at this point would seem to be, as implemented in Australia, the ‘development of a satisfactory definition of serious cartel behaviour and a clear and a workable method of

combining a clear and certain leniency policy’.⁷⁵ The Government has to correctly identify what is morally repugnant in this conduct, and successfully express it in moral terms.⁷⁶ Such a development would clarify what the prosecutor has to prove and help the jury to perceive the offence and its significance more accurately.⁷⁷

Although the new law can be seen as an improvement to the old, ponderous regime, flexibility is yet to be achieved owing to the introduction of an over-inclusive offence and the lack of clarity as to its interpretation. The criminalisation of such conduct remains to be justified, and the moral gap left by the top-down approach taken by the Government is yet to be closed.

A range of conclusions can be drawn. Firstly, as regards the necessity of a vigorously enforced civil system necessary to attain optimal deterrence, notwithstanding criminalisation’s major advantages, civil procedures could conceivably secure very similar results with less costs. However, this is still hard to prove.

Secondly, the overreliance on ‘dishonesty’ in the UK has sidestepped factors at the heart of the problem, such as the clarification and definition of this area, thus promulgating the old law’s under-enforcement in the criminal law system. Therefore the UK’s decision to follow the US’s criminal law lead can be seen as an impulsive choice to act on a global growing concern within a rather more political than economic pretext.

⁶⁷ Rebecca Williams, ‘Cartels in the Criminal Law Landscape’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011) 297.

⁶⁸ *ibid* 296.

⁶⁹ Enterprise Act 2002, s 188A.

⁷⁰ *ibid* s188B.

⁷¹ Corker (n 58) 265–266.

⁷² Jones and Williams (n 11) 121.

⁷³ Macculloch (n 18) 85.

⁷⁴ Jones and Williams (n 11) 118.

⁷⁵ Peter Costello, ‘Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974’ <http://ministers.treasury.gov.au/Ministers/phc/Content/publications/pub_downloads/TPAResponse.pdf> accessed 10 November 2014, pt 4.

⁷⁶ Mucculloch (n 18) 86.

⁷⁷ *ibid*.

PRIVACY, INCREMENTALISM AND THE UK LEGAL ORDER: A CULTURAL ANALYSIS

Matthew Paterson*

1 INTRODUCTION

Law will not work as law unless it seems to people to embody the basic commitments of their society.¹

We live in an age where the spectres of technology and the media are becoming more intrusive of both physical and informational privacy.² The Internet has become ‘a digital marketplace for personal data’ and some elements of the media have been found guilty of ‘phone hacking[,] covert surveillance and harassment’.³ Such alarming developments mean there is a need for effective protection of privacy interests in the English common law. If domestic privacy law is to ‘work’, those responsible for its development (i.e. the judiciary) require a more nuanced understanding of UK ‘privacy culture’. If this occurs, then a process of incrementalism may offer the link between abstract cultural ambitions for privacy and a realisation of them in law. This may in turn, promote a normatively appealing legal order.⁴

Relativist theory posits that there is no one truth, only the ‘truths of different communities’.⁵ Despite this, Solove suggests ‘there appears to be worldwide consensus about the importance of privacy and the

need for its protection.’⁶ However, there is no consensus regarding the importance of privacy. For example, the Australian Law Reform Commission recommended a privacy tort that is weighted favourably towards free speech.⁷ Similarly, privacy appears to invoke a narrative of contradictory statements; ‘most people, when other interests are at stake, do not care enough about privacy to value it.’⁸ Nonetheless, it is constantly intertwined in ‘questions of social and political character’.⁹ Much recent academic debate has been focused around how to regulate this ‘embarrassingly’ amorphous concept.¹⁰ This debate has been stuck in a hall of mirrors because the judiciary have shown not just an unwillingness, but an inability to do anything other than reflect upon the status quo.¹¹ This ‘aspect blindness’ has resulted in little attention being paid to the individual privacy peculiarities across different nations.¹² Hence, ‘a workable theory of privacy ... account[s] for differing attitudes towards privacy across many different cultures.’¹³

This article will show that a distinct culture of privacy persists in the UK. Scrutiny of relevant law, however, indicates a discord between legal and cultural understandings of privacy. This article takes

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¹ James Q Whitman, ‘The Two Western Cultures of Privacy: Dignity versus Liberty’ (2004) Yale LJ 1151, 1220.

² Raymond Wacks, ‘Confronting Dogma: Privacy, Free Speech, and the Internet’ (Proceedings of the tenth conference on Computers, freedom and privacy: challenging the assumptions, Toronto, April 2000) <<http://www.cfp2000.org/papers/wacks.pdf>> accessed 15 January 2016, 197.

³ *ibid* 198; The Leveson Inquiry, *An Inquiry into the Culture, Practices and Ethics of the Press* (HC 2012–13, 780–I) 592.

⁴ Richard Mullender, ‘Privacy, Imbalance and the Legal Imagination’ (2011) 19 Tort L Rev 109, 113.

⁵ Richard Mullender, ‘Human Rights: Universalism and Cultural Relativism’ (2003) 6 CRISPP 70, 91; Simon Blackburn, *A Very Short Introduction to Ethics Part 1* (OUP 2003).

⁶ Daniel Solove, *Understanding Privacy* (Harvard University Press 2008) 4.

⁷ Australian Law Reform Commission, ‘Serious Invasions of Privacy in the Digital Era’ (Report 123, 2014) para 9.31.

⁸ Calvin C Gotlieb, ‘Privacy: A Concept Whose Time Has Come and Gone’ in David Lyon and Elia Zuriek (eds), *Computers, Surveillance, and Privacy* (University of Minnesota Press 1996) 156; Solove, *Understanding Privacy* (n 6) 5.

⁹ Younger Committee, *Report of the Committee on Privacy* (Cm 5012, 1972) 652.

¹⁰ Nicole A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) LQR 628, 628; Whitman (n 1) 1153.

¹¹ TDC Bennett, ‘Privacy, Corrective Justice, and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario’ (2013) 59 McGill LJ 49, 51.

¹² Emilia Mickiewicz, ‘An Exploratory Theory of Legal Coherence in Canengus and Beyond’ (2010) J Juris 465, 484; Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, first published 1953, Wiley-Blackwell 2009) 279.

¹³ Solove, *Understanding Privacy* (n 6) 9.

Rosen's position that 'law is so inextricably entwined in culture', hence any such discord between the two is undesirable.¹⁴ It therefore makes some tentative suggestions as to how the law might develop along less discordant lines. In order to do this, it will focus particularly upon the concept of 'incrementalism', which informs judicial elaboration of the common law.¹⁵ To achieve greater focus, it will concentrate upon protection for privacy interests in private law (i.e. tort and equity), although it ought to be remembered that privacy interests are also secured (albeit not comprehensively) through a range of statutory mechanisms.¹⁶

Throughout this article, a multidisciplinary approach will be used; making reference to literature of historical and legal significance insofar as they depict the current social conditions that have shaped privacy law. Before engaging in this cultural scrutiny, we must locate a framework for analysis. This requires navigation of the tricky definitional terrain of 'privacy' and 'culture'. It is to this initial task that we turn in the next section.

2 THE CONCEPTUAL LABYRINTH OF PRIVACY AND CULTURE¹⁷

2.1 What is Privacy?

'Privacy' is a notoriously difficult concept to define.¹⁸ Despite its frequency of use,¹⁹ the problematic nature of drilling down to its 'conceptual and moral core' has

made it a 'difficult interest for which to provide effective legal protection'.²⁰ For these reasons, Negley stated in 1966 that 'privacy ... can no longer be presumed but must be specified'.²¹ Whilst there have been numerous attempts at specification since, privacy remains 'one of the most critical problems of contemporary ... legal analysis'.²²

Negley then suggested that 'the realisation of privacy is dependent on philosophical definition, not on fact'.²³ Thus, a logical starting point in attempting to define a concept with a 'protean capacity to be all things to all lawyers' is Warren and Brandeis' popular conception of privacy as the 'right to be left alone'.²⁴ Successive attempts to define privacy have been wide-ranging.²⁵ They have considered, *inter alia*: 'control over information about oneself';²⁶ 'the ability to control the access others have to us';²⁷ 'intimacy, moral capital and liberty';²⁸ understandings related to 'dignity and liberty';²⁹ and necessary 'for the development of ... meaningful interpersonal relationships'.³⁰

These definitions appear to strive towards 'Kantian universality as opposed to cultural relativism'.³¹ By contrast, O'Callaghan claims his definition provides 'universality' whilst also allowing for 'reasonable pluralism'.³² Yet O'Callaghan's attempt to satisfy both of these demands leads him to adopt an 'over-inclusive' definition.³³ Mullender provides clarity in

¹⁴ Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press 2006) 7.

¹⁵ *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL); *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) 378 (Lord Goff).

¹⁶ Data Protection Act 1998; Protection from Harassment Act 1997.

¹⁷ Solove, *Understanding Privacy* (n 6) 11.

¹⁸ Arthur R Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (University of Michigan Press 1971) 25; Daniel J Solove, 'Conceptualizing Privacy' (2002) 90 Cal L Rev 1087, 1088.

¹⁹ Ruth Gavison, 'Privacy and the Limits of the Law' (1980) 89 Yale LJ 421, 423.

²⁰ Julie C Innes, *Privacy, Intimacy, and Isolation* (OUP 1996) 3; Bennett, 'Privacy, Corrective Justice, and Incrementalism' (n 11) 54.

²¹ Glenn Negley, 'Philosophical Views on the Value of Privacy' (1966) 31 LCP 319, 320.

²² *ibid.*

²³ *ibid* 319.

²⁴ Tom Gerety, 'Redefining Privacy' (1977) 12 Harv CR-CL Law Rev 233, 234; Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193.

²⁵ Daniel J Solove, "'I've Got Nothing to Hide" and Other Misunderstandings of Privacy' (2007) 44 San Diego L Rev 745, 754; Solove, 'Conceptualizing Privacy' (n 18) 1099.

²⁶ WA Parent, 'Privacy, Morality and the Law' (1983) 12 Phil & Pub Aff 269.

²⁷ Gavison (n 19).

²⁸ N W Barber, 'A right to privacy?' [2003] PL 602.

²⁹ Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer 2013) 1.

³⁰ J Rachels, 'Why Privacy is Important' (1975) 4 Phil & Pub Aff 323.

³¹ Kenneth Neil Farrall, 'Global Privacy in Flux: Illuminating Privacy across Cultures in China and the US' (2008) 2 Int J Comm 993, 994 <<http://ijoc.org/index.php/ijoc/article/view/370>> accessed 13 November 2015.

³² O'Callaghan, *Refining Privacy in Tort Law* (n 29) 1.

³³ Solove (n 6) 36.

this area, suggesting that most academic comment in human rights law paints an ‘unhelpfully crude picture’ that universalism and cultural relativism ‘stand in sharp opposition’.³⁴ In response to this problem, he offers three alternative positions, which accommodate relativism and universality better.³⁵ Most relevant to our concerns in the UK, is the Walzerian approach that advocates a strong relativist grounding whilst accepting that ‘it is possible to extract ... some ... thin norms that have potentially very wide (perhaps even universal) applicability’.³⁶ Although the Walzerian approach may provide an analytic framework that brings privacy law sharply into focus, this article does not attempt to make universal claims, but largely maximalist claims, relevant to the UK jurisdiction.

As seen in the definitions of privacy outlined above, some, but not all of the privacy literature, stems from a deontological paradigm and does not question the validity of its role within its *specific* legal order. The writers overlook the difficulty in proving whether ‘the intrinsic nature of privacy establishes it as a legal right’.³⁷ Rather, they seem to ask: ‘[W]ho could deny that privacy is a jewel?’³⁸ This fastens onto Farrall’s understanding that deontological arguments should be treated wearily for ‘there are other ... concepts under the rubric of human rights ... which privacy cannot ... trump’.³⁹ This seems apt given that tort law is enveloped by the pursuit of organising ideals such as security, freedom of action and distributive justice.⁴⁰

Perhaps tort law is ‘informed by qualified deontological theory’ anyway because it ‘assume[s] the significance of the interests that [it] serve[s] to protect’ and only overrides privacy when ‘significant’ thresholds are ‘regarded as having been reached’.⁴¹ These qualified ‘deontological moral impulses’ are

more prominent than ever in privacy law as they are increasingly filtered down from Articles 8(2) and 10(2) of the European Convention on Human Rights (ECHR) (under the heads of respect for private and family life and freedom of expression respectively).⁴² This ‘qualified deontological’ focus is beneficial for privacy law because it is a mechanism well attuned to the task of dealing with conflicting deontological and consequentialist arguments.

Yet, if the definitional approach (deontological or otherwise) can offer anything, it is an attempt to restore practical significance and determinacy to the term ‘privacy’ (although Wacks disagrees, arguing that ‘privacy’ ‘has been so devalued that it no longer warrants ... consideration as a legal term of art’).⁴³ Moreover, the urge to define ‘privacy’ can also trap us in an enthusiastic mentality that pays wilful disregard to countervailing interests. Still, perhaps we should strive for a middle ground, one that appreciates the impossibility of grasping ‘privacy’ in a crystalline form, but one which also recognises the social desirability of a definition that ensures ‘privacy’ is more amenable to legal and cultural analysis.⁴⁴ As such, the best definition that can be offered is privacy as what your culture, ‘community’ or even country’s ‘shared experience’ allows it to be.⁴⁵ This echoes the view that ‘privacy varies widely across time and individual cultures’.⁴⁶ Accordingly, the above definition avoids doing a ‘disservice’ to privacy by ‘unduly limiting the concept’,⁴⁷ since it appreciates that ‘law is the witness and external deposit of our shared moral life’.⁴⁸

³⁴ Mullender, ‘Human Rights: Universalism and Cultural Relativism’ (n 5) 70.

³⁵ *ibid* 91.

³⁶ *ibid* 80.

³⁷ Negley, ‘Philosophical Views on the Value of Privacy’ (n 21) 319.

³⁸ Phyllis McGinley, ‘A Lost Privilege’ in Phyllis McGinley, *The Province of the Heart* (Viking 1959) 53, 56.

³⁹ Farrall (n 31) 999.

⁴⁰ *ibid*; Richard Mullender, ‘Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy’ (2000) 27 J Law & Soc’y 493, 501.

⁴¹ Richard Mullender, ‘Privacy, Paedophilia and the European Convention on Human Rights: A Deontological Approach’ [1998] PL 384, 388.

⁴² Richard Mullender, ‘Tort, Human Rights, and Common Law Culture’ (2003) 23 OJLS 301, 308–309; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁴³ Raymond Wacks, *The Protection of Privacy* (Sweet & Maxwell 1980) 10.

⁴⁴ Solove, ‘Conceptualizing Privacy’ (n 18) 1088, 1091–1092.

⁴⁵ O’Callaghan, *Refining Privacy in Tort Law* (n 29) 25; Solove (n 6) 9.

⁴⁶ Farrall (n 31) 993.

⁴⁷ Peter Stein and John Shand, *Legal Values in Western Society* (Columbia University Press 1974) 187.

⁴⁸ Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10 Harv L Rev 457, 458.

2.2 *The Informing Analytical Framework*

Rivalling the influence of Warren and Brandeis,⁴⁹ Prosser's taxonomy offered an interpretation of early Anglo-American privacy law.⁵⁰ He was working up to the American *Restatement of Torts* (2d) and thus trying to classify *existing* torts, rather than define a concept.⁵¹ He categorised the causes of action in US law as follows:

1. Intrusion upon solitude;
2. Public disclosure of embarrassing private facts;
3. Appropriating the claimants name or likeness for gain; and
4. False light invasions of privacy.

These classifications provided a historical context, without which future works would have been impossible.⁵² However, his taxonomy now seems too 'under-inclusive' to deal with modern privacy problems associated with our Information Age.⁵³

Nonetheless, by compartmentalising privacy interests the taxonomy stifled the law's potential for fluid development.⁵⁴ Thus, the significance of Prosser's work is twofold. Firstly, he legitimised the explicit legal protection of privacy, but secondly left a 'stultifying' impulse in the prevailing Anglo-American methods of thinking about privacy.⁵⁵ If Prosser's legacy can teach us anything relevant to the forthcoming analysis, it is that looking solely to case law may be deficient when trying to understand privacy within the UK's socio-legal context.

2.2.1 *Adding to Gavison*

In contrast to Prosser's taxonomy, Gavison offers an 'anti-reductionist' model of privacy based on

accessibility.⁵⁶ It focuses on three limbs.⁵⁷ First, 'secrecy' relates 'to the amount of information known about an individual';⁵⁸ second, 'anonymity', is the 'attention paid to an individual';⁵⁹ and third and finally 'solitude', which concerns the level of 'physical access to an individual'.⁶⁰

She contends these three values are 'independent ... but interrelated ... and richer than any definition centred around only one of them'.⁶¹ She also maintains that we ought to adopt an 'explicit legal commitment to privacy' although such a proposal seems only to 'identify the factors that should be considered by the legal system' rather than to give any legal force to a 'right of privacy'.⁶² Thus, she advocates for clarification of privacy instead of a recalibration of its status within the legal system. As such, a cultural understanding of our jurisdiction will help to clarify the *role* and *status* of privacy. Ultimately Gavison's rejection of studying privacy from a case law perspective offers a useful angle for doing analytical work. Adequately understanding privacy in context necessitates looking to the 'extra-legal concept of privacy', which this article will find in UK 'culture'.⁶³

2.2.2 *Making Use of Solove*

Solove's recent, 'pragmatic' taxonomic conception of privacy offers four main contributions.⁶⁴ First, attempts to find core meanings of privacy have hitherto failed.⁶⁵ Second, how we value privacy must be 'determined on the basis of its importance to society, not in terms of individual rights'.⁶⁶ Third, privacy can be understood under four broad taxonomic heads: information collection, information processing,

⁴⁹ Edward J Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 NYUL Rev 962, 964.

⁵⁰ William L Prosser, 'Privacy' (1960) 48 Cal L Rev 383.

⁵¹ Neil M Richards and Daniel J Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 Cal L Rev 1887, 1901.

⁵² *ibid.*

⁵³ *ibid* 1924.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Gavison (n 19); O'Callaghan, *Refining Privacy in Tort Law* (n 29) 11.

⁵⁷ Gavison (n 19) 433.

⁵⁸ *ibid* 429.

⁵⁹ *ibid* 432.

⁶⁰ *ibid* 433.

⁶¹ *ibid* 428.

⁶² *ibid* 467–468.

⁶³ *ibid* 462.

⁶⁴ Solove (n 6).

⁶⁵ *ibid* 8.

⁶⁶ *ibid* 10.

information dissemination and invasion.⁶⁷ Fourth and finally (and perhaps most importantly), we should adopt an ‘alternate’ approach to privacy that accounts for differing attitudes across cultures by ‘conceptualising privacy from the bottom up’ in context rather than abstraction.⁶⁸ This ‘alternate approach’ also aims to reject the task of locating a common theoretical denominator in privacy. This can be achieved by framing privacy with Wittgenstein’s family resemblance model.⁶⁹

The foreseeable objection to Solove is his exclusive focus on the American privacy tradition. Despite this, we can use his framework as a lens through which to scrutinise other jurisdictions, including our own. His framework trumps others’ like Prosser’s, because of his strenuous efforts to achieve generality whilst also ‘accommodat[ing] the insights’ of both cultural relativism and universalism.⁷⁰ Most notably, our UK analysis can draw on his ‘bottom up’ Walzerian approach and respect for cultural difference.⁷¹ The real attractiveness of Solove’s work is to warn against ‘the dangers of the traditional (top-down) methods of thinking about privacy’.⁷²

2.2.3 Conclusions on the Concept of Privacy

From this examination of the ‘conceptual labyrinth of privacy’, the framework for cultural analysis in forthcoming sections can be summarised by the following key concepts.⁷³ First, privacy is a linguistically and conceptually ‘elusive’ term.⁷⁴ In one sense, it can be perceived as relativistic hence it varies geographically and temporally, ‘from culture to culture and from era to era’.⁷⁵ In another sense, it seems to lack objective meaning. This is because

(arguably *all*) meaning is located, at a neurological level, by the use of metaphor, making it inevitably subjective.⁷⁶ Since ‘privacy’ cannot be adequately objectively defined using bare language, we need a contextual understanding that situates the concept within the culture in which legal protections for it are to be designed. Being attentive to differing cultures of privacy is possible using the ‘bottom up’ Walzerian approach. Second and finally, a cultural examination is required to further our understanding of the *role* and *status* of privacy within our distinct legal system. Only then will we be in a position properly to assess the suitability of prevailing privacy-protecting mechanisms to the task at hand.

2.3 What is Culture: Another Definitional Abyss?

Anthropologists have most closely traced definitions of ‘culture’ and unsurprisingly there is little consensus.⁷⁷ It is ‘one of the ... most complicated words in the English language ... because it has ... come to be used for important concepts in several ... intellectual disciplines’.⁷⁸ Nonetheless, Tylor’s enduring anthropological definition considers ‘culture’ the ‘complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities ... acquired by man as a member of society’.⁷⁹ In this sense, ‘culture’ by the notion used in this article, is a genus of Hart’s ‘internal point of view’.⁸⁰ An ‘internal point of view’ with ‘a shared ... sense of reasonableness’ exclusive to members of the UK ‘community’.⁸¹

The dictionary then offers some everyday clarity defining ‘culture’ as ‘the customs, ideas, and social

⁶⁷ *ibid.*

⁶⁸ Solove, ‘Conceptualizing Privacy’ (n 18) 1092.

⁶⁹ *ibid* 1026.

⁷⁰ Mullender, ‘Human Rights: Universalism and Cultural Relativism’ (n 5) 70.

⁷¹ *ibid* 80.

⁷² O’Callaghan, *Refining Privacy in Tort Law* (n 29) 18.

⁷³ Solove (n 6) 11.

⁷⁴ Richard Posner, ‘The Right of Privacy’ (1978) 12 Ga L Rev 393, 393.

⁷⁵ David Lyon, *Surveillance Studies: An Overview* (Polity Press 2007) 7; Farrall (n 31).

⁷⁶ Lea Povozaev, ‘Metaphor as Emotive Change: A Triangulated Approach to Thought, Language, and Emotion Relatable to Aristotelian Sensate Perception’ (2013) 32 Rhetoric Rev 44, 45; Tim Murphy, *Nietzsche, Metaphor, Religion* (State University of New York Press 2001) 66.

⁷⁷ Paul Bohannan and others, ‘Rethinking Culture: A Project for Current Anthropologists [and Comments and Reply]’ (1973) 14 Current Anthropology 357, 357.

⁷⁸ Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (OUP 1976) 76.

⁷⁹ Edward Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art and Custom, vol 1* (John Murray 1871) 1.

⁸⁰ HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 137; Mullender, ‘Tort, Human Rights, and Common Law Culture’ (n 42) 301.

⁸¹ Mullender, ‘Tort, Human Rights, and Common Law Culture’ (n 42) 313.

behaviour of a particular group of people'.⁸² Even clearer is Rosaldo who considers it the doctrine that 'if people feel and think differently about the world, they are not demented or stupid'.⁸³ However, in reality such a convenient turn of phrase does not suffice for 'there is not a single, eternal definition of culture'.⁸⁴ Yet Cotterrell validates the use of the term 'culture' to gain analytic purchase on the UK legal order by stating that whilst 'culture' may not be exact, its 'collective significance is recognisable and requires emphasis'.⁸⁵

This attempt to use one 'ill-defined' term (culture) to analyse another (privacy) might seem foolhardy.⁸⁶ Like 'privacy', the term 'culture' is inevitably subjective because it is located at a neurological level, by the use of metaphor.⁸⁷ However, just because one word seems harder to agree upon a definition of than others does not necessarily mean that the mind is doing anything significantly different when processing the input of 'culture' or 'privacy'.⁸⁸ Similarly, 'many of the ... building blocks of social science ... are hard to define ... [but] that does not make them necessarily incoherent'.⁸⁹ Therefore, the linguistic deficiencies of 'culture' 'should not prevent us from advancing knowledge'.⁹⁰

2.4 Why a Cultural Study of Law?

In Western liberal democracies, much idealism revolves around the notion of law being 'a product of popular consent' and 'commanding the rational and autonomous consent of all those subject to it'.⁹¹ Whilst these are virtually unachievable thresholds for law to meet, culture is essential in understanding 'popular

consent'.⁹² Walzer proposes that through studying law, citizens should 'aim for what is best for themselves, what fits their history and culture'.⁹³ If we do not subscribe to Walzer's approach, we risk 'denarration'.⁹⁴ By this, we would cease to 'have a life' or 'feel lost', because we crave existence within elaborate stories in a quest for (superficial) meaning.⁹⁵

In short, a cultural analysis is necessary, because within privacy we are striving for law that is not merely imposed upon its addressees but that develops out of their 'mores' and 'bind[s] their reason'.⁹⁶ Ultimately, this strikes a Dworkinian note. In his 'soundest theory of law', Dworkin recognises that Hercules is *required* to take account of relevant historical and political discourse.⁹⁷ Thus, encouraging privacy judges to identify relevant principles in the UK legal system necessitates an interdisciplinary move towards a cultural analysis of privacy. Hence, 'cultural studies impinges on jurisprudential thinking as never before so ... a legal theorist must also be a ... cultural theorist'.⁹⁸

2.5 The Contemporary Debate on 'Privacy Culture'

Altman provides a profound ethnographic grounding to the 'privacy culture' debate.⁹⁹ He posits a 'highly abstract' model of privacy as a 'dialectic' 'interpersonal-boundary process'.¹⁰⁰ This considers how people negotiate boundaries of 'social interaction or non-interaction ... over time' and differing circumstances.¹⁰¹ Hughes breathed new life into Altman by transposing him into her 'barriers' thesis,

⁸² Catherine Soanes and Angus Stevenson (eds), *Concise Oxford English Dictionary* (11th edn, OUP 2006) 349.

⁸³ Renato Rosaldo, 'Foreword: Defining Culture' in John Baldwin and others (eds), *Redefining Culture: Perspectives Across the Disciplines* (Lawrence Erlbaum Associates 2006) ix.

⁸⁴ *ibid* vii.

⁸⁵ Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

⁸⁶ Posner, 'The Right of Privacy' (n 74).

⁸⁷ Povozaev (n 76) 45; Murphy (n 76).

⁸⁸ Povozaev (n 76) 54.

⁸⁹ Lawrence M Friedman, 'The Concept of Legal Culture: A Reply' in David Nelken (ed), *Comparing Legal Cultures* (Dartmouth 1997).

⁹⁰ O'Callaghan, *Refining Privacy in Tort Law* (n 29) 4.

⁹¹ Paul W Kahn, *The Cultural Study of Law* (University of Chicago Press 1999) 8; Lesley Dolding and Richard Mullender, 'Tort Law, Incrementalism, and the House of Lords' (1996) 47 NILQ 12, 30.

⁹² Kahn (n 91).

⁹³ Mullender, 'Human Rights: Universalism and Cultural Relativism' (n 5) 81.

⁹⁴ *ibid* 82.

⁹⁵ Andrew Tate, *Douglas Coupland* (Manchester University Press 2007) 38.

⁹⁶ Adam Gearey, 'The Poetics of Practical Reason: Joseph Raz and Philip Larkin' (2007) 19 Law and Lit 377, 383.

⁹⁷ Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 88.

⁹⁸ Steve Redhead, *Unpopular Cultures: The Birth of Law and Popular Culture* (Manchester University Press 1995) 30.

⁹⁹ Irwin Altman, 'Privacy Regulation: Culturally Universal or Culturally Specific?' (1977) 33 J Soc Issues 66.

¹⁰⁰ Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* (Brooks/Cole 1975) 6.

¹⁰¹ *ibid* 23.

which finds that ‘invasions of privacy occur when a [behavioural] barrier of privacy is penetrated’.¹⁰² Both writers are useful in understanding how to incorporate ‘culturally-based privacy mechanisms’ into judicial adjudication.¹⁰³ They spur reflection on whether cultural context can form a valid consideration when engaging in ‘wide fidelity’ legal development. Altman’s overarching merit is to endorse the need for a cultural analysis of the UK, because ‘the behavioural mechanisms by which accessibility is controlled are probably unique to the particular physical ... and social circumstances of a culture’.¹⁰⁴

By contrast, O’Callaghan tracks privacy in an explicitly legal manner. His work is significant in trying to understand our ‘shared experience of privacy’; refining the ‘hard cases’ in tort law and, like Solove, rejecting the (top-down) ‘method in privacy scholarship’.¹⁰⁵ Whilst his ‘privacy curve’ offers a context for understanding ‘hard cases’, his examination of ‘late modernity’ stems from legal literature and black-letter law as opposed to broad cultural indicators.¹⁰⁶ Therefore, to understand how incremental development can promote normatively appealing law, we need to synthesise the abstract cultural outlook of Altman with O’Callaghan’s technical approach.¹⁰⁷ By doing this, it will justify the critical perspective that: when elaborating on the law, judges ought to pay attention not simply to existing doctrine but also to the broader cultural context in which the law’s intended addressees sit.

2.6 Contextualising ‘Privacy Culture’

Whitman identifies ‘on the two sides of the Atlantic, two different cultures of privacy [with] ... different intuitive sensibilities, and ... significantly different laws of privacy’.¹⁰⁸ He suggests the difference is a European sense of ‘privacy as an aspect of dignity’

with the threat of the mass media and in the US – ‘as an aspect of liberty’ responding to the threat of the government.¹⁰⁹

Whitman is a useful foundation to this debate but his article needs to be updated for two reasons. First, he does not deal with the UK either as a distinct culture or even as part of European culture. Second, Whitman’s 2004 article precedes some significant events that have brought issues of privacy into sharp public focus. For example, the (startling) revelations concerning widespread government surveillance by the NSA and GCHQ or the *News International* phone hacking scandal.¹¹⁰ To take Knoke’s phrase, these examples may have been ‘focusing event[s]’.¹¹¹ Knoke considers a ‘focusing event’ to be ‘a rare, sudden and harmful event with high media visibility that draws intense attention to a socio-political problem and may subsequently induce public policy changes’.¹¹² Consequently, the socio-political privacy landscape has shifted significantly since Whitman’s article.

Best concluded that ‘three major developments ... have had an effect on contemporary public sentiment towards privacy’.¹¹³ These might be seen as ‘focusing events’, in Knoke’s sense of the term:

1. [T]he emergence of the Internet;
2. [T]he commencement of the war on terror; and
3. [T]he development of a wide array of new surveillance technologies.¹¹⁴

These examples suggest that the shape of ‘focusing events’ can vary dramatically. They have a large ‘field of interpretive possibility’ ranging from rather drawn-out technological developments like the ‘emergence of

¹⁰² Kirsty Hughes, ‘A Behavioural Understanding of Privacy and its Implications for Privacy Law (2012) 75 MLR 806, 806.

¹⁰³ Farrall (n 31) 1000 (emphasis added).

¹⁰⁴ Altman, ‘Privacy Regulation: Culturally Universal or Culturally Specific?’ (n 99) 82.

¹⁰⁵ O’Callaghan, *Refining Privacy in Tort Law* (n 29) 25, 95, 22.

¹⁰⁶ *ibid* 49–92.

¹⁰⁷ Mullender, ‘Privacy, Imbalance and the Legal Imagination’ (n 4).

¹⁰⁸ Whitman (n 1) 1160.

¹⁰⁹ *ibid* 1208.

¹¹⁰ Section 3.3 below.

¹¹¹ Farrall (n 31) 999.

¹¹² David Knoke, ‘The Sociopolitical Construction of National Policy Domains’ in Christian Henning and Christian Melbeck (eds), *Interdisziplinäre Sozialforschung: Theorie und empirische Anwendungen: Festschrift für Franz Urban Pappi* (Campus Verlag 2004) 84.

¹¹³ Samuel J Best, Brian S Krueger and Jeffrey Ladewig, ‘The Polls – Trends: Privacy in the Information Age’ (2006) 70 Public Opin Q 375, 375; Farrall (n 31) 999.

¹¹⁴ *ibid*.

the internet' to shorter events like 9/11.¹¹⁵ Specifically in the UK context, the *News International* phone hacking scandal may have played a role in recalibrating public sentiment towards the balance between privacy and freedom of speech.¹¹⁶ This scandal raises a question regarding the extent to which judges engaged in incrementally elaborating on how the law ought to pay attention to 'focusing events'. A full answer can only be given by looking at responses to such 'events' in section 4 below.

Finally, to evidence his argument, Whitman failed to explore the wealth of cultural information in literature. Instead, he traced a historical timeline focused on teasing out social norms that could lead to conclusions about European 'privacy culture'. However, he did recognise literature's ability to shape conceptions of privacy by claiming that few privacy advocates would talk of a 'privacy culture' without mentioning Orwell and totalitarianism.¹¹⁷ Therefore, section 3 will remedy this deficiency by going further than just Orwell, to investigate more recent examples of 'privacy in literature' and determine whether they hold the same potency for legal change.

2.7 *The Argument Going Forward*

Having considered the background to the labyrinthine problems of both 'privacy' and 'culture', and established our analytic framework, we are in a position to outline the argument that will be made in the sections ahead. This is crystallised in response to the following statement:

How privacy claims are interpreted and applied in different societies depends on cultural expectations, history, accepted practices, existing law, and other factors.¹¹⁸

Our cultural expectations suggest ours is a country of 'lofty ambition'. Our history largely agrees, and despite having a less than stellar record of protecting privacy, this has often been achieved incidentally

through the protection of other legal interests.¹¹⁹ Our accepted practices are changing rapidly with technology and are increasingly scrutinised, particularly those related to media regulation. Our law is also changing at a similar pace with the on-going interpretation of Articles 8 and 10 of the ECHR. This interpretive process has offered up an ideal opportunity to analyse the judicial decision-making that is shaping the UK's socio-legal landscape.¹²⁰ In furtherance of this critique, we can now proceed to putting privacy in the UK under cultural scrutiny. It will track a timeline of salient literary insights in order to flag up a discord between the culture and the existing privacy law. It is to the task of illuminating our 'lofty cultural ambitions' for privacy that we now turn.

3 THE CULTURAL ANALYSIS OF PRIVACY

The energy that actually shapes the world springs from emotions.¹²¹

– George Orwell

3.1 *The Importance of Imagination*

There is more to ... law than its practical impact ... [It] also aims to express social values.¹²²

This section proposes that privacy law is failing to map tightly onto these social values. This discord can be brought into focus by examining the interplay between three aspects of the imagination – the legal, literary and sociological – and their relevance to legal development.

The legal imagination is 'a dimension of the law's internal point of view ... from which we grasp the law's purposes and find ... authoritative reasons for action.'¹²³ A precursor to making use of the legal imagination is legal consciousness. This is 'the legal knowledge that people invoke in the course of their daily social interactions' which helps to 'justify [their] legal institutions'.¹²⁴ Thus, 'through language,

¹¹⁵ Richard Mullender, 'Judging and Jurisprudence in the USA' (2012) 75 MLR 914, 919.

¹¹⁶ Leveson Inquiry (n 3) 270.

¹¹⁷ Whitman (n 1) 1153; George Orwell, *Nineteen Eighty-Four* (first published 1949, Penguin 2013).

¹¹⁸ Richard T De George, *The Ethics of Information Technology and Business* (Blackwell 2003) 40.

¹¹⁹ O'Callaghan, *Refining Privacy in Tort Law* (n 29) 96.

¹²⁰ *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [11] (Buxton LJ); *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [17].

¹²¹ George Orwell, 'Wells, Hitler and the World State' in George Orwell, *Critical Essays* (Secker and Warburg 1946) 84.

¹²² Whitman (n 1) 1170.

¹²³ Mullender, 'Privacy, Imbalance and the Legal Imagination' (n 4).

¹²⁴ Menachem Mautner, 'Three Approaches to Law and Culture' (2011) 96 Cornell L Rev 839, 842; Lieve Gies, 'The Media and Public Understanding' in Steve Greenfield and Guy Osborn (eds), *Readings in Law and Popular Culture* (Routledge 2006) 75.

tradition, and values' we are able to 'constitute boundaries of consciousness about privacy'.¹²⁵

We can then interpret this legal consciousness with the aid of Nussbaum's literary imagination. This is pertinent since we live in a society 'colonized by made-up-people [and] stories'.¹²⁶ Nussbaum suggests that traditional legal reasoning forms the boundary of the literary imagination, which can then 'steer judges in their judging'.¹²⁷ Similarly, a judge can use the imaginative perspective gained from literature to facilitate 'an analogical leap' from the set rules – the 'ultimate balancing test' in our case – to yield a 'clear answer' when deciding novel case law.¹²⁸ This provides a mechanism to incorporate relevant literary insight into judicial decision-making when incrementally developing the law. Thus, the literary imagination can help judges to 'see one thing as another' and 'conceive of non-existent possibilities'.¹²⁹ These attributes could prove significant when applied to an area of law that has displayed 'judicial inertia' since *Campbell v MGN Ltd.*¹³⁰

Given this study's cultural focus, the sociological imagination can then be factored in as a 'corrective' to lawyers who see law as giving 'adequate expression to [underlying] reasons for action'.¹³¹ The sociological imagination acts 'like a splinter of ice in the heart' of our legal consciousness and equips 'us to attend to legal and ... institutional realities'.¹³² By using these discrete aspects of the imagination as an analytic looking glass, we can reveal a discord between the culture and privacy law. Crucially, if judges exhibit

'aspect blindness' to one or other aspect of the imagination by failing to 'light up' salient features of law, then this cultural discord can escalate into a serious problem.¹³³ A problem occurs where judges are 'unable' to incrementally develop the law and invest it with 'normative appeal' because they cannot act with 'sensitivity to [our] ... politico-legal context'.¹³⁴ Hence, we can begin to search the legal conscience for a discord by plotting a literary timeline of privacy insights.

3.2 *Britain's Privacy: A Land of 'Lofty Ambition'*

This cultural analysis seeks to justify one central claim: British cultural discourse gives voice to a 'lofty ambition' surrounding privacy protection. More precisely, this discourse reserves a special scorn for intrusive conduct and rejects the shoehorning of privacy interests into ill-fitting doctrine. The cultural voice exhibits too much ambition, with which the law has not yet been able to do anything.

3.2.1 *Our Historical Affinity with Privacy*

Privacy has for a long time found way with the British.¹³⁵ Our literary timeline begins in 1215 with *Magna Carta* – 'the foundation of all our laws and liberties' – which enshrined a private space into which the crown could not intrude.¹³⁶ If this document is the closest 'to an irrepealable "fundamental statute" that England has ever had', then by enshrining privacy it set in motion a fundamental ambition for its

¹²⁵ Robert S Laufer and Maxine Wolfe, 'Privacy as a Concept and a Social Issue: A Multidimensional Development Theory' (1977) 33 J Soc Issues 22, 22.

¹²⁶ Ben Elton, *Blind Faith* (Random House 2007) 59.

¹²⁷ Martha C Nussbaum, 'The Literary Imagination in Public Life' (1991) 22 New Lit Hist 877.

¹²⁸ *Re S* (n 120) [17] (Lord Steyn); Richard Mullender, 'Book review: M. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life*' (1998) 61 MLR 287, 290.

¹²⁹ Martha C Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press 1995) 36; Mullender, 'Book Review: *Poetic Justice*' (n 128) 287.

¹³⁰ [2004] UKHL 22, [2004] 2 AC 457; Raymond Wacks, 'Why There Will Never Be an English Common Law Privacy Tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (CUP 2006) 177; TDC Bennett, 'Corrective Justice and Horizontal Privacy: A Leaf out of Wright J's Book' [2010] J Juris 545, 550.

¹³¹ Mullender, 'Privacy, Imbalance and the Legal Imagination' (n 4).

¹³² *ibid.*

¹³³ Mickiewicz (n 12) 476; Wittgenstein (n 12) 212.

¹³⁴ Mullender, 'Privacy, Imbalance and the Legal Imagination' (n 4).

¹³⁵ David Rosen and Aaron Santesso, 'Inviolable Personality and the Literary Roots of the Right to Privacy' (2011) 23 Law and Lit 1.

¹³⁶ David Cameron, 'British Values aren't Optional, They're Vital' *MailOnline* (London, 15 June 2014) <<http://www.dailymail.co.uk/debate/article-2658171/DAVID-CAMERON-British-values-arent-optional-theyre-vital-Thats-I-promote-EVERY-school-As-row-rages-Trojan-Horse-takeover-classrooms-Prime-Minister-delivers-uncompromising-pledge.html>> accessed 12 February 2015; Michael Halley, 'Breaking the Law in America' (2007) 19 Law and Lit 471, 471.

protection.¹³⁷ Consequently, England has experienced some form of ideological protection of privacy before the law for 800 years.

The seventeenth century saw Shakespeare pick up on this trend. Through his ability to play on our imaginative and intellectual faculties simultaneously, his work thickened our understanding of privacy. His thematic persistence on gossip, the passing of information and intrusive behaviour, explored in the ‘tragedy of surveillance’¹³⁸ – *Hamlet* – primed our sociological, literary and legal imaginations for the developments to come in the twentieth century. For example, consider the culmination of these themes in act 3, scene 4.¹³⁹ Hamlet stabs Polonius upon discovering that he is secretly gathering intelligence about his private conversation with Gertrude.¹⁴⁰ From our modern viewpoint, this scene is a haunting prelude to the inherently political nature that privacy takes on in dystopian fiction. Shakespeare offers a view on power. Seclusion from state power is necessary to ensure a just and not ‘rotten’ state like Denmark.¹⁴¹ Shakespeare’s *Hamlet* is not alone in this conclusion. Three years later came *Semayne’s Case*, ‘the foundational privacy decision’ in England.¹⁴² It was held therein that ‘the house of every one is to him as his castle and fortress, as well as for his defense against injury and violence’.¹⁴³ Therefore, through *Hamlet* and *Semayne’s Case*, we realise that physical freedom from the state, is a highly desirable by-product of a system that cherishes privacy.¹⁴⁴

Whilst Shakespeare offers glimmers of the strong foundations of our approach to privacy, the real conception of our legal consciousness began to form in the Romantic Age of English literature. ‘Novels and ... poems, during the eighteenth century, were the

main forum in which emergent ideas about privacy were developed and tested.’¹⁴⁵ Rosen and Santesso suggest that a deeper understanding of privacy emerged in *Epistle to Dr. Arbuthnot*. In it, Pope states:

What Walls can guard me, or what Shades can hide?

... No place is sacred, not the Church is free.¹⁴⁶

Here Pope pays ‘lip service to the notion of solitude’ but, as a poet, he appreciates that free expression and privacy are interdependent.¹⁴⁷ He understands that to live, as he wanted, requires putting up with free expression’s ‘sad civility’.¹⁴⁸ Even though Pope occupies a fitting parallel for our contemporary discussion as a ‘celebrity’, he still expressed an ambition to ‘live, unheard, unknown’.¹⁴⁹ Through this, Rosen and Santesso argue that he represents ‘the pre-modern conception of privacy’, but it appears he exhibits the opposite.¹⁵⁰ He understands that perfect equilibrium between what we would now recognise as interests contained within Articles 8 and 10 ECHR is unfeasible and undesirable. Above all, whilst he recognises that some intrusion into his private life is inevitable, a just ‘balance’ between privacy and free expression requires a fine attentiveness to individual privacy interests.

Our focus on privacy becomes even clearer in the early twentieth century. Woolf’s character Clarissa Dalloway is worthy of note. The culmination of the novel *Mrs Dalloway* sees this protagonist host a party.¹⁵¹ Miller suggests this scene juxtaposes Clarissa’s ability to bring people together with her

¹³⁷ Frederic William Maitland and Sir Frederick Pollock, *The History of English Law before the Time of Edward I*, vol 1 (2nd edn, CUP 1923) 173.

¹³⁸ Lawrence S Zacharias, ‘The Narrative Impulse in Judicial Opinions’ (2011) 23 Law and Lit 80.

¹³⁹ William Shakespeare, *The Tragicall Historie of Hamlet, Prince of Denmarke* (FH Stratmann ed, first published 1603, Trubner 1869).

¹⁴⁰ Zacharias (n 138) 98.

¹⁴¹ William Shakespeare, *Hamlet* (Nigel Alexander ed, first published 1603, Macmillan Education 1973) act 1 scene 4.

¹⁴² Rebecca S Murray, ‘Book Review: Voyeur Nation: Media, Privacy, and Peering in Modern Culture’ (2004) 3 J High Tech L 1, 4 <http://www.suffolk.es/documents/jhtl_book_reviews/murray03.pdf> accessed 13 November 2015.

¹⁴³ (1604) 5 Co Rep 91a, 91b; (1604) 77 ER 194, 195.

¹⁴⁴ Zacharias (n 138) 82.

¹⁴⁵ Rosen and Santesso (n 135) 3–4.

¹⁴⁶ Alexander Pope, *The Poems of Alexander Pope* (John Butt ed, Sheridan 1963) 597.

¹⁴⁷ Rosen and Santesso (n 135) 7–9.

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ Rosen and Santesso (n 135) 7–9.

¹⁵¹ Virginia Woolf, *Mrs Dalloway* (first published 1925, Vintage 1992).

attempted ‘preservation of ... privacy’.¹⁵² To quote Miller:

She believes that each person is ... spread out among other people like mist in the branches of a tree, with another part of her spirit she contracts ... and resents ... any invasion of her privacy.¹⁵³

Woolf may be suggesting that our lives are uncontrollably laid out for others to see, but we still crave the power to ‘contract’ and evade attention. Four years later, Woolf suggested that ‘a woman must have ... a room of her own if she is to write.’¹⁵⁴ Therefore a precursor to freedom in Woolf’s mind was seclusion.¹⁵⁵ This insight has resonance today. The current English protection of privacy is ‘inescapably informational’ rather than focusing on seclusion.¹⁵⁶ Perhaps then, if Clarissa were living today, she would feel more at home in New Zealand or Canada by virtue of an actionable ‘intrusion into seclusion’ tort than the English breach of confidence/misuse of private information (MoPI) set-up.¹⁵⁷

Twelve years later, Orwell weighed in on the matter. ‘The most hateful of all names in an English ear is Nosey Parker’.¹⁵⁸ A person who intrusively snoops on private lives in seeking out private information. Notice that a ‘Nosey Parker’ is despised for his initial acts, and not necessarily because of what he chooses to do with the information he discovers. The sheer fact that he attempts to possess private information is ‘hateful’ according to Orwell.¹⁵⁹ If so, then Nosey Parker is easily analogised with a modern-

day paparazzi photographer. This analogy bears much weight in our immediate legal situation especially considering that English trial judges have been known to downplay the importance of the nature of privacy intrusion. For example, Eady J treated the *Mosley* case as an ‘informational tort case’ yet in Canada it ‘easily fall[s] within the intrusion upon seclusion category’.¹⁶⁰ This ties in with a claim made by Heidegger, that ‘the fundamental event of the modern age is the conquest of the world as a picture’.¹⁶¹ Therefore, ‘privacy culture’ is pitted against a wider framework that views anything that ‘can’t be quantified or *pictured* [as] effectively consigned to non-existence’.¹⁶² Nonetheless, we have seen shimmers of our ‘lofty ambition’ in instances where the law has sought to uphold ‘longstanding prohibitions against Peeping Toms and eavesdroppers’.¹⁶³

Orwell goes on to find that ‘the pull of [the English] impulses is in the other direction’, away from intrusive regimentation.¹⁶⁴ If law is ‘a complex of moral impulses (contingently) woven into the fabric of legal institutions’, then possibly this English impulse has brought us to where we are now.¹⁶⁵ It was the reason *Campbell* moved privacy protection from a focus on confidential information to a respect for individuals and their private life.¹⁶⁶ It was the reason the courts have at times defended footballers’ intimate relationships.¹⁶⁷ It was the reason children and vulnerable parties now find protection (albeit

¹⁵² J Hillis Miller, *Fiction and Repetition: Seven English Novels* (Harvard University Press 1985) 195.

¹⁵³ *ibid.*

¹⁵⁴ Mark Warby, Nicole Moreham and Iain Christie (eds), *Tugendhat and Christie: The Law of Privacy and the Media* (2nd edn, OUP 2011) ix.

¹⁵⁵ *ibid.*

¹⁵⁶ TDC Bennett, ‘Emerging Privacy Torts in Canada and New Zealand: An English Perspective’ (2014) 36 EIPR 298, 304.

¹⁵⁷ *ibid.*; *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672; *Jones v Tsige* (2011) 333 DLR (4th) 566, 2011 ONSC 1475 (Ontario SC).

¹⁵⁸ George Orwell, *The Lion and the Unicorn: Socialism and the English Genius* (first published 1941, University of Adelaide 2014) 2.

¹⁵⁹ *ibid.*

¹⁶⁰ Bennett, ‘Privacy, Corrective Justice, and Incrementalism’ (n 11) 89; *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), [2008] All ER (D) 135 (Apr); *Jones* (n 157) 62.

¹⁶¹ Josh Cohen, *The Private Life: Why We Remain in the Dark* (Granta 2013) xiv.

¹⁶² *ibid.*

¹⁶³ David J Siepp, ‘English Judicial Recognition of a Right to Privacy’ (1983) 3 OJLS 325, 337; O’Callaghan, *Refining Privacy in Tort Law* (n 29) 114.

¹⁶⁴ Orwell, *The Lion and the Unicorn* (n 158).

¹⁶⁵ Richard Mullender, ‘Law, Morality and the Egalitarian Philosophy of Government’ (2009) 29 OJLS 389, 409.

¹⁶⁶ (n 130).

¹⁶⁷ *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB).

unsatisfactorily) before privacy law.¹⁶⁸ Perhaps it will be the reason we move to a more explicit protection of privacy that rejects intrusive conduct and does not focus on information.¹⁶⁹ Less ambitiously, maybe it will spur judges to engage in ‘wide’ incremental development of privacy law.¹⁷⁰

3.2.2 *Dystopian Fiction: A Distress Call?*

Privacy is the quietest of our freedoms...

Privacy is best measured as it drains away.

Privacy is most appreciated in its absence.¹⁷¹

These three conjectures elucidate the focus that dystopian fiction has had on ‘privacy culture’. The genre has been a distressing one, for it has ‘focuse[d] on the possible’, speculating on privacy’s abolishment.¹⁷² Arguably, then it has been a warning shot across the bows of the legal and social institutions.¹⁷³ They have sought to show that the abolition or restriction of privacy can curb individuality, repress eccentricity and thwart non-conformity.¹⁷⁴

First in this analysis to sharpen the dystopian focus is Huxley’s *Brave New World*.¹⁷⁵ Huxley paints the individual as a factor of production¹⁷⁶ and shows that in a world driven by consumption and addiction relationships become transient and life’s meaning vacant.¹⁷⁷ He differentiates the novel from much of the genre by his depiction of the intrusiveness of society itself. It is not the impact of the fictitious governmental regime that burdens our legal conscience after

finishing the book, but the insidious detraction that individuals have on the quality of life of others. A parallel could be drawn with our celebrity culture, or rather with the media’s predilection with ‘vapid tittle-tattle’.¹⁷⁸ If there is a consumer demand, then our society has few qualms about degrading one’s private life.¹⁷⁹ Posner gives this parallel vibrancy in arguing that ‘the cost of invading privacy has fallen with the “information revolution”’.¹⁸⁰ This suggests that recently, the currency of privacy – ‘the right to be let alone’ – has been devalued as we spread our lives out more thinly and haphazardly.¹⁸¹ Put differently, technology has ‘greased’ information by making it more readily available and by blurring the public and private spheres.¹⁸²

However, even if Posner is correct and invading privacy has become a ‘cheaper’ affair, then we can still evidence a ‘lofty privacy ambition’ because Huxley’s novel, to this day, provokes fear in its readership.¹⁸³ To go back to our three conjectures, *Brave New World* reminds us that whilst privacy can all too easily slip from our grasp, its quiet disappearance can significantly detract from our life and lead us into the abyss of ‘denarration’.¹⁸⁴ The novel, read from our contemporary standpoint, evokes in us an ‘energy’ to shape the law with privacy near the top of our hierarchy of social values.¹⁸⁵ The most vivid example of this is the book’s ending where the protagonist’s only response to his privacy being violated by hordes of people is to hang himself.¹⁸⁶ This scene served to open the reader’s mind to empathise more easily with

¹⁶⁸ TDC Bennett, ‘The Relevance and Importance of Third Party Interests in Privacy Cases’ (2011) 127 LQR 531; *AAA v Associated Newspapers Limited* [2013] EWCA Civ 554; *Murray v Express Newspapers Plc* [2008] EWCA Civ 446, [2009] Ch 481.

¹⁶⁹ Bennett, ‘Emerging Privacy Torts’ (n 156).

¹⁷⁰ Dolding and Mullender (n 91) 13; section 4.5 below.

¹⁷¹ Paul Chadwick, ‘The Value of Privacy’ (2006) 5 EHRLR 495, 495.

¹⁷² Nussbaum (n 129) 5.

¹⁷³ Richard A Posner, ‘Orwell versus Huxley: Economic, Technology, Privacy, and Satire’ (1999) John M Olin Law & Economics Working Paper No 89 <<http://ssrn.com/abstract=194572>> accessed 28 January 2015.

¹⁷⁴ *ibid.*

¹⁷⁵ Aldous Huxley, *Brave New World* (first published 1932, Vintage 2007).

¹⁷⁶ Karen Yeung, ‘Can We Employ Design-Based Regulation While Avoiding Brave New World?’ (2011) 3 LIT 1, 1.

¹⁷⁷ Richard A Posner, *Law & Literature* (3rd edn, Harvard University Press 2009) 396.

¹⁷⁸ *Campbell* (n 130) 501 (Baroness Hale); Leveson Inquiry (n 3) 509–579; Will Self, ‘A Point of View: The Tittle-Tattle Business’ *BBC News Magazine* (London, 28 December 2011) <<http://www.bbc.co.uk/news/magazine-16338447>> accessed 20 April 2015; section 3.3 below.

¹⁷⁹ Leveson Inquiry (n 3) 593.

¹⁸⁰ Posner, ‘Orwell versus Huxley’ (n 173).

¹⁸¹ Warren and Brandeis (n 24).

¹⁸² James H Moor, ‘Towards a Theory of Privacy in the Information Age’ (1997) 27 *Computers and Society* 27, 27.

¹⁸³ Margaret Atwood, ‘Introduction’ in Aldous Huxley, *Brave New World* (first published 1932, Vintage 2007) xvi.

¹⁸⁴ Douglas Coupland, *Polaroids from the Dead* (Flamingo 1997).

¹⁸⁵ Mullender, ‘Privacy, Imbalance and the Legal Imagination’ (n 4).

¹⁸⁶ Huxley, *Brave New World* (n 175) 215, 228.

those who lose privacy and in turn offers them a 'reason to action' to protect it more.¹⁸⁷ Through Huxley we realise that insufficient privacy protection in law must be remedied by a 'scrupulous optimism', as 'privacy culture' constantly morphs.¹⁸⁸

In contrast to Huxley, the interest in Orwell's dystopia, *Nineteen Eighty-Four*, 'lies almost wholly in [its] frankness'.¹⁸⁹ Most pertinent is the shocking portrayal of the intrusiveness of the governmental regime itself. Orwell shows privacy to be an inherently political notion. To him, socialism was partly the answer. To modern-day Britain, this endemic imputation of politics into privacy raises three barriers to its adequate protection: first, a barrier in the judicial adjudication of privacy cases through fear of political bias;¹⁹⁰ second, barriers in Parliament as they seek not to offend the media with overbearing legislation; and third, a normative barrier in the form of a discord between privacy law and 'privacy culture'.

The importance of privacy is brought into focus by various devices in *Nineteen Eighty-Four* such as the 'telescreen' and the 'thought-police'.¹⁹¹ However, in one line, Orwell makes explicit the 'lofty ambitions' he had for privacy:

Tragedy ... belonged to the ancient time ... when there was still privacy, love, and friendship, and when ... famil[ies] stood by one another.¹⁹²

Here the word order appears important. Privacy is the foremost concern. Without its 'context', love, friendship and kinship could not operate.¹⁹³ Even if Orwell is reminiscing about a 'realistic utopia' that

never existed, this still suggests Orwell has 'lofty aspirations' about the value of privacy in society.¹⁹⁴ '[P]rivacy', he tells us, is 'a very valuable thing'.¹⁹⁵ However, Orwell is also alive to the difficulty of tightly defining this 'thing', for the word 'thing' suggests a quasi-ambivalence towards privacy that captures our cultural attitude well. Whilst we hold privacy in high regard in literature, we let it slowly drain away through new technology and our own snooping tendencies, readily symbolised in today's social media culture.¹⁹⁶ For example, the Information Commissioner's report to Parliament found that personal information ranked third in terms of social concerns behind only crime and education.¹⁹⁷ Yet, in terms of actual protection, *Privacy International* ranked the UK joint 43rd out of 45 surveyed countries.¹⁹⁸ If anything, this reaffirms that the conceptual abyss of privacy explored in section 2 proves to be an inherent barrier to the realisation of our 'lofty ambitions' in law.

In *Nineteen Eighty-Four*, Orwell probes three notions related to privacy: solitude, secrecy and power.¹⁹⁹ Consider the deployment of all three in the following passage:

Anything that suggested a taste for solitude ... was always ... dangerous. There was a word for it in Newspeak: *ownlife*[,] meaning individualism and eccentricity.²⁰⁰

This alarming passage seems an apt reason why, to this day, our culture is 'haunted by the spectres of ... Big Brother, and the omnipresent state'.²⁰¹ If the dominant political force can control one's *ownlife* then any sense of individuality, 'originality, humanity or dignity' are

¹⁸⁷ Mullender, 'Privacy, Imbalance and the Legal Imagination' (n 4).

¹⁸⁸ Roger Scruton, *The Uses of Pessimism: And the Danger of False Hope* (OUP 2010) 22.

¹⁸⁹ Raymond Williams, *Culture and Society 1780–1950* (first published 1958, Columbia University Press 1983) 285; Orwell, *Nineteen Eighty-Four* (n 117).

¹⁹⁰ Wacks (n 130) 182.

¹⁹¹ Orwell, *Nineteen Eighty-Four* (n 117) 2.

¹⁹² *ibid* 78.

¹⁹³ Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Harvard University Press 1970) 142; Jeffrey H Reiman, 'Privacy, Intimacy, and Personhood' (1976) 6 Phil & Pub Aff 26, 31.

¹⁹⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 126.

¹⁹⁵ Orwell, *Nineteen Eighty-Four* (n 117) 302.

¹⁹⁶ Chadwick (n 171).

¹⁹⁷ Information Commissioner's Office, *What Price Privacy? The Unlawful Trade in Confidential Personal Information* (HC 1056, May 2006) para 3.3; Roger Toulson, 'Freedom of Expression and Privacy' (2007) 41 Law Teacher 139, 139.

¹⁹⁸ Demetrius Klitou, *Privacy Invading Technologies and Privacy by Design: Safeguarding Privacy, Liberty and Security in the 21st Century* (Asser Press 2014) 7.

¹⁹⁹ Posner, 'Orwell versus Huxley' (n 173).

²⁰⁰ Orwell, *Nineteen Eighty-Four* (n 117) 187.

²⁰¹ Negley (n 21) 319.

diminished.²⁰² Yet, Orwell's conception of *ownlife* offers a quite 'lofty aspiration' in its content. Orwell is proposing a definition of privacy along similar lines to the '*leitmotif*' which runs through Warren and Brandeis' article: privacy as a right to individualism.²⁰³ Orwell presses our imaginations further on the extent to which we protect 'the individual from excessive intrusion by others, including the state'.²⁰⁴ He is attempting thereby to bridge the analogical gap between our current existence and the thinking-up of practical, legal protective mechanisms that will result in better-functioning 'politico-legal' arrangements.²⁰⁵ Therefore we can sum up Orwell's contribution to our 'privacy culture' as advocating protection of human rights heavily tempered by individualism and autonomy. In light of *Nineteen Eighty-Four*, we see society and the state as the malevolent parties and the individual as the vulnerable party, requiring additional legal safeguards.

Thus far, reasons have been outlined suggesting that Huxley and Orwell have contributed significantly to the cultural set-up of privacy. However, Elton's 2007 novel *Blind Faith* is a useful anecdotal insight into the more temporal warnings being voiced in the dystopian genre. It concerns a post-natural disaster London where 'privacy is [a] crime' and society is founded on credulity.²⁰⁶ The protagonist lives an exposed life denied of privacy in most respects. He has to endure being pressed against naked bodies and permanently live-streaming his private life. To rebel, he keeps private (often meaningless) secrets. His efforts to begin a political revolution end with him being burnt to death on a pyre of his own books.

Whilst Elton owes a debt to Orwell, he distinguishes *Blind Faith* from preceding dystopias by

ensuring privacy is the key subversive value at work and not auxiliary to the novel.²⁰⁷ He is trying to ensure the reader ponders the following question: is a society where privacy is a perversion far away?²⁰⁸ Elton professes that UK culture is not Orwellian, in the sense of the state denying individual privacy, but that we are throwing privacy away. Essentially, we value it greatly but we are not '*able*' to act upon our impulses to improve our protection of it.²⁰⁹ The inability to act is linked with Elton's definition of 'privacy':

[It] had been the result of a strange force deep within him, which desired a moment of privacy. A longing to keep something to himself.²¹⁰

With this, Elton seems to describe aptly our cultural perception of privacy. It is some 'strange force' deep within us, something we cannot locate, but that we value as paramount to our lives. Thus, through *Blind Faith* 'privacy culture' gains a new currency; we realise it is in fact a paradox. On one hand, we value privacy as a strongly purposive value.²¹¹ Hence Tolkien seeks solitude for Bilbo to write his memoirs in the tunnelling privacy of Bag End, and Woolf requires 'a room of one's own' to write.²¹² On the other hand, by craving ever more gossip, technological innovation and voyeuristic social media, we see privacy slip further away. As Schoeman found, 'though we ... acknowledge [privacy's] value in the abstract there are numerous grounds for being puzzled over its significance'.²¹³ Ultimately we exhibit a 'double passion about today's culture of pathological intrusiveness'.²¹⁴ We assert a right to know everything, yet this acts as a 'protest against our ignorance of ourselves'.²¹⁵

By analysing dystopian fiction, we have been able to reflect (using the literary imagination) on our

²⁰² Moreham (n 10) 641; Harry Kalven Jr, 'Privacy in Tort Law – Were Warren and Brandeis Wrong?' (1966) 31 LCP 326, 326.

²⁰³ Dorothy J Glancy, 'The Invention of the Right to Privacy' (1979) 21 Ariz L Rev 1, 21–22; Warren and Brandeis (n 24).

²⁰⁴ Toulson (n 197) 148.

²⁰⁵ Mullender, 'Privacy, Imbalance and the Legal Imagination' (n 4).

²⁰⁶ Elton (n 126) 244.

²⁰⁷ Henry Sutton, 'Ben Elton: Is the Former Stand-up Comedian the New Orwell?' *The Independent* (London, 11 November 2007) <<http://www.independent.co.uk/arts-entertainment/books/features/ben-elton-is-the-former-standup-comedian-the-new-orwell-399527.html>> accessed 18 February 2015.

²⁰⁸ *ibid.*

²⁰⁹ *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 [18].

²¹⁰ Elton (n 126) 29.

²¹¹ Posner, 'The Right of Privacy' (n 74) 405.

²¹² Virginia Woolf, *A Room of One's Own* (first published 1929, Penguin Classics 2000); J R R Tolkien, *The Lord of the Rings* (first published 1954, Harper Collins 2005).

²¹³ Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature* (CUP 1984) 1.

²¹⁴ Cohen (n 161) xii.

²¹⁵ *ibid* xiii.

society in more objective terms. We have then been able to place ourselves more easily within our social context and reappraise our 'privacy culture'. In doing so, dystopian fiction has been a sharp warning about what could happen if privacy law does not live up to the 'lofty ambitions' we have identified. This dystopian insight about law in its *ius* sense will allow us to transition to making tentative suggestions about law in its *lex* sense in section 4.²¹⁶

3.2.3 Privacy in Non-Fiction: Symbolic Value

To offer the fullest possible picture of our culture, this section will consider non-fiction social commentaries. In these we discover that English 'privacy culture' is underscored by the symbolism of the home.

In *The English: A Portrait of a People*, Paxman finds that the 'English dream is privacy without loneliness, everyone wants a house'.²¹⁷ And in having a house, it becomes 'his castle' where freedom, autonomy and control over oneself reign supreme.²¹⁸ This suggests the English conception of privacy is closely aligned with Hughes' thesis of privacy as 'a right to respect for barriers'.²¹⁹ Hence, our view of the world is that it just 'keeps ... intruding on domestic peace'.²²⁰ Scruton calls this the 'English Reserve'.²²¹ The idea is that we hold people to a certain distance in social interactions. We live in a culture where we are 'rather glad' if strangers remain strangers and stay at a 'comfortable distance'.²²² The inherent unsociability of the English makes this notion of seclusion perfectly acceptable.²²³ New Zealand and Canada benefit from some form of overarching 'intrusion into seclusion' tort, whereas the English person's seclusion is only incidentally protected by trespass, harassment and piecemeal common law fortification.²²⁴

However, Paxman argues that the lack of 'constitutional protection' of privacy gives us little to worry about because 'the importance of privacy

informs the entire organisation of the country, from the assumptions on which laws are based to the buildings in which [we] live'.²²⁵ Similarly, 'a truly comparable word for "privacy" ... does not exist in French or Italian, yet ... it is one of [England's] informing principles'.²²⁶ Paxman's insistence that privacy is an 'informing principle' in English culture sits uncomfortably alongside its role in jurisprudence. In breach of confidence/MoPI law, the lack of a clear, overarching privacy principle is cited as a reason why some claims (for instance, those primarily concerned with a wrongful act of intrusion) are 'shoehorn[ed]' into ill-fitting doctrine.²²⁷ Consequently, the 'fixation with owning their own homes is a physical expression of the English belief in privacy' which highlights the high level of cultural 'ambition' that the law is yet to reach.²²⁸

Accordingly, we can summarise Paxman as making three statements relevant to identifying a discord between culture and law. First, we believe in privacy as an 'informing principle' in everyday life. Second, we believe in privacy as a right to seclusion. Third and finally, we believe in privacy as a higher-order right.

Scruton then offers another perspective on privacy's symbolic value in finding that:

Repression caused [the English] to value privacy more than any other social gift. To the English there was no more valuable freedom than the freedom to close a door.²²⁹

Scruton refers to privacy as a social *gift*. In doing so, he goes further than Paxman by proposing that privacy creates a social norm of reciprocity. In order to maintain our privacy, we ought to respect others of theirs. We ought not to act like the characters in *Nineteen Eighty-Four* or *Brave New World*, where

²¹⁶ John Gardner, 'Legal Positivism: 5 1/2 Myths' (2001) 46 Am J Juris 199, 226.

²¹⁷ Jeremy Paxman, *The English: A Portrait of a People* (Penguin 2007) 118.

²¹⁸ *Semayne's Case* (n 143) 194.

²¹⁹ Hughes (n 102).

²²⁰ Paxman (n 217) 117.

²²¹ Roger Scruton, *England: An Elegy* (2nd edn, Pimlico 2001) 50.

²²² *ibid* 51; George Santayana, *Soliloquies in England and Later Soliloquies* (Constable 1922) 32.

²²³ Paxman (n 217) 120.

²²⁴ Bennett, 'Emerging Privacy Torts' (n 156); *C v Holland* (n 157); *Jones* (n 157).

²²⁵ Paxman (n 217) 118.

²²⁶ *ibid*.

²²⁷ *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125 [53].

²²⁸ Paxman (n 217) 123.

²²⁹ Scruton (n 221) 51.

their intrusive conduct degraded each other's standards of living. Furthermore, Scruton suggests that being able to close a door or rather the ability to seclude oneself is the most valuable freedom in England. Thus, the English person sees privacy through rose-tinted glasses; closing a door is itself considered a freedom rather than a trapping. If anything, this epitomises our 'lofty ambitions' for privacy.

3.3 *Response to the News International Scandal: Ambition Embodied?*

All the historical and literary analysis that has gone before is nothing without recourse to a concrete embodiment of our 'lofty ambitions'. We find this in the response to the News of the World (NoTW) phone hacking scandal. To determine the event's influence we must consider it in light of Knoke's 'focusing event'. This, it will be recalled, relates to 'a rare, sudden and harmful event with high media visibility that draws intense attention to a socio-political problem and may subsequently induce public policy changes'.²³⁰ The scandal appears to fit this template. It comprises events leading up to 2011 where it was revealed that NoTW hacked the mobile phone of the late Milly Dowler.²³¹ It later transpired that this practice had been going on for up to nine years and could be described as one 'monumental invasion of privacy'.²³²

Knoke's requirement of 'high media visibility' was certainly fulfilled as evidenced by '60,000 tweets every 20 minutes with the NoTW hashtag' following the announcement that NoTW would close.²³³ In addition, there was widespread coverage from *The Guardian* and *The New York Times*.²³⁴ As a consequence of the NoTW 'focusing event', 'public opinion turned sharply ... against ... the mass media in general'.²³⁵ This was echoed by *ComRes* who found

that 80% of Britons do not trust the media.²³⁶ However, the British response was epitomised by the rapid set up of the Leveson Inquiry and the fervent following it gathered. The resulting report stated its reasons for being set up were the 'wide scale public revulsion' at the conduct of the NoTW.²³⁷ For present purposes, the crux of its findings were as follows:

One of the main complaints advanced by those who testified ... was that a cultural strand exists within the press betraying an unethical cultural indifference to the consequences of exposing private lives, and a failure to treat individuals with appropriate dignity and respect.²³⁸

From this, we can identify some of those who testified as upholding our 'lofty ambitions'. But, more broadly, the scandal is driven by 'the *assumption* ... that [the] UK's citizens have a right to a personal life and privacy, and nobody should be able to pry into their lives'.²³⁹ Therefore, the NoTW scandal drew to public attention that there exists an assumption that privacy ought to be protected in this country. However, the scandal went further and focused the debate more precisely on the balance between free expression and privacy.²⁴⁰

Consequently, as a 'focusing event' we can identify the scandal not necessarily as changing popular opinion but bringing to the fore a sentiment that has long been held in the UK's literary culture. The final point to consider in Knoke's definition is whether this 'induced public policy change'.²⁴¹ In breach of confidence/MoPI, as we will examine in the following section, it is clear the law has remained stagnant.²⁴² However, 'it would be a ... mistake to underestimate the potential impact of this crisis ... on

²³⁰ Knoke (n 112).

²³¹ Des Freedman, 'The Phone Hacking Scandal: Implications for Regulation' (2012) 13 TVNM 17, 17.

²³² Dominic Wring, "'It's just Business': The Political Economy of the Hacking Scandal' (2012) 34 Media Cult Soc 631, 635.

²³³ Jonathan Richards, 'How Twitter Tracked the News of the World Scandal' *The Guardian* (London, 13 July 2011) <<http://www.theguardian.com/media/interactive/2011/jul/13/news-of-the-world-phone-hacking-twitter>> accessed 20 February 2015.

²³⁴ Leveson Inquiry (n 3) 340–412.

²³⁵ Stephen Coleman, 'Believing the News: From Sinking Trust to Atrophied Efficacy' (2012) 27 Eur J Commun 35, 39.

²³⁶ *ibid.*

²³⁷ Leveson Inquiry (n 3) 270.

²³⁸ *ibid.* 593.

²³⁹ David Hencke, 'Privacy? It's A Dangerous Myth' (2011) 22 Br Journal Rev 43, 43 (emphasis added).

²⁴⁰ Simon Dawes, 'Privacy and the Freedom of the Press: A False Dichotomy' in Julian Petley (ed), *Media and Public Shaming: Drawing Boundaries of Disclosure* (IB Taurus 2013) 43.

²⁴¹ Knoke (n 112).

²⁴² Text to n 252.

regulatory structures'.²⁴³ Consequently, 'we are faced ... with the most exciting prospects for media reform in the UK for a generation', to which we would suggest the solution is 'wide' incrementalism.²⁴⁴

3.4 *What Discord does this Set Up?*

In concluding this literary examination of 'privacy culture', we can identify the following two points as relevant to the final sections' tentative suggestions about how the law should progress. First, our legal consciousness tends to side more with a generous or wide interpretation of Article 8 ECHR.²⁴⁵ By virtue of the high regard that privacy is held, we need to think carefully about whether privacy and freedom of speech are (and should be) 'presumptively equal' in law.²⁴⁶ We ought to take this notion forward when considering novel cases, as previous European Court of Human Rights ('ECtHR' or 'Strasbourg Court') decisions suggest a generous interpretation is within the remit of the UK Supreme Court. Second, 'privacy culture' is driven by fear, a very real fear about privacy slowly drifting away and this gives way to a 'lofty' and urgent ambition to protect privacy interests in the future.

4 THE NORMATIVE ANALYSIS: DISCORD AND INCREMENTALISM

4.1 *The Growth of Privacy Protection*

English privacy law 'is still in its infancy'.²⁴⁷ The proposed replacement of the Human Rights Act 1998 (HRA) by the Conservative Party and innovative judicial approaches in some Commonwealth countries means privacy continues to be fluid and exciting area of law.²⁴⁸ The privacy landscape has been compelled

by the 'necessity to comply' with Articles 8 and 10 ECHR.²⁴⁹ Section 2 of the HRA has encouraged courts to use Article 8 against private individuals in a form of indirect horizontality.²⁵⁰ In this sense, privacy law is necessarily 'reactive' as opposed to 'proactive'.²⁵¹

The UK has traditionally protected privacy as a second-rate right.²⁵² We are yet to recognise a general 'blockbuster' tort of the invasion of privacy.²⁵³ Hence 'when English law has attached value to ... privacy in the past, it has done so only incidentally to the pursuit of other objects' such as the protection of reputation, property, bodily integrity, and the home.²⁵⁴ Therefore, by sheer luck the law has managed to protect certain privacy interests but never have they been directly tackled. However, five attempts have been made to enshrine privacy in statute since 1961.²⁵⁵ Yet the fear of ossification in an area of law that stands at the intersection between technological innovation, ever-changing journalistic practices and intricate cultural norms, has always been too great.²⁵⁶ Nonetheless, privacy has found some statutory protection through the Data Protection Act 1998 and the Protection from Harassment Act 1997.²⁵⁷

Conversely, the judiciary have been more active in shaping privacy law than Parliament. This can be traced back to the equitable 'breach of confidence' doctrine in *Coco v AN Clark (Engineers Ltd)*.²⁵⁸ Influenced by the ECHR and the artificiality of using this doctrine to protect Convention rights,²⁵⁹ the MoPI

²⁴³ Freedman (n 231) 19.

²⁴⁴ *ibid* 20.

²⁴⁵ (n 42).

²⁴⁶ Normann Witzleb and others, *Emerging Challenges in Privacy Law: Comparative Perspectives* (CUP 2014) 408.

²⁴⁷ Patrick O'Callaghan, 'Privacy in Pursuit of a Purpose?' (2009) 17 Tort LR 100, 113.

²⁴⁸ Oliver Wright, 'David Cameron to 'Scrap' Human Rights Act for new 'British Bill of Rights' *The Independent* (London, 1 October 2014) <<http://www.independent.co.uk/news/uk/politics/conservative-party-conference-cameron-announces-plans-to-scrap-human-rights-act-9767435.html>> accessed 30 March 2015; Australian Law Reform Commission, *Australian Privacy Law and Practice* (Report 108, vol 3, 2008) 2539–2543.

²⁴⁹ *Tugendhat and Christie* (n 154) vii.

²⁵⁰ Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2013) 741; TDC Bennett, 'Horizontality's New Horizons – Re-examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part I' (2010) 21 Ent L R 96, 96; Human Rights Act 1998, s 2.

²⁵¹ O'Callaghan, 'Refining Privacy in Tort Law' (n 29) 78–84.

²⁵² Stein and Shand (n 47) 188.

²⁵³ *Secretary of State for the Home Dept v Wainwright* [2001] EWCA Civ 2081, [2002] QB 1334 [60] (Mummery LJ); *Tugendhat and Christie* (n 154) x.

²⁵⁴ Stein and Shand (n 47) 188; *Wainwright* (n 253).

²⁵⁵ Toulson (n 197) 142.

²⁵⁶ Joint Committee on Privacy and Injunctions, *Privacy and Injunctions* (2010–12, HL 273, HC 1443) 36.

²⁵⁷ O'Callaghan, 'Refining Privacy in Tort Law' (n 29) 98.

²⁵⁸ [1968] FSR 415 (Ch).

²⁵⁹ *Tugendhat and Christie* (n 154) 224.

action was born in *Campbell*.²⁶⁰ It was recently confirmed a tort by the Court of Appeal in *Vidal-Hall v Google Inc.*²⁶¹ This incremental development ensured ‘limited relief for informational privacy violation[s]’ but, as we will see, further ‘wide’ incremental development may be necessary to keep up with cultural ‘flux’.²⁶² Thus, with an inadequate body of law, the need for a greater appreciation of UK ‘privacy culture’ may be necessary to avoid the law descending into value judgment and further discord. Before proposing a normative argument as to how the law can proceed along less discordant lines, we must identify the problems inherent in the current doctrinal arrangements.

4.2 The Domestic Balancing Test

The current methodology intertwines ‘common law thinking’ and ‘Strasbourg influences’.²⁶³ The first stage, the ‘gateway’ test, determines ‘whether there is a *prima facie* engagement of Article 8(1)’.²⁶⁴ It reads as follows:

When the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept [private].²⁶⁵

This test combines objectivity in the standard of ‘reasonableness’ with the subjective perspective of the claimant.²⁶⁶ The subjectiveness of the test is so ‘broad and open-textured’ that it permits the court to take account of an ‘almost infinite variety of factual situations’ relating to Article 8.²⁶⁷ The subjectiveness is crucial because individuals may have vastly

different views on what information can be categorised as ‘private’.²⁶⁸

After the ‘reasonable expectation’ test, courts engage in the ‘ultimate balancing test’.²⁶⁹ This is the structure in which the Article 8 and 10 conflict is resolved for they are now ‘the very content of the domestic tort that the English court has to enforce’.²⁷⁰ In the process of balancing ‘privacy’ and ‘freedom of expression’, both interests are qualified by reference to Articles 8(2) and 10(2). Additionally, Article 8 is an ‘inherently qualified right’ because it is a right to ‘respect’ for privacy’.²⁷¹ A reductionist interpretation of the test reads as follows:²⁷²

1. Neither Article 8 nor 10 have precedence over the other.
2. An ‘intense focus’ of the facts of the individual case takes place in which limiting principles are considered:
 - Is the information already ‘generally accessible’?²⁷³
 - Did the individual consent to the invasion of privacy?²⁷⁴
 - Does the information pass the ‘*de minimis*’ threshold?²⁷⁵
 - Is it in the public interest?²⁷⁶
 - What is the ‘nature’ of the freedom of speech at stake?²⁷⁷
3. Justifications for interfering with Articles 8 or 10 are taken into account:
 - It must be ‘in accordance with law’;
 - It must pursue a legitimate aim in Art 8(2) or 10(2);²⁷⁸ and

²⁶⁰ O’Callaghan, ‘Refining Privacy in Tort Law’ (n 29) 97; *Campbell* (n 130).

²⁶¹ [2015] EWCA Civ 311, [2015] 3 WLR 409.

²⁶² Dolding and Mullender (n 91) 12; Bennett, ‘Privacy, Corrective Justice, and Incrementalism’ (n 11) 54–55; David G Stern, *Wittgenstein on Mind and Language* (OUP 1995) 161.

²⁶³ O’Callaghan, ‘Refining Privacy in Tort Law’ (n 29) 100.

²⁶⁴ O’Callaghan, ‘Privacy in Pursuit of a Purpose?’ (n 247) 101; *ibid* 97.

²⁶⁵ *Campbell* (n 130) [134] (Lady Hale); *Tugendhat and Christie* (n 154) 226.

²⁶⁶ Moreham (n 10) 645; O’Callaghan, ‘Refining Privacy in Tort Law’ (n 29) 128.

²⁶⁷ *Tugendhat and Christie* (n 154) 227; *Murray* (n 168).

²⁶⁸ Moreham (n 10) 645; O’Callaghan, ‘Refining Privacy in Tort Law’ (n 29) 97.

²⁶⁹ O’Callaghan, ‘Refining Privacy in Tort Law’ (n 29) 98; *Re S* (n 120) [17] (Lord Steyn).

²⁷⁰ *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [81] (Buxton LJ).

²⁷¹ *Tugendhat and Christie* (n 154) 230; *M v Sec State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 [83] (Lord Walker).

²⁷² O’Callaghan, ‘Refining Privacy in Tort Law’ (n 29) 98–100.

²⁷³ *A-G v Observer Ltd* [1990] 1 AC 109 (HL) 282.

²⁷⁴ *A v B and C (No 1)* (QB, 2 March 2001).

²⁷⁵ *A-G v Observer* (n 273) 148 (Lord Goff).

²⁷⁶ *Re S* (n 120) 603 (Lord Steyn).

²⁷⁷ *Campbell* (n 130) [28]–[29].

²⁷⁸ ECHR (n 42) arts 8(2), 10(2).

- It must be ‘necessary in a democratic society’; and
- 4. A proportionality test is applied.

That is far from the end of the story on the English doctrine. By virtue of section 2 of the HRA, *Weller v Associated Newspapers Ltd* recently applied the European balancing test as set out in *von Hannover v Germany Nos 1 and 2*, and *Axel Springer AG v Germany*.²⁷⁹ The ECtHR considers the following relevant to the balance between Articles 8 and 10:

1. Whether the information contributes to a debate of general interest;
2. How well known the person concerned is and the subject matter of the report;
3. X’s conduct prior to publication of impugned articles;
4. The method of obtaining the information and its veracity;
5. Consent, form, and consequences of the publication; and
6. The severity of the sanction imposed on the application.²⁸⁰

Going forward, it must be remembered ‘that s2 of the [HRA] states that decisions of the [ECtHR] “must be taken into account” ... not ... that they have to be followed in every instance’.²⁸¹ Thus the English doctrine ‘need[s] nowadays to be considered in light of ... *von Hannover*’ though not necessarily aggressively shaped by it.²⁸² In light of this, O’Callaghan suggests Strasbourg ‘merely sets general parameters for action’ so ‘it is up to the state to decide on implementation within the margin of appreciation’.²⁸³ This means the role of the domestic courts is much ‘*more* than simply

apply[ing] contradictory and inconsistent “Strasbourg principles” to domestic cases’.²⁸⁴ Thus, the European test is as much a ‘powerful reason for action’ as it is a reason to look introspectively at the state of UK cultural and legal affairs.²⁸⁵

4.3 Critique of the Tests

Balancing tests are commonplace in European privacy law with both France and Germany using them. Thus, they appear suitable methods by which we can seek to ‘go on’ in the elaboration of privacy interests.²⁸⁶ Nonetheless, the case law is a ‘chaotic state of affairs’.²⁸⁷ If *Weller* is anything to go by, English courts may seek, confusingly, to utilise both approaches simultaneously.²⁸⁸ However, irrespective of which approach the courts adopt, they both offer wide discretion to the judges as they only have to weigh up numerous ‘open-textured’ factors.²⁸⁹ In both tests there is no prescription on how this ought to be done, or the weighting of any of the factors, other than that ‘it is important not to deal in generalities’.²⁹⁰ This lack of ‘clear guidance to judges ... risk[s] corroding the rule of law’.²⁹¹ Accordingly, the combination of conflicting tests, conflicting case law and a lack of appreciation for domestic ‘privacy culture’ highlights that a clear and incremental development of privacy law may be necessary to stop the area descending into further discord.

Blind Faith’s plot binds up this attitude towards the inherent doctrinal problems.²⁹² Elton sees society as going about their lives *believing* easily but not questioning or *understanding* their Heideggerian ‘Being’.²⁹³ In Elton’s dystopia ‘so many laws contradict ... actual personal experience’ and it seems

²⁷⁹ *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] EMLR 24; *von Hannover v Germany* [2004] EMLR 379, (2005) 40 EHRR 1; *Axel Springer AG v Germany* [2012] ECHR 227, [2012] EMLR 15 [89]–[109].

²⁸⁰ *Axel Springer* (n 279).

²⁸¹ O’Callaghan, ‘Privacy in Pursuit of a Purpose?’ (n 247) 113; Geoffrey Robertson and Andrew Nicol, *Media Law* (5th edn, Penguin 2008) 69–70.

²⁸² *Tugendhat and Christie* (n 154) 257.

²⁸³ O’Callaghan, ‘Privacy in Pursuit of a Purpose?’ (n 247) 105.

²⁸⁴ *ibid.*

²⁸⁵ Mullender, ‘Tort, Human Rights, and Common Law Culture’ (n 42) 316.

²⁸⁶ O’Callaghan, ‘Privacy in Pursuit of a Purpose?’ (n 247) 110; Ludwig Wittgenstein, *Philosophical Investigations* (first published 1953, Basil Blackwell 1958) 60–61.

²⁸⁷ O’Callaghan, ‘Privacy in Pursuit of a Purpose?’ (n 247) 102.

²⁸⁸ (n 279).

²⁸⁹ HLA Hart, *The Concept of Law* (OUP 1961) 120.

²⁹⁰ *Re W* (Children, Identification: Restrictions on Publication) [2005] EWHC 1564 (Fam), [2006] 1 FLR 1 [53].

²⁹¹ O’Callaghan, ‘Privacy in Pursuit of a Purpose?’ (n 247) 100.

²⁹² Elton (n 126).

²⁹³ *ibid* 186; Martin Heidegger, *Being and Time: A Translation of Sein und Zeit* (first published 1953, State University of New York 1996).

this is true of our present society too.²⁹⁴ However, the lack of doctrinal clarity may actually be beneficial. It offers an opportunity for judges to easily engage in 'wide incrementalism' (a concept expanded upon below) to sharpen up and rectify the discordant law.²⁹⁵ With imprecise and often 'conflicting factors' involved in the decision-making process, judges are well placed to fashion decisions giving substance to Llewellyn's 'wide fidelity' to law.²⁹⁶

The doctrinal overview also highlights that collectively, the judiciary has latched onto the Strasbourg principles instead of making use of the 'rich [English] common law culture' and its 'lofty ambitions'.²⁹⁷ To pull privacy law in certain direction, judges have looked externally to Europe as opposed to 'develop[ing] their own set of privacy principles'.²⁹⁸ This has created tension by attempting to apply simultaneously *von Hannover* and *Campbell*; two cases 'clearly at odds with one another'.²⁹⁹ Thus, domestic cultural analysis is useful in refining our perspective on the current case law as it develops with increasing reference to the European jurisprudence.³⁰⁰ This should promote viewing the 'Strasbourg influences' as 'invitations for more work' but not necessarily the normative core of our domestic law.³⁰¹

4.4 Problematic Case Law

The exact application of the MoPI action is still uncertain.³⁰² This uncertainty can only be resolved by wrestling with the case law that attempts to develop it.³⁰³ For our purposes, the problem begins with *Campbell*.³⁰⁴ It could be interpreted as either 'wide' or 'narrow' incremental development.³⁰⁵ It is certainly

wider than some subsequent, narrow developments though possibly not 'wide' in an *Anns v Merton London Borough Council* sense.³⁰⁶ However, the judiciary made it out to be 'narrow' so it will be considered as such in this article. Nonetheless, it is more important to look to what the case actually achieved. It was an attractive decision in moving the law from the protection of confidential information to a 'respect for an individual's privacy'.³⁰⁷ Since then the courts have dealt more narrowly with novel cases and have not been attentive to the 'lofty ambitions' contemporary society holds for privacy. We can identify one key situation where there is a distinct discord between the general legal consciousness and the 'actually-existing' law:³⁰⁸ the judiciary's predilection for shoehorning.³⁰⁹

4.5 Endemic Shoehorning

By shoehorning, what is meant is the practice of taking novel situations or developments and attempting to fit them into existing and often unsuitable laws.³¹⁰ The most obvious example is trying to fit privacy interests under the existing law of confidence, which, some argue, is what *Campbell* did.³¹¹ The amalgamation of confidentiality law with modern human rights law, combined with a lack of legal and sociological imagination, has birthed uncertainty and incoherency.³¹² In essence, the law has sought to reduce personal privacy down to base informational interests for the purpose of making them amenable to disposition under a legal mechanism more used to dealing with trade secrets.³¹³ Hence, the current law of privacy evinces a lack of articulation of the true underlying values of privacy and freedom of

²⁹⁴ Elton (n 126) 45.

²⁹⁵ Dolding and Mullender (n 91) 15.

²⁹⁶ *ibid*; Mickiewicz (n 12) 468.

²⁹⁷ O'Callaghan, 'Privacy in Pursuit of a Purpose?' (n 247) 100.

²⁹⁸ O'Callaghan, 'Refining Privacy in Tort Law' (n 29) 104.

²⁹⁹ O'Callaghan, 'Privacy in Pursuit of a Purpose?' (n 247) 102.

³⁰⁰ O'Callaghan, 'Refining Privacy in Tort Law' (n 29) 100; Weller (n 279).

³⁰¹ Mullender, 'Tort, Human Rights, and Common Law Culture' (n 42) 311.

³⁰² Bennett, 'The Relevance and Importance of Third Party Interests' (n 168) 531–532.

³⁰³ *ibid*.

³⁰⁴ *Campbell* (n 130).

³⁰⁵ Dolding and Mullender (n 91).

³⁰⁶ [1978] AC 728 (HL); Dolding and Mullender (n 91) 18.

³⁰⁷ *Tugendhat and Christie* (n 154) 225; *Campbell* (n 130) [12] (Lord Nicholls).

³⁰⁸ Mautner (n 124); Richard Mullender, 'Hegel, Human Rights, and Particularism' (2003) 30 J Law & Soc 554, 562.

³⁰⁹ *Douglas* (n 227).

³¹⁰ Wacks (n 130) 177.

³¹¹ Jonathan Morgan, 'Hello! Again: Privacy and Breach of Confidence' (2005) 64 CLJ 549, 550; Tanya Aplin, 'The Future of Breach of Confidence and the Protection of Privacy' (2007) 7 Oxford U Commw LJ 137, 163.

³¹² Aplin (n 311) 137.

³¹³ Toulson (n 197) 153.

expression.³¹⁴ This came into view recently in *Google v Vidal-Hall* where the Court of Appeal insisted that MoPI is informed by principles different from those informing breach of confidence, though, unhelpfully, it did not expressly state what these principles are.³¹⁵

Shoehorning, and the lack of legal imagination that goes with it, reached a new low in *OPO v MLA*.³¹⁶ The Court of Appeal held that MoPI was not relevant to the application for an injunction regarding the publication of an autobiography that could cause psychological harm to the author's son. Rather, it restrained publication under the seldom-used (and rather obscure) tort in *Wilkinson v Downton*.³¹⁷ In *OPO* we see a particular judicial mantra where the law is 'unable' to respond to novel problems broadly.³¹⁸ Instead, it languidly resurrected an ill-fitting doctrine that failed to address any balance between Articles 8 and 10. Arden LJ achieved this shoehorning by removing the requirement for false information, stretching what constitutes direct communication and narrowing the justifications for publishing the material to 'whether it was justified *vis-a-vis* the claimant'.³¹⁹ She dismissed MoPI 'on the basis that the claimant must be the owner of the private information'.³²⁰ Thus, a remedy in privacy was prevented by MoPI's inherent focus on information as opposed to intrusion; a notion that the UK's culture seems to be at odds with.

Moreover, it seems impossible to reconcile *OPO* with the positive obligation (where individuals' physical and psychological integrity is at stake) in *Söderman* and *X v Netherlands*.³²¹ This specifies that the UK, in accordance with the margin of appreciation doctrine, must maintain a higher threshold of 'an acceptable level of protection' rather than just providing a remedy.³²² Thus, the UK must take 'active measures to ensure ... an individual's [Article 8] rights ... are not infringed by another private party'.³²³ If our

'lofty ambition' does not possess the force to change the law to meet this obligation, then it must at least suggest a *broad* interpretation of Article 8 and draw attention to the need for greater certainty.

Solely in terms of its outcome, *OPO* was a murky triumph of our 'lofty ambitions'. However, seeing it this way exposes the overarching problem; our cultural views have too great an ambition that the law has not yet managed to realise effectively. However, if the judiciary operates properly in the 'wide' incremental mode, the law *could* realise our ambitions. *OPO* is a confusing paradox. It moved *towards* an ample protection of privacy interests (in the sense of psychological integrity) yet did so by doubling back on itself. The case widened the available doctrine but in a regressive manner. The judiciary in *OPO* fell 'into the trap of believing that new law flows simply from existing law, which is ... not solely the case. New law also flows from principle, amenable to change as society realises more about itself'.³²⁴ As argued in section 3, society seems to be realising it deserves more certainty than is currently on offer. The novel facts provided an opportunity to explore and promote privacy interests. Doing so would have 'predictably attracted controversy' but the favoured approach itself attracted a considerable amount.³²⁵ If anything, finding for the claimant in *OPO* was a welcome decision but its method tells a home truth: privacy interests in the UK are subject to a doctrinal and creative lethargy.

4.6 Editor's Note

Since this article was written, the Supreme Court overturned the claim under *Wilkinson* in *OPO* (there was no appeal to the unsuccessful MoPI claim).³²⁶ The Court confined the *Wilkinson* tort to where there was a genuine, not imputed, intention to cause harm or distress to the claimant; it seems the speech would need to be at least 'deceptive, threatening or possibly

³¹⁴ *ibid.*

³¹⁵ *Vidal-Hall* (n 261) 21.

³¹⁶ *OPO v MLA* [2014] EWCA Civ 1277, [2015] EMLR 4.

³¹⁷ [1897] 2 QB 57 (QB).

³¹⁸ *Wainwright* (n 209).

³¹⁹ *OPO* (CA) (n 316) 69; Dan Tench, 'Case Law: *OPO v MLA*, Shock and disbelief at the Court of Appeal' *Inform* (13 October 2014) <<https://inform.wordpress.com/2014/10/13/case-law-opo-v-mla-shock-and-disbelief-at-the-court-of-appeal-dan-tench/>> accessed 15 April 2015.

³²⁰ Ying Khai Liew, 'The Rule in *Wilkinson v. Downton*: Conduct, Intention, and Justifiability' (2015) 78 MLR 349, 350.

³²¹ *Söderman v Sweden* App no 5786/08 (ECHR, 12 November 2013); *X and Y v The Netherlands* (1986) 8 EHRR 235.

³²² *ibid* 91.

³²³ Patrick O'Callaghan, 'Monologism and Dialogism in Private Law' (2010) J Juris 405, 425 (emphasis added).

³²⁴ Bennett, 'Privacy, Corrective Justice, and Incrementalism' (n 11) 91–94.

³²⁵ *Tugendhat and Christie* (n 154) 260.

³²⁶ *OPO v MLA* [2015] UKSC 32, [2015] 2 WLR 1373.

abusive'.³²⁷ Even still, it is an open question as to whether such liability could arise at all.

Nonetheless, some evidence of a 'shoehorning' approach is still apparent. The pleading of the claim in MoPI suggests an awareness on the part of counsel of the potential malleability of the tort of MoPI. Given recent (post-*Campbell*) 'shoehorning' of a range of privacy-related types of claim into the MoPI tort – including for purely intrusive activities not causing distress and injury to feelings such as 'phone hacking'³²⁸ – it is unsurprising that this was attempted. In rejecting the claim in MoPI, however, the courts have signalled a new 'limiting principle': a claim will lie only where the claimant is the subject of the information alleged to have been misused.³²⁹ Since the information related only to the defendant, the claim in MoPI had nothing upon which to bite and was dismissed accordingly.

It is regrettable that the reasons given by the courts at first instance and on appeal lack detailed guidance as to the basis upon which this limitation of MoPI rests. This is particularly since the interests of children affected by the publication of information relating to another have been deemed a relevant consideration in MoPI claims in recent years owing to the courts' obligation to consider the best interests of children affected by their rulings.³³⁰

4.7 *Wielding our 'Lofty Ambitions':*

Incrementalism

'Ambition' is 'a strong desire to do or to achieve something'.³³¹ Thus, we turn to the problem of realising our 'lofty ambition' to 'go on' in progressing privacy law in the least discordant manner possible. We must wrestle with the problem of effecting change in an area of law where the intrusion of politics is endemic. In addition, privacy experiences the problem

of being shaped by 'multiple and often contrary purposes'.³³² The solution to these seems to be agreement with New Zealand's Court of Appeal:

The scope of a cause ... of action protecting privacy should be left to incremental development by future courts.³³³

Incrementalism is a type of 'common law judicial methodology' in which the courts 'drive legal development' by creating 'novel legal rules ... preconditioned ... by existing rules, principles, and values'.³³⁴ Two 'modes' of incrementalism are evident in England; 'wide' and 'narrow'.³³⁵ 'Wide' incrementalism is suited to privacy because it involves the 'identification of underlying *values/principles* and ... the fashioning of new categories of torts to give effect to these principles'.³³⁶ Section 3 of this article broadly identified the principle that the UK possesses a 'lofty ambition' especially regarding notions of intrusion and shoehorning. Therefore 'wide' incrementalism may offer the link between an abstract ambition and a realisation of it in law. The central aim of this article is to propose that judges, when elaborating the law, ought to pay attention not simply to existing doctrine but also to the broader social and cultural context in which the law's intended addressees sit; yet it seems impossible to realise this goal adequately 'if our focus is narrowly legal'.³³⁷

We can bring this proposition into focus by examining what actually happens when a judge transitions from 'narrow fidelity' to 'wide fidelity'.³³⁸ If the former is a matter of applying 'legal norms to fact situations' and the latter is judges attempting to 'secure the ends ... which undergird a given body of law', then the transition is a widening of justifications

³²⁷ *ibid* [77].

³²⁸ *Gulati v MGN Ltd* [2015] EWCA Civ 1291.

³²⁹ O'Callaghan, *Refining Privacy in Tort Law* (n 29) 97–98.

³³⁰ See *K v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827; *CDE v MGN Ltd* [2010] EWHC 3308 (QB), [2011] 1 FLR 1524; AAA (n 168). Thanks go to Dr Tom Bennett for his assistance with this note.

³³¹ Soanes and Stevenson (n 82) 41.

³³² Mickiewicz (n 12) 468; Allan C Hutchinson and Derek Morgan, 'Canengusian Connection: The Kaleidoscope of Tort Theory' (1984) 22 Osgoode Hall LJ 69.

³³³ Mullender, 'Privacy, Imbalance and the Legal Imagination' (n 4) 112; *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1, 117.

³³⁴ Bennett, 'Privacy, Corrective Justice, and Incrementalism' (n 11) 53.

³³⁵ Dolding and Mullender (n 91) 13.

³³⁶ Bennett, 'Privacy, Corrective Justice, and Incrementalism' (n 11) 84–84 (emphasis added).

³³⁷ Richard Mullender, 'Negligence Law, the Welfare State, and "Our Moral Life"' (2009) 25 PN 187, 206.

³³⁸ Dolding and Mullender (n 91) 13.

in the judicial net.³³⁹ Crucially, it is a move from black-letter law to potent (and potentially limitless) abstract considerations. Then, theoretically, there should be no issue, assuming the cultural argument is sufficient in force, to incorporate it into the adjudication process. Yet the problem to be grappled with is the extent to which judges should be tacit about this in order to allay fears from constitutional lawyers of ‘undue judicial activism’.³⁴⁰ This ‘fear’ could be countered if we were to identify privacy judges as engaging in Llewellyn’s ‘grand[er] model’ of adjudication.³⁴¹ By this ‘grand’ style, judges do more than pay heed to precedent; they continually try to enact ‘growth’ and ‘harmony’ in law so it operates as ‘machinery with purpose’.³⁴² In doing so, judges undertaking their ‘work in the grand style also make extensive reference to relevant policy considerations’.³⁴³ Thus, their decisions are able to give voice to social discourse.

This fear of unconstrained judicial discretion can be countered on another ground. Whilst adjudicative considerations *may* be ‘potentially limitless’, to incorporate cultural understandings such as ‘focusing events’ only requires slightly more discretion than we currently have. We find support for this in Phillipson’s ‘constitutional restraint model’.³⁴⁴ On his understanding, courts participate in incremental ‘piecemeal reform’, ‘by extending existing doctrines, adjusting them to changing circumstances or introducing small alterations to avoid ... injustice[s] in their application’.³⁴⁵ All this is justified by ‘deep’ legal principles or constitutional norms.³⁴⁶ Therefore we can use cultural context as a justification to avoid ‘injustices’ and move privacy law in a certain direction but not necessarily to ‘reform [the] entire area of law in a single sweep’.³⁴⁷

Mullender has touched upon the inclusion of social context in adjudication with his concept of ‘tradition’.³⁴⁸ He argues an ‘account of the historical context in which doctrine ... develop’ is essential for judging.³⁴⁹ Thus, on Mullender’s conception of judicial method, section 3’s findings could operate as one of tort law’s ‘tools’;³⁵⁰ namely, a ‘tool’ offering judges greater freedom to challenge the legal status quo. However, the notion of culture used in this article attempts to build on ‘tradition’. It does so by submitting that under the ‘grand[er] model’, a concrete or systematised way of realising our ‘lofty ambition’ is to factor in Knoke’s ‘focusing events’. Accordingly, when policy arguments are put to the court, or in ‘hard cases’ like *OPO* or *Campbell*,³⁵¹ when ‘adequate guidance is not furnished by presently existing law’, the court should more rigorously investigate recent events which have funnelled social and cultural feeling in a particular direction.³⁵² This helps ‘the cautious lawyer who says ‘I do not ask to see the way ahead – one step enough for me’, to make that one step a little larger because their judgments will be buttressed by a more deft appreciation of the cultural currents.’³⁵³ Ultimately, it ensures ‘rationality of the decisions reached’.³⁵⁴ This may offer a more persuasive ‘reason to action’ and a higher degree of urgency for change in privacy law than a purely historical look at ‘tradition’ could offer.

Nonetheless, when making use of Knoke, one should be mindful of the definitional frailty of the term ‘focusing event’. It may be problematic to distinguish between events that genuinely have the potential to ‘induce public policy changes’ and mere passing storms.³⁵⁵ Nonetheless, one hopes that advocating a focus on ‘wide’ incrementalism in privacy law will move the UK towards the ‘harmonization of vision

³³⁹ *ibid* 32.

³⁴⁰ Bennett, ‘Privacy, Corrective Justice, and Incrementalism’ (n 11) 49.

³⁴¹ Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown 1960) 36–37.

³⁴² *ibid*.

³⁴³ Dolding and Mullender (n 91) 32.

³⁴⁴ Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 MLR 878.

³⁴⁵ *ibid* 904.

³⁴⁶ *ibid* 903.

³⁴⁷ *ibid* 904.

³⁴⁸ Mullender, ‘Negligence Law, the Welfare State, and “Our Moral Life”’ (n 337) 187.

³⁴⁹ *ibid* 206.

³⁵⁰ *Kent v Griffiths (No 2)* [2001] QB 36 (CA) [50] (Lord Woolf MR).

³⁵¹ O’Callaghan, ‘Refining Privacy in Tort Law’ (n 29) 95.

³⁵² Dolding and Mullender (n 91) 32.

³⁵³ Toulson (n 197) 139.

³⁵⁴ Dolding and Mullender (n 91) 32.

³⁵⁵ Knoke (n 112).

[our 'lofty ambition'] with [legal] tradition'.³⁵⁶ This in turn may promote a paradigm shift towards King's 'contextual institutionalism' whereby, *inter alia*, the 'normative content [of] ... human rights and other public values' is expressed as something truly 'worth protecting'.³⁵⁷

However, Badiou's concept of the 'Event' may offer a more abstract 'tool' to enact change in privacy law.³⁵⁸ He considers 'Events' to be 'ruptures in our everyday existence and ... paradigmatic markers of ontological fullness/emptiness'.³⁵⁹ They are not 'casual' meaningless coincidences because 'they reveal something about humankind's subjectivity in its being'.³⁶⁰ The benefit of an abstract notion of 'Event' to privacy law is their purpose of 'punctur[ing] the organisation of reality' through the 'destruction of the existing order and [the] definition of a new order'.³⁶¹ In this sense, we ought to question the extent to which the NoTW scandal constitutes an 'Event' offering insight into UK understandings of 'being' that are worthy of a reaction from the judiciary.

To do justice to the incremental method stated above, judges should also aspire to achieve 'balanced realism' in their judgments.³⁶² They ought to attend to both the 'sceptical aspect' and 'rule-bound aspect' of law.³⁶³ This means they need to have an 'awareness ... that they can manipulate legal rules and precedents' but that this is 'conditioned by the understanding that legal rules nonetheless work'.³⁶⁴ Therefore, when trying to give expression to the UK's culture with 'focusing events' or policy arguments, judges may need to make an effort always to view these insights through a particularly legal set of 'spectacles'.³⁶⁵

4.8 A Novel Privacy Tort?

If 'wide' incrementalism, 'grand' model adjudication and 'balanced realism' become the norm in privacy law, a move towards a novel privacy tort that gives expression to our vision surrounding seclusion and intrusion could be facilitated. Bennett argues that the 'recognition of a [broad] novel tort might be preferable to ... evolution' by 'narrow' incremental method and that MoPI 'has given rise to considerable uncertainty'.³⁶⁶ But there will also be uncertainty in 'scope' and 'application' with a novel tort in the short run.³⁶⁷ However, a fresh start that undoes the doctrinal shoe-horning may outweigh the short-term uncertainty. Moreover, a novel tort would show a clear commitment to the UK's 'lofty' cultural 'ambitions'. In essence, giving voice to the people's concerns seems preferable to maintaining the 'awkward position' in which the post-*Campbell* privacy era sits.³⁶⁸

Perhaps one normative barrier preventing the recognition of a novel tort is linguistic; our judicial and academic communities frequently castigate the concept of 'privacy' as more extreme and overbearing than in, say, Canada. For example, it has been labelled as a 'blockbuster' and a 'super tort'.³⁶⁹ This seems to dull the case for incrementalism and may dissuade even the boldest judges from engaging in doctrinal creativity. Ultimately, 'laws ... no matter how efficient and well-arranged must be reformed or abolished if they are unjust'.³⁷⁰ Therefore, when considering the merits of incrementalism and a novel tort, one should try to look past the well-formed (though confusing) nature of the current privacy framework and to its wavering respect for procedural justice like in *OPO* in the Court of Appeal.³⁷¹ Hopefully, the next time the courts are faced with an opportunity like *Campbell* or

³⁵⁶ Dolding and Mullender (n 91) 32.

³⁵⁷ Jeff A King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409, 430.

³⁵⁸ *Kent* (n 350).

³⁵⁹ Antonio Calcagno, *Badiou and Derrida: Politics, Events and their Times* (Continuum 2007) 6.

³⁶⁰ *ibid.*

³⁶¹ Andrew Robinson, 'An A to Z of Theory | Alain Badiou: The Event' *Ceasefire Magazine* (15 December 2014) <<https://ceasefiremagazine.co.uk/alain-badiou-event/>> accessed 30 March 2015.

³⁶² Brian Z Tamanaha, 'Balanced Realism on Judging' (2010) 44 Val UL Rev 1243.

³⁶³ *ibid.* 1258.

³⁶⁴ *ibid.*

³⁶⁵ Llewellyn (n 341) 36–37.

³⁶⁶ Bennett, 'Privacy, Corrective Justice, and Incrementalism' (n 11) 91–94.

³⁶⁷ Chris D L Hunt, 'Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort' (2011) 37 Queen's LJ 167, 169.

³⁶⁸ Bennett, 'Corrective Justice and Horizontal Privacy' (n 130) 546.

³⁶⁹ O'Callaghan, 'Refining Privacy in Tort Law' (n 29) 84; *Wainwright* (n 253).

³⁷⁰ John Rawls, *A Theory of Justice* (first published 1971, Harvard University Press 1999) 3.

³⁷¹ *OPO* (CA) (n 316).

OPO, they will choose ‘wide’ incrementalism. Moreover, that they entertain ‘the possibility that the common law might develop to recognise a tort of invasion of privacy’ and give the UK its own version of *ABC v Lenah Game Meats* or *Jones v Tsige* to stop privacy ‘struggling on in convulsions’.³⁷²

5 CONCLUSION

Life was raging all around me and ... I loved all the people, dealing with all the contradictory impulses – that’s what I loved the most, connecting with the people. Looking back, that’s all that really mattered.³⁷³

Perhaps what ‘really matters’ in privacy law is a connection with the people that can be achieved through greater sensitivity to cultural context. Consequently, this article advanced two main aims: to show that a distinct ‘privacy culture’ persists in the UK and that scrutiny of the law indicates an undesirable discord between legal and cultural understandings of privacy. To this end, it was found that our culture exhibits a ‘lofty’ and urgent ambition to protect privacy interests, which has not yet been realised in

law. By considering the interplay between different aspects of the imagination, through a literary timeline, we have found this ‘ambition’ to reserve a special scorn for intrusive conduct and the shoe-horning of privacy interests. This sentiment was embodied in the NoTW ‘focusing event’. Hopefully, this ‘ambition’ will be more widely recognised in the UK to ensure privacy law can relinquish its ‘aspect blindness’ and emerge from its hall of mirrors.³⁷⁴

We must remember that privacy is still a relatively new legal concept. With an attentiveness to the UK’s deeply engrained cultural values and a commitment to ‘wide incrementalism’, hopefully, one day, the law will mature in a manner offering greater coherence. There is no panacea to the Article 8 and 10 tension. However, when elaborating the law, judges ought to pay attention not simply to existing doctrine but also to the broader social and cultural context in which the law’s intended addressees sit. Hence, privacy law should harness the common law’s ‘capacity to adapt to vindicate rights in light of ... changing social context[s]’ and endeavour to ‘embody the basic commitments’ of the UK.³⁷⁵

³⁷² *ABC v Lenah Game Meats* [2001] HCA 63; (2001) 185 ALR 1; *Jones* (n 157); Des Butler, ‘A Tort of Invasion of Privacy in Australia?’ (2005) 29 MULR 339, 340; Charles Dickens, *Hard Times* (first published 1854, Penguin 2012) 29 (emphasis added).

³⁷³ *Waking Life* (Richard Linklater dir, 2001).

³⁷⁴ Mickiewicz (n 12) 474–482.

³⁷⁵ *C v Holland* (n 157) 75; *Whitman* (n 1).

***MCPHAIL V DOULTON* AND THE FUNDAMENTAL DISTINCTION BETWEEN TRUSTS AND POWERS**

*Benjamin Donnell**

1 INTRODUCTION

Lord Wilberforce's noteworthy judgment in *McPhail v Doulton*¹ has been weakly described as 'failing' to preserve the fundamental distinction between trusts and powers. This is because Lord Wilberforce extended the rule applying to mere powers, from *Re Gulbenkian's Settlement Trusts (No 1)*,² as applying to trust powers. Thus, the test was now whether it could be said that a given individual was, or was not, within the specified class.³ There was no longer a need to ascertain all the objects of the class from the outset.

This assimilation of the test between trust powers and mere powers has been interpreted as narrowing the division between trusts and powers because, on a literal reading, it appears that an imperative trust only needs to satisfy the same requirements as that of a non-imperative power.⁴ This gives cause for concern when we consider that a trustee is obliged to exercise the trust power and it is therefore important for the trustee to appreciate who is to benefit from its subject matter.⁵

This article shall focus on the judgment of Lord Wilberforce's leading judgment containing the test outlined above. An analysis of the case law shall lead us to conclude that *McPhail* did not fail to preserve the distinction between trusts and powers. It shall also focus on Lord Wilberforce's argument that the courts do not need to ascertain all the objects of the trust, and how this recognises the changing landscape of the trust before concluding that *McPhail* was pragmatic but not clear-cut.

2 DISTINCTION

Hopkins challenges the above contention. He points out that it has been the opinion of many leading judges that the distinction between the trust and power has not been as 'fundamental' as the above would suggest.⁶ Lord Reid highlights, in *Re Gulbenkian (No 1)*, that donees of powers are frequently referred to as 'trustees' in instruments, and often owe a fiduciary duty to consider the application of the power.⁷ No doubt, in the mind of the donee, the exercise of this power will be just as significant as the exercise of a trust power. Furthermore, Lord Denning, in *Re Gulbenkian (No 1)*, contends that trust cases should be 'brought into line' with those on powers.⁸ Reading their Lordships' opinions together, it is clear that the distinction between a trust power and a mere power is at times an artificial construction of the law.

This view is compelling when one considers that Lord Wilberforce strikingly describes the distinction as 'artificial', in cases such as *McPhail*.⁹ This is revealing, as *McPhail* concerns a discretionary trust with a duty to appoint.¹⁰ This can be reconciled with the opinions of Lords Denning and Reid, as the subject matter within the *Re Gulbenkian* cases was whether an instrument created a discretionary trust, or a mere power.¹¹ Hence it would appear that the distinction between the trust and power is only 'artificial' in cases concerning discretionary trusts. We can also infer from Lord Wilberforce's wording that the assimilation of

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¹ [1971] AC 424 (HL) 456.

² [1970] AC 508 (HL).

³ *ibid.*

⁴ John Hopkins, 'Power in the Nature of a Trust-Certainty of Objects' (1972) 30 CLJ 41.

⁵ John Hopkins, 'Certain Uncertainties of Trusts and Powers' (1971) 29 CLJ 68, 69.

⁶ John Hopkins, 'Trusts-Discretionary Trusts-Certainty of Objects' (1970) 28 CLJ 206, 207.

⁷ (n 2) 518.

⁸ [1968] Ch 126 (CA) 133 (Lord Denning MR).

⁹ (n 1) 448.

¹⁰ *ibid.*

¹¹ (n 2).

the test for both trust powers and mere powers is to only apply in cases involving discretionary trusts.¹²

On this analysis, it is a stretch to argue that *McPhail* failed to preserve the ‘fundamental’ distinction between trusts and powers. As has been demonstrated above: (i) *McPhail* only has direct applicability in cases involving discretionary trusts; and (ii) the distinction between trust powers and mere powers, in cases of discretionary trusts, was never ‘fundamental’ but ‘artificial’; therefore (iii) it cannot be concluded that there was a ‘fundamental’ distinction to preserve. Excluding the case of discretionary trusts, the fixed trust will still require that its beneficiaries are ascertainable, and, therefore, it can be concluded that a list must still be capable of being compiled. This is reflected in Lord Wilberforce’s judgment.¹³ *McPhail* still preserves the distinction between trusts and power in terms of the fixed trust.

3 EQUAL DISTRIBUTION

Whilst the argument that *McPhail* has not preserved the ‘fundamental’ distinction between trusts and powers fails for the above reasons, there are some very fallible contentions that submit that the reasoning behind *McPhail* is ultimately flawed. Such unsteady claims assume that the validity of a trust is completely dependent on its enforceability by the Chancery courts.¹⁴ It is argued that because a trust power is imperative, if the trustee fails to make a selection out of a class of objects, it is logically left to the court to exercise the trust equally amongst all its beneficiaries.¹⁵ By doing so the court will not be substituting its own intention for that of the settlor or testator, and this is only possible if all beneficiaries are ascertainable, by the court, from the outset.¹⁶

Hopkins argues that, on the face of it, the argument that ascertainability will lead to enforceability by the court is robust.¹⁷ It makes sense to say that in order for the court to distribute the trust property equally, amongst all its beneficiaries, that the court must have

a full appreciation of those beneficiaries. The provision that the trustee, or court, must be capable of compiling a list of all beneficiaries, as advocated in *Inland Revenue Commissioners v Broadway Cottages Trust*, may therefore appear to be logically necessary to the validity of a trust power.¹⁸ It is the enforceability of the trust that will validate it in the courts’ eyes.

4 INTENTION

The assumption that the court may only order equal distribution of the trust, so as to not substitute its intention for that of the settlor, also appears strong. Palmer notes that the settlor has given the discretion to the trustee for a specific reason.¹⁹ Hence, it would not be appropriate for the court to exercise this discretion on the trustee’s behalf, as this would not accurately reflect the will of the settlor. Thus, equal distribution by the court would be the only means by which the court could exercise the trust without exercising any discretion the settlor has not awarded them.

Such persuasive arguments may potentially raise problems for the reasoning behind Lord Wilberforce’s judgment in *McPhail*. This is because the court will require full ascertainment of all the beneficiaries, not just whether it could be ascertained that there was one individual fitting the description of the class. However, Grbich argues that by distributing the trust property in equal shares, the court is actually substituting their intention for that of the settlor.²⁰ This is an alluring contention because it is sensible to suggest that if a settlor intended the trust property to be distributed equally amongst certain, ascertainable beneficiaries, they would have created a fixed trust by which to implement this.²¹ Thus, a reading of Grbich alongside that of Palmer, suggests that Palmer’s argument is not as strong as it initially appears. By intending not to substitute its intention for that of the settlor, the courts are participating in the very activity they wish to avoid. An order of equal distribution would be at variance with the intention of the settlor.²²

¹² *McPhail* (n 1).

¹³ *ibid* 451.

¹⁴ Jill Martin, *Hanbury & Martin: Modern Equity* (19th edn, Sweet & Maxwell 2012) 109.

¹⁵ George Palmer, ‘Private Trusts for Indefinite Beneficiaries’ (1873) 71 Mich L Rev 359, 366.

¹⁶ Hopkins (n 5).

¹⁷ *ibid*.

¹⁸ [1955] Ch 20 (CA).

¹⁹ Palmer (n 15).

²⁰ Yuri Grbich, ‘Baden: Awakening the Conceptually Moribund Trust’ (1974) 37 MLR 643, 645.

²¹ *ibid* 648.

²² Hopkins (n 5) 90.

5 UNEQUAL DISTRIBUTION

Lord Wilberforce pragmatically argues that it is not necessary that the courts must always order equal distribution, namely where a trustee has failed to exercise a trust power to appoint.²³ Lord Wilberforce argued that the court, given the right circumstances, can execute a discretionary trust in unequal shares, so as to better implement the perceived intention of the settlor.²⁴ This was a bold break from the orthodox view advocated in the sections above. However, the striking 18th century case of *Warburton v Warburton* challenges the assumption that the court has historically distributed equally.²⁵ In *Warburton* the court ordered that a family trust be executed unequally as the settlor had indicated that the beneficiary most in need should receive the majority share.²⁶ This is compelling as it suggests that Lord Wilberforce is not advocating anything ‘revolutionary’ by holding that unequal distribution is permissible.

The editor of then-current edition of *Lewin on Trusts* convincingly argues that where there is a ‘measurement’ as to the settlor’s intention, the court has the ability to distribute the trust property unequally so as to best execute the settlor’s intention.²⁷ This is a robust view, as in *Warburton* it was the fact that the settlor directed the trust to be distributed favouring the most ‘needy’ of the beneficiaries that prompted the court to divide unequally.²⁸ It is appropriate to assume that this extra level of clarity within the instrument is what *Lewin* means by a ‘measurement’ of the settlors intention. In light of *Lewin*, Lord Wilberforce is arguing for a position that is: (i) not ‘revolutionary’ in light of *Warburton*; and (ii) the best means by which the courts can carry out the original intention of the settlor.

6 FORWARD-LOOKING

Lord Wilberforce’s recognition in *McPhail* that there were alternative approaches available to the court may not be capable of being labelled as ‘revolutionary’ for other reasons.²⁹ This is not to say that his leading

judgment was not pragmatic or forward-looking. Lord Wilberforce’s progressive application of the given postulant test from *Re Gulbenkian* demonstrates foresight of the general direction society was heading at the time. Grbich contends that the modern settlor tends to avoid the finite language of the fixed trust so as to benefit from the practical advantages of the flexible discretionary trust.³⁰ Observation of discretionary trust cases, such as *McPhail*, demonstrates that the modern trust is one that can be aimed at a large class of objects. Compare this to the traditional ‘family’ settlement that the ratio in *Broadway Cottages* caters to, and it is obvious that the modern trust is quite different to that of the 18th Century.³¹

If more settlors are opting for ever wider and more flexible discretionary trusts, it would have been impractical for Lord Wilberforce to have upheld a principle of law that depended on the courts ability to ascertain all the beneficiaries of a trust just so that it could order equal distribution.³² This is true when it is accepted that the court may pursue the unequal distribution of a trust and avoid the impractical, and taxing, task of compiling a list of all the objects of a potentially large class. With this in mind, Lord Wilberforce’s assimilation of the test for trust powers was pragmatic and forward-looking as many modern discretionary trusts would no longer fail because of an outdated system which demanded a court could administer a trust in default.

Whilst *McPhail* was pragmatic and forward-looking for reasons mentioned above, one would experience difficulties in concluding it was a clear-cut decision. The Court of Appeal in *Re Baden’s Deed Trusts (No 2)* experienced great difficulty in interpreting Lord Wilberforce’s given postulant test and, regrettably, reached different conclusions as to what level of ‘certainty’ was required to satisfy the test.³³ Sachs LJ argued that as long as the wording of the settlor’s instrument was ‘conceptually’ certain, the

²³ *McPhail* (n 1).

²⁴ *ibid.*

²⁵ (1702) 4 Bro PC 1, 2 ER 1.

²⁶ *ibid.*

²⁷ John Mowbray, *Lewin on Trusts* (16th edn, Sweet & Maxwell 1964) 630.

²⁸ *Warburton* (n 25).

²⁹ *McPhail* (n 1).

³⁰ Grbich (n 20).

³¹ (n 18).

³² Grbich (n 20) 655.

³³ *Re Baden’s Deed Trusts (No 2)* [1973] Ch 9 (CA).

trust would not fail for uncertainty,³⁴ whilst Megaw LJ submitted that the test is satisfied only when a substantial number of objects can be said with certainty to fall within the class.³⁵ It is obvious that their Lordships found Lord Wilberforce's given postulant test challenging to interpret and apply. Thus, it would be a stretch to conclude that the decision in *McPhail* was clear-cut.

7 CONCLUSIONS

It has been demonstrated that *McPhail* has not failed to preserve the 'fundamental' distinction between trusts and powers because: (i) *McPhail* is only applicable to discretionary trusts; and (ii) this distinction was never 'fundamental', but 'artificial' as the terminology employed to describe the

discretionary trust has been used interchangeably with that of the power; thus (iii) there was never a 'fundamental' distinction to preserve from the outset.

Secondly, the assimilation of the test in *McPhail* was pragmatic and forward-looking as validity of a trust no longer depended on the court ascertaining all the objects of the trust so as to order equal distribution if needs be. *McPhail* recognised the social trend towards wide, flexible discretionary trusts, and the courts ability to exercise such a trust unequally ensured that such trusts would no longer fail for want of certainty of objects. However, their Lordships difficulty in applying the *McPhail* test, in *Re Baden (No 2)* indicates that the *McPhail* test is not entirely clear-cut.

³⁴ *ibid* 20.

³⁵ *ibid* 24.

TRADITIONAL AND FUNCTIONAL VIEWS OF THE FAMILY IN THE LAW

*Megan Atack**

The continuing evolution of the family in society parallels the legal concept of family as anything but static.¹ The ambiguous relationship between the law and family is consequently grounded in the disputed role of the law and whether it should define what a family is.² In this article, it will be argued the law is taking an increasingly functional approach to outlining the family and the parameters of family law,³ yet this approach has nonetheless reinforced the patriarchal hetero-normativity of the traditional nuclear family.⁴ Additionally this article will portray family law as a chaotic platform with atypical and elusive bounds,⁵ which the law has unsuccessfully attempted to normalise.⁶ Finally, it will discuss the public-private division in law and will argue that law should privatise the family so far as it achieves the aim of balancing autonomy, equality and protection of the vulnerable and exploited.

Historically the law took a formalist approach where for legal purposes family was determined by formal status, predominately the heterosexual marriage.⁷ This was relatively straightforward, as outlined by Asquith LJ, it was an ‘abuse of the English

language’ to determine social units outside of the rigid formal status of heterosexual marriage⁸ as families.⁹

Thankfully, the law has progressed beyond this restrictive approach and, instead of defining family, has taken a functionalist approach in validating relationships that fit within its elusive description, what Diduck describes as its ‘club’ of family.¹⁰ For instance, since the 1970s, societal changes, like the decline in marriage and no fault divorce,¹¹ have transformed the legal family from a restrictive term of art¹² into a flowing, inclusive¹³ adjective.¹⁴

Indeed, the judiciary are increasingly accepting of differing family forms and seem aware of the need to facilitate an adjustment of legal status to align with societal change,¹⁵ particularly for homosexual relationships as demonstrated in *Ghadian v Godin-Mendoza*.¹⁶ Yet, in becoming more inclusive, the judiciary in cases like *M v Secretary of State for Work and Pensions*¹⁷ have neglected to effectively value the multitude of family forms in emphasising the

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¹ Rebecca Probert, *Cretney's Family Law* (5th edn, Sweet & Maxwell 2003) 3.

² Katherine O'Donnovan and Alison Diduck, ‘Feminism and Families: Plus Ça Change?’ in Alison Diduck and Katherine O'Donnovan (eds), *Feminist Perspectives on Family Law* (Routledge Cavendish 2006) 7.

³ Edward Stein, ‘Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives and/or Functionalism’ (2010) 28 J Theory and Practice 345, 351–352.

⁴ Alison Diduck, ‘Shifting Familiarity’ (2005) 58 CLP 235, 247.

⁵ John Dewar, ‘The Normal Chaos of Family Law’ (1998) 61 MLR 467, 467.

⁶ O'Donnovan and Diduck (n 2) 6.

⁷ Robert E Gross, Amy Adams Squire Strongheart (eds), *Our Families, Our Values. Snapshots of Queer Kinship* (Harrington Park 1997) xvii.

⁸ Jill Black and others, *A Practical Approach to Family Law* (9th edn, OUP 2012) 4.

⁹ *Gammans v Ekins* [1950] 2 KB 328 (CA) 331 (Asquith LJ).

¹⁰ Diduck (n 4) 236.

¹¹ John Eekelaar, *Family Law and Social Policy* (Weidenfeld and Nicolson 1978) 156.

¹² Lord Evershed, ‘Foreword’ in Ronald H Graveson and Francis R Crane, *A Century of Family Law* (Sweet & Maxwell 1957) vii.

¹³ John Eekelaar, *Family Law and Personal Life* (OUP 2006) 26.

¹⁴ Ronald H Graveson and Francis R Crane, *A Century of Family Law* (Sweet & Maxwell 1957) vii.

¹⁵ Eekelaar (n 11) 156.

¹⁶ [2004] UKHL 30, [2004] 2 AC 557 [139] (Baroness Hale); cf *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL).

¹⁷ [2006] UKHL 11, [2006] 2 AC 91 [113] (Lord Walker).

prototype nuclear family and heterosexual marriage¹⁸ as the norm.¹⁹ This creates tension between law, reality and equality,²⁰ because in setting a benchmark of legal recognition,²¹ certain relationships suffer the practical-legal consequences of being too distinct from the norm. For example, in *Carega Properties SA v Sharratt* the law unfairly excluded an eighteen-year cohabiting relationship simply because it was platonic and therefore did not function sufficiently similar²² to the norm.²³ Thus, whilst the functional approach is more inclusive than the formal approach, the judiciary continue to advocate the role of the law being to categorise, preserve, and sustain the limited heterosexual nuclear family as the norm.²⁴

Despite this, the elasticity of the functional approach's conception of family²⁵ is useful in promoting equality within the normal chaotic nature of the family.²⁶ This is because it has potential to value substantive relationships of kinship²⁷ irrespective of the law's current obsession²⁸ with legal status.²⁹ This promotes equality, as it transpires functionalism could encompass a wider spectrum of individuals, specifically those currently neglected by the law, like the Queer community.³⁰

Nonetheless, sexual practices continue to 'determine law',³¹ as law continually privileges the intimate familial connection³² based on 'natural'

reproduction above the substance of a relationship.³³ This is outdated and unfair because it restricts legal support to married couples, civil partners, and relationships functioning sufficiently similarly.³⁴ For example, in *Burden v UK* the Court prohibited two cohabiting sisters from the same inheritance tax benefits as married couples and civil partners because they did not have a sexual relationship despite, by Judge Björgvinsson's own admissions, *living like married or civil partners* in every other way.³⁵

Furthermore, consummation being a solely heterosexual marriage requirement³⁶ could indicate a move towards sexual liberation for those in same-sex formal relationships.³⁷ Yet, it appears clear from parliamentary debates that the legislature sought to underline consummation and heterosexual sex as synonymous,³⁸ thereby establishing heterosexual sex as the only legitimate sexual relationship. Thus, although, it has been argued that the Marriage (Same-Sex Couples) Act 2013 has diluted the meaning of traditional marriage,³⁹ it is arguable same-sex marriages and civil partnerships are secondary to traditional marriages because they do not require

¹⁸ Justice Sachs, in John Eekelaar and Thandabantu Nhlapo (eds), *The Changing Family, Family Forms and Family Law* (Hart 1998) xii.

¹⁹ Nickie Charles, 'Families, Communities and Social Change: Then and Now' (2012) 60 Soc Rev 438, 447.

²⁰ Franz Rothenbacher, 'Social Change in Europe and its Impact on Family Structures' in John Eekelaar and Thandabantu Nhlapo (eds), *The Changing Family, Family Forms and Family Law* (Hart 1998) 16.

²¹ Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (3rd edn, Hart 2012) 27.

²² Susan Edwards, *Family Law* (4th edn, OUP 2013) 12.

²³ [1979] 1 WLR 928 (HL) 932 (Viscount Dilhorne).

²⁴ Chris Snow, 'Book Note: Defining the Family: The Family in Transition' (1999) 1 J Law and Fam Stud 287, 289.

²⁵ Gemma Soames, 'All in the Family' *The Sunday Times* (London, 12th October 2008)

<<http://www.thesundaytimes.co.uk/sto/style/living/article239963.ece>> accessed 6 February 2015.

²⁶ Dewar (n 5) 468.

²⁷ Kris Franklin, 'A Family Like Any Other Family: Alternative Methods of Defining Family in Law' (1991) 18 NYU Rev L & Soc Change 1027, 1031.

²⁸ Judith Masson, Rebecca Bailey-Harris and Rebecca Probert, *Principles of Family Law* (8th edn, Sweet & Maxwell 2008) 2.

²⁹ Angie Smolka, 'That's the Ticket: A New Way of Defining Family' (2001) 10 Cornell J L & Pub Pol'y 629, 654.

³⁰ Meghan Murphy, 'Podcast: Can Marriage Ever be Feminist? An Interview with Nicola Barker' (Canada, 3rd September 2012).

³¹ Herbert W Titus, 'Defining Marriage and the Family' (1994) 2 Wm & Mary Bill Rts J 327, 340.

³² Michael Freeman, 'Fifty Years on Family Law: an Opinionated Review' in Gillian Douglas and Nigel Lowe (eds), *The Continuing Evolution of Family Law* (Jordan 2009) 154.

³³ Murphy (n 30).

³⁴ Eekelaar (n 11) 239.

³⁵ Case 13378/05 *Burden v United Kingdom* [2008] 2 FLR 787 (ECHR) 808–809.

³⁶ Matrimonial Causes Act 1973, s 12.

³⁷ Andrew Bainham, 'Family Law in a Pluralistic Society' (1995) 22 J Law and Soc'y 234, 237.

³⁸ HC Deb 5 February 2013, vol 558, col 147.

³⁹ Ruth Gledhill, 'Gay Marriage Plan Could Divorce Church From The State' *The Times* (London, 12 June 2012)

<<http://www.thetimes.co.uk/tto/faith/article3442753.ece>> accessed 13 February 2015.

consummation.⁴⁰ Therefore, rather than promoting equality, the law unjustly constructs a hierarchy of family relationships based on the notion that heterosexual sexual intercourse is the only legitimate sexual relationship.⁴¹

A feminist critique of the functional approach is that it reinforces hetero-normativity.⁴² For example in *Re W (A Minor) (Custody)* the Court referred to a father being the carer as assuming a 'mother's role'.⁴³ This is problematic because it denotes the conventional gender roles⁴⁴ of females as carers and males as breadwinners.⁴⁵ More worryingly, in constructing distinct gender roles, social units like single parent or dual-worker families – where this model may not be possible – are seemingly denoted as inferior.⁴⁶

Consequently, in endorsing a gendered labour division,⁴⁷ the law conserves men to the public arena and women to the private.⁴⁸ As Barker demonstrates, this privatisation of care unjustifiably enforces care responsibilities onto the female at home and away from the state.⁴⁹ Moreover, this could promote male dominance within the home,⁵⁰ because in leaving women unprotected from their male counterpart,⁵¹ the law undermines a woman's chance to transcend her prescribed norm.⁵²

However, the functional approach may challenge conventional gender roles because it should value individuals regardless of gender and legal status. In focusing on the presentation of the agreed family attributes,⁵³ it could shed the prescribed gender roles of the traditional nuclear family,⁵⁴ so long as the judiciary in cases like *Ghadian* refrain from upholding the gender-constricting characteristics of the nuclear family.⁵⁵ Nevertheless, despite the potential of the functional approach to shed gender norms, so long as legal rules dictate basic gender differences in practices such as maternity⁵⁶ and paternity⁵⁷ leave, the law will continue to make it difficult for men and women to break their prescribed roles, especially when children are brought into a family.

By extension, the progressive legal recognition of homosexual relationships indicates family law is endorsing equality irrespective of sexual orientation, yet some would argue civil partnerships and same-sex marriage are inferior to heterosexual marriage because they remain distinct institutions.⁵⁸ Significantly, whilst this indicates family law is a mechanism to publically endorse societal change,⁵⁹ it could demonstrate the law is seeking to normalise homosexual relationships as imitations of heterosexual relationships. Regardless, the law seems to follow social change rather than dictate it.⁶⁰

⁴⁰ Rosemary Auchmuty, 'Same-Sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14 *Feminism & Psychology* 101, 105.

⁴¹ Jonathan Herring, *Family Law* (Pearson 2013) 6.

⁴² Murphy (n 30).

⁴³ [1983] 4 FLR 492 (CA) 499 (Cumming-Bruce LJ).

⁴⁴ Suzanne Moore, 'The Only Way is Marriage' *The Guardian* (London, 15 October 2011) <<http://www.theguardian.com/world/2011/oct/15/gay-marriage-conservative-tories>> accessed 7 February 2015.

⁴⁵ Bainham (n 37) 239.

⁴⁶ The Centre for Social Justice, 'Green Paper on the Family' (January 2010) <http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Green_paper_on_the_family.pdf> accessed 9 February 2016, 6.

⁴⁷ O'Donnovan and Diduck (n 2) 5–6.

⁴⁸ Tracy E Higgins, 'Symposium of Unfinished Feminist Business: Reviving the Public/Private Distinction in Feminist Theorising' (2000) 75 *Chi-Kent L Rev* 847, 849.

⁴⁹ Murphy (n 30).

⁵⁰ Fran Olsen, 'The Politics of Family Law' in Henry J Krause, *Family Law, Volume One* (Dartmouth 1992) 2.

⁵¹ Rob George, *Ideas and Debates in Family Law* (Hart 2012) 21.

⁵² Higgins (n 48) 851.

⁵³ Perry Sentell Jr, 'The Law of Marriage and Family: Developments in the Law' (2003) 116 *Harv L Rev* 1996, 2021–2022.

⁵⁴ Bainham (n 37) 244.

⁵⁵ (n 16) [139] (Baroness Hale).

⁵⁶ The Maternity and Parental Leave etc. Regulations 1999, r 7.

⁵⁷ Employment Rights Act 1996, s 80A(3).

⁵⁸ Auchmuty (n 40) 105.

⁵⁹ Carol Smart, 'Stories of Family Life: Cohabitation, Marriage and Social Change' (2000) 17 *Can J Fam L* 20, 22.

⁶⁰ David Chambers, 'The Legalisation of the Family: Toward a Policy of Supportive Neutrality' in Henry J Krause (ed), *Family Law, Volume One* (Dartmouth 1992) 809.

This suggests the role of family law is to balance sending public messages as to what desirable and often traditional families accomplish⁶¹ with promoting equality.⁶² Moreover, despite significant steps towards equality made by the feminist movement, such as gaining equal property rights,⁶³ the law has been criticised as being destructive to men.⁶⁴ More specifically, Buchanan argues fatherhood is being systematically removed from society due to the feminist movement.⁶⁵ Though such a view is inconsistent with the pro-father approach of the Courts in cases like *Re S (A Minor) (Parental Responsibility)*,⁶⁶ it reiterates that family law should promote equality for all, regardless of gender and sexual orientation. Therefore, to achieve true equality, the law should establish the family as a unit of love, care, protection and stability as opposed to resuscitating the heterosexual, married, nuclear family mould.⁶⁷

Consequently, law cannot be expected to define the family because family law is pluralistic and so to define family would be simplistic and unhelpful.⁶⁸ Indeed, the article 8 ECHR right to private and family life⁶⁹ implies the law should respect an adult's freedom to choose and define⁷⁰ their own private personal relationships.⁷¹ This was, however, contested in *Bellinger v Bellinger* where the Court underlined that law dictates who can enter formal relationships, (then)

restricting marriage to a union between a man and a woman.⁷² Similarly, in dictating the gestational mother as the legal mother⁷³ and presuming fatherhood,⁷⁴ the law reinforces traditional roles of parenthood being separated by femininity and masculinity.⁷⁵ Realistically, this suggests article 8 is only ever universally applicable to childless informal relationships because the law has no need to engage or enforce gender requirements in these unions.

Moreover, the paternalistic focus on the parent-child relationship in family law⁷⁶ established in *J v C*⁷⁷ is encouraging because it deflects the focus of law from defining adult relationships onto the protection of children.⁷⁸ Thus, it appears the law is increasingly seeking to limit state intervention in the family to the parent-child relationship, but is failing to strictly adhere to this without succumbing to endorsing restrictive gender conventions.

Nevertheless, whilst legal intervention in the family appears to be reduced to familial breakdown⁷⁹ and the parent-child relationship, this is not necessarily accurate. The state can never be 'neutral' to the family as the chaotic nature of family means it is indirectly compounded and protected⁸⁰ by a myriad of legal and

⁶¹ Judith Masson, 'Caring for our Generations' in Gillian Douglas and Nigel Lowe (eds), *The Continuing Evolution of Family Law* (Jordan 2009) 241.

⁶² Jonathan Herring, *Relational and Family Law* (Springer 2014) 60.

⁶³ Murphy (n 30).

⁶⁴ Justice for Men and Boys, 'General Election Manifesto 2015' (28 December 2014) <<https://j4mb.files.wordpress.com/2014/09/141228-v6-general-election-manifesto.pdf>> accessed 14 February 2015, 71–74.

⁶⁵ Helen Nianias, 'Feminists Hate Men: Meet Mike Buchanan, the Leader of Britain's New Justice for Men and Boys Party' *The Independent* (London, 14 January 2015) <<http://www.independent.co.uk/news/people/feminists-hate-men-meet-mike-buchanan-the-leader-of-britains-new-justice-for-men-and-boys-party-9977357.html>> accessed 14 February 2015.

⁶⁶ [1995] 2 FLR 648 (CA) 657 (Waller LJ).

⁶⁷ Martha Albertson Fineman, 'Progress and Progression in Family Law' (2004) 1 U Chi Legal F 1, 4.

⁶⁸ Dewar (n 5) 470.

⁶⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁷⁰ Barbara Bennett Woodhouse, 'It All Depends on What You Mean by Home: Toward a Communitarian Theory of the Nontraditional Family' [1996] Utah L Rev 569, 570.

⁷¹ *Warren v Care Fertility Limited* [2014] EWHC 602 (Fam), [2014] 3 WLR 1310 [125] (Hogg J).

⁷² [2003] UKHL 21, [2003] 2 AC 467 [16] (Lord Nicholls).

⁷³ *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305 [34] (Baroness Hale).

⁷⁴ *Banbury Peerage Case* (1811) 1 Sim & St 153, 57 ER 62.

⁷⁵ Richard Collier, 'Feminist Legal Studies and the Subject(s) of Men: Questions of Text, Terrain and Context in the Politics of Family Law and Gender' in Alison Diduck and Katherine O'Donnovan (eds), *Feminist Perspectives on Family Law* (Routledge Cavendish 2006) 237.

⁷⁶ O'Donnovan and Diduck (n 2) 8.

⁷⁷ [1970] AC 668 (HL) 726 (Lord Donovan).

⁷⁸ O'Donnovan and Diduck (n 2) 6.

⁷⁹ *ibid* 8.

⁸⁰ Eekelaar (n 11) 72.

political systems every day.⁸¹ For example, criminal law prohibits marital rape,⁸² tort law prioritises the 'closest family ties'⁸³ and the Welfare State supports families in need. Specifically, some feminists regard the creation of the Welfare State alongside equal divorce rights as compensation for historical conventional gender disadvantages by enabling women to have legal independence.⁸⁴

Others, though, have that argued income-based benefits, such as Child Benefit, have contradicted the notion that state intervention is reduced to the formal relationship because it disregards formal status by assessing household income.⁸⁵ Thus, many seemingly private decisions apparently unconnected to law⁸⁶ have wider socio-legal⁸⁷ and economic⁸⁸ consequences, especially for the parent-child relationship in households where finances are assessed together but not shared.⁸⁹ It seems then that family life is more in the public sphere because it is regulated by branches of law and policy that are not typically affiliated to the family law discussed in the textbooks.

However, the family being completely public can have undesirable implications. For example, the former one-child policy in China had been described as 'cruel'⁹⁰ because laws dictating family form oppressively control the fabric of Chinese society.⁹¹ Comparatively, the recent cuts in legal aid and push for mediation imply too much state intervention can be damaging to on-going relationships, like co-parenting relationships after divorce.⁹² The law should aim to remove the legal ends of relationships as far from the

adversarial system as possible to avoid bitterness and negativity clouding opportunities for individuals to take responsibility and resolve issues independently both before and after the breakdown.⁹³

However, placing family life more in the private sphere could suppress individualism because it may prohibit people, specifically women, from having equal opportunities to exercise their autonomy.⁹⁴ Hence, the state should directly intervene where there is breakdown and exploitation, so should leave the vast majority of responsible adults to live their lives the way they choose. The welfare principle should continue to dictate the parent-child relationship⁹⁵ and where welfare is not compromised, the law should only act as a stamp of approval.⁹⁶ This is because in reality, the parent-child relationship is often effectively self-regulated by the personal obligations to the child arising from being a parent.⁹⁷ Therefore, it is arguable family law should only permeate the public sphere to support personal autonomy and so protect the vulnerable in families.

In conclusion, this article has sought to demonstrate the chaotic notion of the legal family.⁹⁸ It is submitted the law seeks and fails to normalise the differential family forms in society through relying on the traditional nuclear family.⁹⁹ Family law has continued to stifle gender and sexual equality, because it reiterates conventional gender roles and divisions between women and men in the family.

⁸¹ Frances E Olsen, 'The Myth of State Intervention in the Family' in Michael D Freeman (ed), *Family, State and Law, Second Series, Volume One* (Dartmouth 1999) 836.

⁸² *R v R* [1992] 1 AC 599 (HL) 623 (Lord Keith).

⁸³ *McLoughlin v O'Brien* [1983] 1 AC 410 (HL) 422 (Lord Wilberforce).

⁸⁴ Jonathan Herring, *Relational Autonomy and Family Law* (Springer 2014) 31.

⁸⁵ Murphy (n 30).

⁸⁶ Chambers (n 60) 807.

⁸⁷ John Eckelaar, 'What is "Critical" Family Law?' (1989) 105 LQR 244, 260–261.

⁸⁸ 'Child Benefit: What Are The New Rules?' *The Guardian* (London, 7 January 2013)

<<http://www.theguardian.com/society/shortcuts/2013/jan/07/child-benefit-what-are-the-new-rules>> accessed 14 February 2015.

⁸⁹ Murphy (n 30).

⁹⁰ Jonathan Kaiman, 'China's One-Child Policy to be Relaxed as Part of Reforms Package' *The Guardian* (London, 15 November 2013) <<http://www.theguardian.com/world/2013/nov/15/china-one-child-policy-relaxed-reforms>> accessed 11th February 2015.

⁹¹ Elisabeth Croll, Delia Davin and Penny Kane (eds), *China's One-Child Family Policy* (Macmillan 1985) xii.

⁹² Nigel V Lowe and Gillian Douglas, *Bromley's Family Law* (10th edn, OUP 2007) 8.

⁹³ Masson, Bailey-Harris and Probert (n 28) 3.

⁹⁴ Sentell Jr (n 53) 2021–2022.

⁹⁵ Children Act 1989, s 1(1)–(3).

⁹⁶ *Re S (Parental Responsibility)* [1995] 2 FLR 648 (CA) 657 (Waller LJ).

⁹⁷ Jonathan Herring, 'Relational Autonomy and Family Law' in Julie Wallbank, Shazia Choudry and Jonathan Herring (eds), *Rights, Gender and Family Law* (Taylor and Francis 2009) 268.

⁹⁸ Dewar (n 5) 468.

⁹⁹ O'Donnovan and Diduck (n 2) 6.

Indeed, the functional approach has the potential to revolutionise family law and should promote functions of love, care and nurture to further to break down gender conventions and push towards equality and autonomy. The relationship between the law and families will continue to be unclear because family and

family law is chaotic and elusive. However, it is submitted the law should work to protect autonomy and protect the family form, as family is often the most important thing in a person's life and for some remains 'at the heart of a heartless world.'¹⁰⁰

¹⁰⁰ Alan Carling, 'Family Policy, Social Theory and the State' in Alan Carling, Simon Duncan and Rosalind Edwards (eds), *Analysing Families, Morality and Rationality in Policy and Practicing* (Routledge 2012) 11.

THE FAILURE OF *R v KILLICK* TO GIVE VICTIMS OF CRIME A VOICE

*Zoe Carre**

The decision in *R v Christopher Killick* certainly bolstered victims' rights by recognising that since 'a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision'.¹ Prior to *Killick*, reform had focused on service rights, such as support,² special measures for vulnerable and intimidated witnesses,³ compensation⁴ and access to information. Now, more emphasis is being placed on procedural rights, such as victim personal statements (VPS) and the right to review a CPS decision not to prosecute.⁵ More importantly, victims' rights have been codified as directly binding and enforceable.⁶

In theory, these are undoubtedly important steps in providing the victim with a voice within the criminal justice process (CJP). However, I argue that this is insufficient because it does not, in practice, give the victim a voice within the CJP, by which I mean an effective participative role. The adversarial system acts as a barrier to victims' rights and only a CJP which accommodates more restorative models of justice will do this.

I will firstly outline the assumptions behind the argument that the right to review provides the victim with a voice in the CJP. Secondly, I will defend its counter-arguments and a broader understanding of

what is required to provide the victim with a voice. Thirdly, I will briefly outline how restorative justice best achieve what the victim wants from the CJP.

The claim that the right to review provides victims with a voice in the CJP contains the following underlying assumptions:

- (i) Victims' rights are subject to a balance between the state, the victim and the offender's rights;⁷
- (ii) If (i) is not respected, victims' rights undermine the court's objectivity, create disparity in sentencing, unrealistically raise the victim's expectations, intrude into the public domain⁸ and undermine the offender's right to due process and fairness;⁹
- (iii) To avoid (ii), victim's rights to be heard are legitimately restricted;¹⁰
- (iv) Therefore, the right to review is sufficient to fulfil the right to be heard.

I concur that the right to review provides the victim with a voice in the CJP. The limiting of the finality of CPS decisions empowers victims to seek justice where it is otherwise absent; they are not mere observers in the CJP, but 'real participants with both interest to

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¹ [2011] EWCA Crim 1608, [2012] 1 Cr App R 10 [48] (Thomas LJ).

² United Nations ODCCP, 'Handbook on Justice for Victims' (1999)

<https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf> accessed 9 February 2016, 11; Home Office, 'Victim's Charter' (1996).

³ Youth Justice and Criminal Evidence Act 1999; Criminal Justice Act 2003; Home Office, 'Speaking Up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System' (1998).

⁴ Council of Europe, 'European Convention on the Compensation of Victims of Violent Crime' (1983); Handbook on Justice for Victims (n 2) 44.

⁵ Ministry of Justice, 'Code of Practice for Victims of Crime' (2013).

⁶ Council Directive 2012/29/ EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime [2012] OJ L 315.

⁷ *R v B* [2003] 2 Cr App R 197 [27] (Lord Woolf CJ); Council Directive Establishing Minimum Standards (n 6) preamble para 12.

⁸ Carolyn Hoyle and Lucia Zedner, 'Victims, Victimization, and Criminal Justice' in Mike Maguire and others (eds), *The Oxford Handbook of Criminology* (4th edn, OUP 2007) 476.

⁹ Human Rights Act 1998; International Covenant on Civil and Political Rights 196 Article 14; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6.

¹⁰ *R v Perkins* [2013] EWCA Crim 323 [9(b)].

protect and rights to enforce'.¹¹ However, it does not follow that this is sufficient. The line of argument above would accommodate the view that VPS endanger the adversarial model.¹² Erez and Roberts have argued that under an 'impact model', there is a misconception that the purpose of VPS is to impact on sentencing. Under a 'communicative model', the purpose is expressive and therapeutic; the victim can have a voice in the CJP without raising the concerns outlined in (ii).¹³ The minimum standard for the right of victims to be heard is fulfilled 'where victims are permitted to make statements or explanations in writing'.¹⁴ Thus, the UK is upholding EU minimum standards for victim's rights, but no more. Victims are given a voice but subsequently are not heard;¹⁵ such 'institutional disinterest'¹⁶ inevitably marginalises the victim in the CJP.¹⁷ As victims' voices are not heard in practice, I cannot conclude that the right to review is sufficient to provide the victim with a voice in the CJP.

Upon re-evaluation of the assumptions outlined in the argument above, there is seen ample room to argue that the right to review is not sufficient to provide the victim with a voice in practice. One of the inherent deficiencies in this argument is that it fails to consider that the right to review does not apply to all victims. The right to review is available for 'any victim'¹⁸ as long as they are reviewing a 'qualifying decision',¹⁹ thus excluding cases where the police 'exercise their independent discretion not to investigate'.²⁰ Such

cases are dealt with by the CPS Feedback and Complaints Policy, essentially giving the victim only pre-Killick rights. Considering the substantial amount of allegations that are not investigated, the scope of victim's rights is in fact narrow in practice. Over 800,000 crimes reported are not recorded each year, representing an under-reporting rate of 19%. Moreover, police are less likely to report violent and sexual offences as crimes, where under-recording amounts to 33% and 26% respectively.²¹ The implication is that many victims 'do not receive the service to which they are entitled',²² i.e. their right to review and to be heard. Equally, victims that do not report offences committed against them are excluded. It is difficult to estimate the dark figure of unrecorded crime,²³ although the Stern Report estimates that the attrition rate (from incidents reported to conviction) for rape is 6%.²⁴ The right to review cannot be sufficient to provide victims with a voice because it fails to provide such a right to all victims.

I further contend that the adversarial system is at the expense of the victim. Despite the fact that the CJP relies on victims of crime for witness testimony,²⁵ the latter have been (and arguably still are) subject to secondary victimisation within the CJP. This may take various forms; including, but is not limited to: insensitive questioning by the defence and the prosecution;²⁶ victim blaming and precipitation;²⁷ intimidation;²⁸ and poor quality of information relating

¹¹ Keir Starmer, 'Finality in Criminal Justice: When Should the CPS Reopen a Case?' (2012) 7 Crim LR 534.

¹² Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 Brit J Criminol 578.

¹³ Edna Erez and others, 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 Int Rev Criminol 225.

¹⁴ Council Directive Establishing Minimum Standards (n 6) preamble, para 41.

¹⁵ Victim Support, 'Victim's Justice? What Victims and Witnesses Really Want From Sentencing' (2010)

<<https://www.victimsupport.org.uk/sites/default/files/Victim%20Support%20sentencing%20report%20Dec-2010.pdf>> accessed 9 February 2016, 21.

¹⁶ P Green, 'A Victim Perspective: A Civilised Society? The Other Side of Murder' in James McGuire and Beverley Rowson (eds), *Does Punishment Work?* (Institute for the Study and Treatment of Delinquency 1995) 70.

¹⁷ M Schluter, 'Relational Justice: Twelve Propositions' in James McGuire & Beverley Rowson (eds), *Does Punishment Work* (The Institute for the Study and Treatment of Delinquency 1995) 85, para 7.

¹⁸ Director of Public Prosecutions, 'Victim's Right to Review Guidance' (Crown Prosecution Service 2014) para 13.

¹⁹ *ibid* para 10.

²⁰ *ibid* para 11(ii).

²¹ HMIC, 'Crime Recording: Making the Victim Count' (2014) <<https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/crime-recording-making-the-victim-count.pdf>> accessed 9 February 2016, 49, para 7(1).

²² *ibid* 63.

²³ Michael Maxfield and others, 'Comparing Self-Reports and Official Records of Arrests' (2000) 16 J Quant Criminol 87.

²⁴ Vivien Stern, 'The Stern Review: A report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales' (Government Equalities Office, 2010) 10.

²⁵ Council Directive Establishing Minimum Standards (n 6) preamble, para 34; Jenny McEwan, 'Special Measures for Witnesses and Victims' in Michael McConville & Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (OUP 2002) 237.

²⁶ Hoyle and Zedner (n 8) 475.

²⁷ Benjamin Mendelsohn, 'The Origin of the Doctrine of Victimology' (1963) 3:3 *Excerpta Criminologica* 239; H Von Hentig, *The Criminal and his Victim: Studies in the Sociobiology of Crime* (Yale University Press 1948).

²⁸ Criminal Justice and Public Order Act 1994, s 51(1).

to judicial process and CPS decisions.²⁹ Moreover, reliance on witness testimony places victims that are weak at self-expression or understanding³⁰ at a considerable disadvantage, risking acquittal of the offender.³¹ Some victims have retracted complaints due to mistreatment in the CJP³² or have more tragically taken their lives.³³ More generally, secondary victimisation discourages victims from reporting crime and entering the CJP, most notably with domestic violence.³⁴

Much of the earlier reform has focused on improving the victim's experience as a witness in the CJP, without acknowledging that the adversarial system is the source of the problem. The Speaking Up For Justice Report (1998) issued recommendations on how to enable vulnerable or intimidated witnesses (VIWs) to give their best evidence, by use of special measures in court.³⁵ These recommendations were implemented in Youth Justice and Criminal Evidence Act 1999, including measures such as screens, video-recorded evidence and pre-trial cross-examination, live television links, clearing the public gallery, removal of wigs and gowns, communication aids and intermediaries.³⁶ Measures were also taken to avoid self-represented defendants from cross-examining the victim in rape cases³⁷ and irrelevant questioning during cross-examination³⁸ (in the past questions about past sexual history and abuse have been used to coerce

or intimidate the witness.)³⁹ These measures were further developed in the Coroner's and Justice Act 2009⁴⁰ and extended to allow pre-trial statements of witnesses,⁴¹ a presumption in favour of refreshing memory,⁴² special measures for all children,⁴³ a Commissioner for Victims and Witnesses⁴⁴ and more recently, strengthened lifetime reporting restrictions for under-18 victims and witnesses.⁴⁵

Hamlyn's study concludes that the impact of special measures for VIWs is generally positive; victims are less likely to feel anxious, were more likely to give evidence and had more overall satisfaction with the CJP.⁴⁶ Plotnikoff and Woolfson later examined the implementation of these measures for young witnesses and noted that 44% of them did not receive pre-trial familiarisation and 65% had comprehension issues with questioning in court. Their study demonstrates a significant 'implementation gap' between policy objectives and their implementation for young witnesses in practice.⁴⁷ Burton and others are more critical, claiming that special measures merely mitigate the inherent disadvantages of the adversarial system, such as 'confrontation[,] the principle of orality, the centrality of witness statements and ... cross-examination'.⁴⁸ This implies that reform needs to be more radical. Specifically, Burton and her co-authors raise concerns about the sharp categorisation of VIWs⁴⁹ leading to non-identification by the police

²⁹ Killick (n 1).

³⁰ Youth Justice and Criminal Evidence Act 9 (n 3) ss 16–17.

³¹ McEwan (n 25) 237.

³² Carolyn Hoyle & Andrew Sanders, 'Police Response to Domestic Violence' (2000) 40 *Brit J Crimin* 14; Andrew Robinson & Dee Cook, 'Understanding Victim Retraction in Cases of Domestic Violence: Specialist Courts, Government Policy, and Victim-Centred Justice' (2006) 9 *Contemporary Justice Rev* 189.

³³ 'Violinist Frances Andrade 'Failed' by Mental Health Services' *BBC News* (London, 25 July 2014) <<http://www.bbc.co.uk/news/uk-england-28489500>> accessed 2 February 2016.

³⁴ Antonia Cretney & Gwynn Davis, 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36 *Howard Journal* 146.

³⁵ 'Speaking Up for Justice' (n 3).

³⁶ Youth Justice and Criminal Evidence Act 1999, ss 16–30.

³⁷ *ibid* ss 36–40.

³⁸ *ibid* ss 41–43.

³⁹ McEwan (n 25) 249.

⁴⁰ Coroners and Justice Act 2009, ss 98–111.

⁴¹ Criminal Justice Act 2003, s 116.

⁴² *ibid* s 139.

⁴³ Coroners and Justice Act 2009, s 101.

⁴⁴ *ibid* s 142.

⁴⁵ Criminal Justice and Courts Act 2015, s 78.

⁴⁶ Becky Hamlyn and others, 'Key findings from the Surveys of Vulnerable and Intimidated Witnesses 2000/01 and 2003' (Home Office Research Findings 2004) 112.

⁴⁷ Joyce Plotnikoff & Richard Woolfson, 'Measuring Up? Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings' (Nuffield Foundation & NSPCC 2009) 153.

⁴⁸ Mandy Burton and others, 'Vulnerable and Intimidated Witnesses in the Adversarial Process in England and Wales' (2007) 11 *Int J Evidence and Proof* 2.

⁴⁹ *ibid* 6.

and the CPS and late identification by Witness Service. This nullifies the provision of pre-trial familiarisation visits,⁵⁰ which are shown to be the most important measure because it allows VIWs to discuss other available measures.⁵¹ They recommend that pre-trial visits should be provided in every case⁵² and conclude that VIWs are not adequately consulted about their preferences⁵³ and ‘adversarialism will always be an obstacle to some witnesses’.⁵⁴ I would concur and add that special measures for VIWs fail to address issues within the adversarial system for those considered ‘normal’ witnesses, violating their right to be heard. Therefore, the right to does not prevent the CJP from treating the victim as a witness and is not sufficient to provide the victim with a voice. Outside the adversarial box, there are more effective means of providing the victim with a voice, without raising concerns expressed in (ii).

‘Representation, reparation and recognition’ through restorative justice can best achieve what the victim wants from the CJP.⁵⁵ Firstly, restorative justice represents the victim’s voice by giving them ‘the chance to explain to the offender how they have been affected by a crime and to ask any questions they may have about the incident’,⁵⁶ which they lack in the CJP. Looking at Joe Nodding’s case,⁵⁷ it becomes apparent that each victim wants something different from the CJP. To truly give victims a voice, we need to allow for a more individualised experience in the CJP where we explore conflicts as a ‘potential for activity, for participation’.⁵⁸ Secondly, restorative justice gives the

victim access to innovative reparation to truly restore serious crimes. Thirdly, restorative justice gives the offender an opportunity to recognise the harm suffered by the victim, by admission of guilt or an apology. Contrarily, the adversarial system discourages the offender from entering a guilty plea where there is the potential for a reduced sentence, despite the possibility of genuine remorse.

Victim Support reports that 94% of victims want the offender not to commit the crime again and 81% would rather the offender receive an effective sentence⁵⁹ than a short custodial sentence.⁶⁰ In restorative justice, ‘reintegrative shaming’⁶¹ creates a more constructive environment for the offender’s rehabilitation by focusing on the offender’s behaviour and reintegrating him back into the community. Restorative justice is thus more conducive to ‘reduced recidivism’.⁶² In contrast, the adversarial system is disintegrative because it labels/stigmatises the offender and further excludes him from society and rehabilitation.⁶³ If punishment is justified by the desire to rehabilitate the offender, a ‘non-conflict perspective is a precondition’.⁶⁴ Furthermore, restorative justice achieves the victim’s desire of protection from secondary victimisation⁶⁵ more radically than special measures within the adversarial system. Finally, the fitting model of restorative justice to achieve these ends has the following features: the requirements of consent, safety and admission of guilt from the offender,⁶⁶ mediation for low-risk crimes (where

⁵⁰ *ibid.*

⁵¹ *ibid* 9; Hamlyn and others (n 46) 115.

⁵² Burton (n 48) 22.

⁵³ *ibid* 6.

⁵⁴ *ibid* 23.

⁵⁵ Green (n 16) 71.

⁵⁶ Victim Support (n 15) 26.

⁵⁷ Zoe Williams, ‘Restorative Justice: Why I Confronted the Man who Raped Me’ *The Guardian* (London, 25 January 2011) <<http://www.theguardian.com/society/2011/jan/27/restorative-justice-confronted-rape>> accessed 9 February 2016.

⁵⁸ Nils Christie, ‘Conflicts As Property’ (1977) 17 *Brit J Criminol* 7.

⁵⁹ Ministry of Justice, ‘Victims of Crime Want Punishment – But not Always Prison’ (16 November 2007) <probation.homeoffice.gov/output/Page391.asp> accessed 2 February 2016, 65.

⁶⁰ ‘Victim’s Justice?’ (n 15) 12.

⁶¹ John Braithwaite, *Crime, Shame and Reintegration* (CUP 1989); Toni Makkai & John Braithwaite, ‘Reintegrative Shaming and Compliance with Regulatory Standards’ (1994) 32 *Criminology* 361.

⁶² Christie (n 58) 9.

⁶³ Anne-Marie McAlinden, ‘The Use of Shame with Sexual Offenders’ (2005) 45 *Brit J Criminol* 373; Anne-Marie McAlinden, ‘Managing Risk From regulation to the Reintegration of Sexual Offenders’ (2006) 6 *Criminology and Criminal Justice* 197.

⁶⁴ Christie (n 58) 4.

⁶⁵ Laura Freeman, ‘Support for Victims: Findings from the British Crime Survey’ (Ministry of Justice 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/194181/findings-crime-survey.pdf> accessed 9 February 2016, 34.

⁶⁶ Jean Wynne, ‘Mediation and Reparation’ in James McGuire & Beverley Rowson (eds), *Does Punishment Work?* (Institute for the Study and Treatment of Delinquency 1995) 65.

appropriate)⁶⁷ as a complement to the punitive model⁶⁸ and post-sentence application for serious crimes to ensure that the offender's rehabilitation is in good faith.⁶⁹ Therefore, to truly provide the victim with a voice in the CJP, we should continue to support, improve and integrate existing restorative justice models.⁷⁰

Killick does not give victims a true voice in the criminal justice process. Arguments that it does are based on the misconception that the right to review is sufficient to fulfil the right to be heard within the adversarial model. In theory, the right to review provides the victim with a voice, albeit post-sentence.

But, in practice, the right to review is not sufficient to establish a voice for victims in the CJP because it fails to provide a voice to all victims and it does not prevent the CJP from treating the victim as a witness (despite special measures to mitigate secondary victimisation). The adversarial system acts as a barrier to victim's rights and it must gradually accommodate restorative justice for representation, reparation and recognition of such rights. The victim's voice will be heard through the model proposed to achieve reduced recidivism and protection against secondary victimisation. Only then can the victim be at the centre of the CJP.

⁶⁷ *ibid.*

⁶⁸ Kathleen Daly, 'Mind the Gap: Restorative Justice in Theory and in Practice' in Andreas von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing of Reconcilable Paradigms?* (Hart 2003).

⁶⁹ James Dignan, 'Restorative Justice and the Law: The Case for an Integrated, Systemic Approach' in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan 2002).

⁷⁰ Ministry of Justice, 'Restorative Justice Action Plan for the Criminal Justice System for the Period to March 2018' (November 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375581/restorative-justice-action-plan-2014.pdf> accessed 9 February 2016.

INTERNATIONAL HUMAN RIGHTS: THE PERSUASION APPROACH

*Viačeslav Volžanin**

1 INTRODUCTION

Human rights are conventionally comprehended as equal and inalienable entitlements of an individual against a state and society.¹ The owner of Harrods,² a former king of Greece³ as well as a refugee from Sierra Leone⁴ have a right to claim equal freedom and dignity, justice and well-being. Human rights cannot be gained or lost since they are enjoyed by virtue of someone being a human.⁵ Despite the optimistic nature of human rights language, the reality seems to be at least controversial. For instance, while Amnesty International reports that while torture has been recently practised in 141 countries,⁶ only 3% of Americans and Europeans recognise human rights as ‘the most important problem of the world today’.⁷ This article will attempt to demonstrate that notwithstanding the existing criticism of human rights ineffectiveness, there have been significant practical consequences in the international human rights field. In this regard, its primary focus will be on persuasion as the main method for human rights protection. It will concentrate on: first, common difficulties with human rights implementation; second, the persuasion

approach itself; and third, the risks caused by human rights manipulation.

2 COMMON DIFFICULTIES

To begin with, the human rights system is predominantly criticised for the inability to deliver effectively its noble promises.⁸ This criticism might rest on various grounds. For example, human rights are ‘designed for failure’⁹ because of their vague norms or the implicit intent to override cultural peculiarities.¹⁰ However, the main concern lies with ambiguous authority of human rights provisions and toothless enforcement mechanisms. For instance, under the ICCPR¹¹ and UN Torture Convention,¹² governments are free to choose whether to recognise or reject the jurisdiction of both Human Rights Committee and Committee against Torture as well as to decide whether to follow or ignore their recommendations. The overwhelming reason for notoriously weak treaty regimes is the principle of states’ consent. Each state is sovereign and thus could only voluntarily enter into certain law commitments by making reservations that eventually reflect the interests of its government and limit responsibility.¹³ Consequently, human rights

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¹ Douglass Cassel, ‘Does International Human Rights Law Make a Difference?’ (2001) 2 Chi J Int Law 121, 125; Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 Hum Rts Q 281, 284.

² *Al-Fayed v United Kingdom* (1994) 18 EHRR 393.

³ *Former King Constantinos of Greece v Greece* (2001) 33 EHRR 21.

⁴ *K v Secretary of State for the Home Department, Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412.

⁵ The Universal Declaration of Human Rights 1948, arts 1–2; Vienna Declaration and Programme of Action (25 June 1993) Part 1 <<http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>> accessed 2 February 2015.

⁶ Amnesty International, ‘Global Crisis on Torture Exposed by New Worldwide Campaign’ (13 May 2014) <<http://www.amnesty.org/en/news/amnesty-international-global-crisis-torture-exposed-new-worldwide-campaign-2014-05-13>> accessed 3 February 2015.

⁷ Kristina Puzarina, Jana Pötzschke and Hans Rattinger, ‘Attitudes Towards Human Rights and Democracy: Empirical Evidence in Europe and the United States’ (2014) Transworld Working Paper 30 <http://www.transworld-fp7.eu/wp-content/uploads/2014/06/TW_WP_30.pdf> accessed 19 January 2016.

⁸ Douglas Donoho, ‘Human Rights Enforcement in the Twenty-First Century’ (2006) 35 Ga J Int’l & Comp L 1, 5.

⁹ *ibid.*

¹⁰ David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2002) 15 Harv Hum Rts J 101, 111; Richard Mullender, ‘Human Rights: Universalism and Cultural Relativism’ (2003) 6(3) Crit Rev Int Social and Pol Philosophy 70, 71.

¹¹ International Convention on Civil and Political Rights 1966.

¹² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

¹³ Siobhan McInerney-Lankford, ‘Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective’ (2009) 1 J Human Rts Practice 51, 68.

protection dependent on voluntary state compliance has been perceived as largely declaratory and precatory.¹⁴ Moreover, clear disapproval of international human rights systems can be perceived when considering that in certain cases the conclusion of formal agreements leads to a greater number of violations committed by national governments.¹⁵ Therefore, the usual argument proposed by human rights sceptics is that a 'symbolic dimension of human rights'¹⁶ offsets the actual implementation and hence undermines their very purpose.¹⁷

3 THE PERSUASION APPROACH

In the light of this negative assessment of the human rights project a more constructive approach could yield a richer and insightful analysis. This might be identified as a 'vertical story'¹⁸ or more accurately – 'persuasion as a mechanism of social influence'¹⁹ based on conviction and cooperation. Under the persuasion approach the emphasis is put not on the enforcement of legal instruments as such but, more significantly, on the promotion of human rights through disclosure, congruence with values and internalisation.²⁰ The incalculable advantage of persuasion, as oppose to coercion, is the absence of compulsion that sets favourable conditions for a dialogue between a human rights organisation and a state. Persuasion requires substantial arguments that could encourage a state to re-examine its practices and genuinely accept promoted human rights standards.²¹ Furthermore, such an approach necessitates the

assessment of the content of a right and its conscious comprehension. In this respect, acceptance could be seen as a more desirable outcome than compliance or conformity. The former 'changes ... the minds'²² and reduces the possibility of symbolic enforcement.

What is more, relying on the argument advanced by Koh, acceptance might result in social, political and legal internalisation.²³ The global campaign to ban anti-personnel landmines can partly serve as an example. The movement, which was instigated by non-governmental organisations and supported by such prominent figures as Pope John Paul II and Princess Diana, concluded with the adoption of Ottawa Treaty.²⁴ This treaty was legally incorporated and became binding in the courts of Fiji,²⁵ Austria, Cambodia and several other states.²⁶ As a consequence, persuasion can be seen as a powerful instrument for human rights protection. Irrespective of its slow effect, it represents an incremental development which could culminate in an international human rights commitment being entrenched in a domestic legal and social order.

4 TWO DIRECT ADVANTAGES OF THE PERSUASION APPROACH

The persuasion approach brings two direct advantages. Firstly, persuasion could address a state which is under the primary duty to ensure protection of human rights.²⁷ In this respect, while treaties and conventions

¹⁴ Harold Hongju Koh, 'How Is International Human Rights Law Enforced?' (1999) 74 Ind L J 1397, 1408.

¹⁵ Emilie M Hafner-Burton and Kiyoteru Tsutsui, 'Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most' (2007) 44 JPR 407, 422.

¹⁶ Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 EJIL 903, 909.

¹⁷ Joseph Raz, 'Human Rights Without Foundations' (2007) Oxford Legal Studies Research Paper 14/2007 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999874> accessed 3 February 2015.

¹⁸ Koh (n 14) 1412.

¹⁹ Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 Duke LJ 621.

²⁰ *ibid* 22; Donoho (n 8) 17.

²¹ Carl Iver Hovland, Irving Lester Janis and Harold H Kelley, 'Communication and Persuasion: Psychological Studies of Opinion Change' (Yale University Press 1953) cited in Ryan Goodman and Derek Jinks (eds), *How to Influence States: Socialization and International Human Rights* (2004) Public Law & Legal Theory Research Paper Series 13.

²² Goodman and Jinks (n 19) 12.

²³ Koh (n 14) 1413.

²⁴ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction 1997; Koh (n 14) 1412; Goodman and Jinks (n 19) 11.

²⁵ Landmine Monitor Core Group, 'Landmine Monitor Report 1999: Toward a Mine-Free World' (Human Rights Watch 1999) 1044.

²⁶ Joe McGrath and David Robertson, 'Monitoring the Landmine Convention: Ratification and National Implementation Legislation' (1999) VERTIC Research Report <http://www.vertic.org/media/Archived_Publications/Research_Reports/Research_Report_5_McGrath_Robertson.pdf> accessed 19 January 2016.

²⁷ Vienna Declaration (n 5).

‘stabilize expectations’²⁸ in the international community, mechanisms such as monitoring and reporting, publishing best practices as well as criticism, encourages states to fulfil their obligations. It could be argued that while no government could be forced to secure the freedom from discrimination or torture, it is indirectly bound to do so by virtue of being watched and assessed. In this context, the work of UN Special Rapporteurs has proved to be mostly effective.²⁹ For example, in the sphere of health by producing extensive guidance they assisted in the development of a widely used Health Rights of Women Assessment Instrument.³⁰ Besides this, Special Rapporteurs serve as a valuable source of reference for international diplomatic community, provide recommendations for the states by issuing reports and hence through dialogue persuade governments to address human rights issues.³¹

A self-interest in adopting human rights could also arise from the risk of international isolation. This can be illustrated by China’s loss of the race to host the Olympic Games in 2000 whereby China promised to pay greater attention to human rights protection.³² In addition to this, international cooperation contributed to the change of interrogation of suspected terrorists in Israel and decline in forced disappearances in Argentina.³³ As a result, the provided examples of persuasion adopted either by monitoring bodies or international society indicates the direct and positive impact on state practices.

Secondly, the persuasion approach could operate even more effectively at the level of states’ citizens. The strengthened perception of the legitimacy of human rights principles provides a civil society with an enforcement tool that international treaties lack.

This tool is the increased expectation and demand for compliance by governments either with the already undertaken responsibilities or not.³⁴ Hence if a state refuses to perform its obligations it would be pressured to do so by its own citizens. A greater public awareness of rights takes a central stage. Accordingly, a state that rejects participation in the process of ‘domestic political bargaining’³⁵ increases remarkably the likelihood of losing the legitimacy it requires to govern and not damage its international status.³⁶

A key factor in fostering human rights consciousness is non-governmental activism. One of the major practical benefits of nongovernmental organisations (NGOs) is their independently conducted research and fact-finding operations.³⁷ Since NGOs are acting as self-sufficient entities, the information revealing human rights violations and shaming abusers could be easily circulated and accessed. Thus the more problems are reported, the more aware society becomes. The knowledge acquired might further encourage such initiatives as that in Indonesia where local human rights groups exchanged information with the International Commission of Jurists to campaign for the release of political prisoners.³⁸ Besides this, there is not only a possibility for infringements to be exposed but also for a state to be constrained in its abusive actions. For instance, despite its repressive nature, the government of Malaysia is ultimately held accountable by domestic forces. This could be explained by the presence of relatively strong non-governmental activism for women’s rights and the environment and hence the fear of the state that it might lose the support of

²⁸ Bernstorff (n 16) 911.

²⁹ Surya P Subedi, ‘Protection of Human Rights through the Mechanism of UN Special Rapporteurs’ (2011) 33 Hum Rts Q 201, 223.

³⁰ James Harrison, ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’ (2011) 3 J of Hum Rts Practice 162, 168.

³¹ Subedi (n 29) 224–225.

³² Keith Suter, ‘Progress in the International Protection of Human Rights’ (2001) 18 Medicine, Conflict and Survival 283, 284.

³³ James Ron, ‘Varying Methods of State Violence’ (1997) 51 Int’l Org 275; Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998) 103–110; Emilie M Hafner-Burton and Kiyoteru Tsutsui, ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’ (2005) 110 Am J Soc 1373, 1377.

³⁴ Thomas Buergenthal, ‘The Contemporary Significance of International Human Rights Law’ (2009) 22 LJIL 217, 222.

³⁵ Hafner-Burton and Tsutsui (n 33) 1380.

³⁶ *ibid* 1385; Buergenthal (n 34) 223.

³⁷ Suter (n 32) 293.

³⁸ Anja Jetschke, ‘Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999) 140–141; Hafner-Burton and Tsutsui (n 33) 1385.

electorate.³⁹ Consequently, the enhanced public opinion on human rights affairs through training, education and involvement in NGOs has a potential to contribute to notable improvements in human rights practices.

The proposed method of persuasion should not be seen as the sole mechanism for effective implementation of human rights. A combination of interrelated strands exists.⁴⁰ One of the most evident elements is cultural and social affinity coupled with a shared political and economic system. The presence of such favourable conditions in Europe generated one of the most celebrated developments in human rights – the adoption of European Convention on Human Rights that established the first international human rights court.⁴¹ Notwithstanding its regional scope, the ECHR is regarded as the most effective enforcement paradigm mainly because it allows an individual to bring a case before a court which makes legally binding decisions.⁴² However, the situation outside Europe is different. The international human rights treaties appear to be least operative in poorly governed, unstable and corrupted countries.⁴³ This can be illustrated by reference to International Covenant on Economic, Social and Cultural Rights 1966 which obliges states to ensure such rights as a right to free education or social security subject to the availability of resources.⁴⁴ In this respect, even a member state to a treaty genuinely willing to implement human rights could not practically afford it. Thus it is not correct to attribute the inability of a state to ensure economic rights to the defective operation of the human rights

system. Besides this, a positive impact on protection of human rights might be caused by foreign direct investment which usually correlates with improvement of empowerment and workers' rights.⁴⁵ Practical benefits could be also achieved by expelling or suspending state's membership in the international human rights organisations and so inspiring social movement mobilisation.⁴⁶

5 MANIPULATION

In addition to the fact that persuasion in a composition with other processes could attain positive developments, there is also a significant risk of international human rights law 'to empower the powerful'.⁴⁷ As a rule it occurs when the external disproportionate pressure is exercised over a state. Military intervention might serve as an apparent precedent. While Jack Goldsmith argues that military force could be utilised for the purposes of promoting human rights,⁴⁸ David Kennedy warns that human rights have been constantly abused to legitimate war.⁴⁹ For instance, the Western interventions in Kosovo, Afghanistan, Iraq and Syria had one thing in common – these states' negative human rights record as the official justification for a military action.⁵⁰ This external imposition of human rights standards has been claimed to rest on a principle of 'fundamental duty of a sovereign state'.⁵¹ Despite the fact that this approach might imply the opposite, it necessitates the use of external source of enforcement if the state itself cannot ensure the protection of ideals of humanity.⁵²

While the notion of a 'fundamental duty' could be criticised for being too vague and controversial, certain

³⁹ Emilie M Hafner-Burton, Kiyoteru Tsutsui and John W Meyer, 'International Human Rights Law and the Politics of Legitimation' (2008) 23 Int Sociol 115, 125.

⁴⁰ Cassel (n 1) 123.

⁴¹ Donoho (n 8) 27.

⁴² *ibid* 44; Buergenthal (n 34) 219.

⁴³ Hafner-Burton and Tsutsui (n 15); Donoho (n 8) 24; Koh (n 14) 1404.

⁴⁴ *ibid* art 2(1).

⁴⁵ Emilie M Hafner-Burton, 'A Social Science of Human Rights' (2014) 51 JPR 273, 277.

⁴⁶ Goodman and Jinks (n 19) 30.

⁴⁷ David Chandler, *Constructing Global Civil Society: Morality and Power in International Relations* (Palgrave Macmillan 2005) 171; James D Ingram, 'What Is a "Right to Have Rights"? Three Images of the Politics of Human Rights' (2008) 102 APSR 401.

⁴⁸ Jack Goldsmith, 'Sovereignty, International Relations Theory, and International Law' Ryan Goodman and Derek Jinks (eds), *How to Influence States: Socialization and International Human Rights* (2004) Public Law & Legal Theory Research Paper Series 13, 46.

⁴⁹ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005) 35 cited in Bernstorff (n 16) 922.

⁵⁰ Bernstorff (n 16) 921.

⁵¹ Ellen Marie Englehart, 'Human Rights Enforcement: A Fundamental Duty of the Sovereign State' *United States Air Force Academy* (May 1997)

<http://www.researchgate.net/publication/35522255_Human_rights_enforcement__a_fundamental_duty_of_the_sovereign_state_> accessed 3 February 2015.

⁵² *ibid* 31.

evidence further points to the counterproductive effects of coercion. Firstly, the unilateral US interventions match a decline in women's political and economic rights in the invaded territory. Secondly, the resulting political chaos provides a platform for the protagonists to betray their biases against the occupied country. For example, the facts reported about sexual violence in Liberia during its civil war were much exaggerated. Instead of 10–20% it was stated that 75% of women were raped.⁵³ In a similar way, the visits of US officials to Ukraine are correlated with intensified military actions in Donbass and the south-eastern territory of the country is alleged to be occupied by terrorists.⁵⁴ As a result, while persuasion becomes authoritative when merged with other interwoven strands, caution should be paid when such a merger raises a potential risk of employing human rights for adverse state interests.

6 CONCLUSION

Taking everything into account, despite the continuing imbalance between official declaration and actual implementation, the international human rights movement has been dramatically expanding for the last decades. Human rights have been regarded as fundamental principles that serve as the yardsticks by which the human progress is measured.⁵⁵ In this context the human rights are promoted through a constructive dialogue with reasoned argumentation. Therefore, public consciousness provides international human rights law with teeth and constitutes a major practical consequence. The incremental persuasion approach enables both the individual and the state to genuinely accept the universal principles of human rights. In addition to this, human rights remain the only effective proven response to a wide range of threats to human dignity.

⁵³ Hafner-Burton (n 45) 281.

⁵⁴ 'Ukraine in Maps: How the Crisis Spread' *BBC News* (London, 18 February 2015) <<http://www.bbc.co.uk/news/world-europe-27308526>> accessed 7 February 2015.

⁵⁵ Ingram (n 47).

THE 'BLURRED LINES' OF CAPACITY TO CONSENT IN RAPE

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1 INTRODUCTION

A poignant controversy with the current law on rape in England and Wales remains the low conviction rate and the process of attrition, whereby many cases are lost at each stage of the Criminal Justice System. This process has resulted in what is called the 'justice gap'.¹ A study by Harris and Grace found that only 6% of cases recorded by the police ended in a conviction.² One possible factor for the high level of attrition is the adverse influence of rape myths at each stage of the Criminal Justice Process,³ and the failings of the Sexual Offences Act 2003 to prevent such myths from infiltrating the Criminal Justice System.

This article will assess to what extent does rape myth reliance pervade the three key stages of the criminal justice system (investigation, prosecution and trial) with regards to extremely intoxicated victims, and asks what ought to be done by way of reform to provide protection from prejudicial attitudes. This necessitates a socio-legal perspective by a consideration of the extent to which the police, the CPS and the jury rely on, or are influenced by, stereotypical attitudes in cases of extreme drunkenness. This analysis at the 'macro-level' is important because the effect of the institutional response at each stage of the Criminal Justice System may 'implicitly encourage the social acceptance of unsympathetic, victim-blaming attitudes.'⁴

Why exactly is alcohol consumption in the context of attrition so significant? The answer, as explained in section 2 of this article, is that the use of alcohol in

sexual relations is firmly embedded in our 21st century culture. Cases of rape involving alcohol have created scepticism and discrepancies between academics and judges alike. To illustrate, in 2014 a university student publicly asked 'why does our criminal justice system penalise women for drinking rather than their rapists?' She stressed that blame should rest with the Criminal Justice System, and not on drunken women.⁵ Worryingly, those highest in authority within the Criminal Justice System would appear to do the opposite. Retired judge Mary Jane Mowat expressed the opinion that the conviction rate will not improve until women stop drinking to excess,⁶ albeit in the context of evidential difficulties. Alcohol consumption is a frequent and enjoyable pastime, especially as part of the youth culture of today at university. The problem is, as Mowat pointed out, an evidential one. The presence of consent will often be 'blurry', which makes increasing conviction rates an 'elusive goal'.⁷ The failings of the Sexual Offences Act 2003 are discussed in section 4 of this article, in particular the lack of guidance on the effect of extreme, voluntary intoxication on consent. A proposal for the introduction of a statutory rebuttable presumption of extreme drunkenness for a lack of consent will be evaluated.

The concern is not with alcohol use as a means of relaxation and to set the mood *per se*. Rather, it is the more sinister effects of extreme alcohol consumption on women, as occurs in the common youth culture of today, that makes them an easy 'target' for those few

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¹ Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 1.

² J Harris and S Grace, 'A Question of Evidence: Investigating and Prosecuting Rape in the 1990s' (Home Office Research Study 196, 1999) x.

³ Liz Kelly, Jo Lovett and Linda Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (Home Office Research Study 293, 2005) x.

⁴ Colleen A Ward, *Attitudes Towards Rape: Feminist and Psychological Perspectives* (Sage 1995) 136.

⁵ Maria Marcello, 'How I Was Raped – and Pressured into Dropping the Charges' *The Guardian* (London, 1 September 2014) <<http://www.theguardian.com/lifeandstyle/womens-blog/2014/sep/01/raped-pressured-dropping-charges-police-university-oxford>> accessed 8 October 2014.

⁶ Heather Saul, 'Former Judge Says Rape Conviction Rates Will not Improve Until "Women Stop Getting so Drunk"' *The Independent* (London, 26 August 2014) <<http://www.independent.co.uk/news/uk/home-news/former-judge-says-rape-conviction-rates-will-not-improve-until-women-stop-getting-so-drunk-9691911.html>> accessed 8 October 2014.

⁷ Temkin and Krahé (n 1) 9.

predatory males to take advantage of.⁸ Nevertheless, in adopting this viewpoint a careful balance will be adopted. The Criminal Justice System's overarching concern is justice and fairness to each party. There is a strong case to argue, as was put forward in the Home Office Review, preceding the Sexual Offences Act 2003, that the law should be slow to interfere in private, sexual relations for fear of injustice⁹ without 'very good reason'.¹⁰ From this report, one can infer that to introduce a presumption of non-consent where a victim is extremely voluntarily intoxicated must be 'necessary' and 'proportionate'.¹¹ The article poses the question and will develop the answer: who decides what is 'necessary' and 'proportionate'? The following discussion offers the view that the reality is this: raping a woman, who is too intoxicated to consent, is precisely what the Home Office would term 'harmful, unpleasant and degrading'.¹² It is necessary and proportionate for the law to intervene and protect a vulnerable woman. However, extreme alcohol consumption *does not* mean that consent is automatically void; men who have sex with a drunken woman are not all rapists.¹³

It is an apt statement that:

the legal, moral, philosophical, and practical implications of determining whether sex was voluntary or criminal are daunting; the competing considerations between fairness to the accused and victimised are difficult to resolve.¹⁴

The following question will be asked: in what circumstances should drunken sexual relations between individuals be regulated, and where do we draw the line between varying levels of intoxication?

Questions of this nature are considered in the final section (6) on reform. In considering how far the law should intrude into private sexual relations via the introduction of a statutory rebuttable presumption of non-consent in cases of voluntary intoxication, regard must be had to the concept of sexual autonomy, striking the right balance between negative and positive autonomy.¹⁵ A balance must be struck between protecting an extremely intoxicated woman from being taken advantage of against her will, and recognising her freedom to voluntarily engage in drunken sexual relations if she desires.

Perhaps a moral outlook can assist us in treading this line. Morality is a key underlying theme as the law on sexual offences, according to the Home Office, 'embodies society's view of what is right and wrong'.¹⁶ The law on rape must delineate acceptable behaviour from that what is so unacceptable as to warrant criminal liability.¹⁷ However, the Home Office has stressed that the criminal law is not the 'arbiter of morals',¹⁸ implying that it deals with conduct that is criminal, not necessarily immoral. This begs the question: is taking advantage of a drunken woman merely 'immoral' or does it justify criminal sanction? This theme underpins this article.

2 'RAPE MYTHS' AND DRUNKEN VICTIMS

Rape myths are traditionally defined as 'stereotyped or false beliefs about rape, rape victims and rapists'¹⁹ that serve to 'deny, downplay or justify sexual violence against women'.²⁰ A report by Amnesty International found that 30% of people thought a woman was partially or totally responsible for being raped if she was drunk.²¹ This suggests rape myths are frequently endorsed by ordinary members of society as part of a

⁸ Miranda Horvath and Jennifer Brown, 'The Role of Drugs and Alcohol in Rape' (2006) 46 Med Sci Law 219, 221.

⁹ Home Office, 'Setting the Boundaries: Reforming the Law on Sex Offences' (Consultation: Volume 1, July 2000) 3.

¹⁰ *ibid* 5.

¹¹ *ibid* 5.

¹² *ibid* 1.

¹³ Valarie Ryan, 'Intoxicating Encounters: Allocating Responsibility in the Law of Rape' (2004) 40 Cal WL Rev 407, 428.

¹⁴ Jane Campbell Moriarty, 'Rape, Affirmative Consent to Sex, and Sexual Autonomy: Introduction to the Symposium' (2008) 41 Akron L Rev 839, 841.

¹⁵ Alan Wertheimer, 'Intoxicated Consent to Sexual Relations' (2001) 20 Law and Philosophy 373, 376.

¹⁶ Home Office (n 9) iv.

¹⁷ *ibid* 1.

¹⁸ *ibid* 6.

¹⁹ Martha R Burt, 'Cultural Myths and Support for Rape' (1980) 38 J Personality and Social Psych 217, 217.

²⁰ Heike Gerger and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggressive Behaviour 422, 423.

²¹ ICM, 'Sexual Assault Research: Summary Report' (2005)

<http://www.icmresearch.com/data/media/pdf/2005_november_amnesty_international_sexual_abuse.pdf> accessed 1 November 2014, 4.

'victim blaming' attitude.²² However, Reece argues that not all societal attitudes are widespread and that there is little comparison to other underreported crimes.²³ Do public attitudes such as those expressed in the Amnesty Survey deserve the title 'rape myth'?²⁴ The participants may have meant that the woman was culpable. Alternatively they may have meant that her drunkenness was 'causally implicated' because she may not have been raped had she been sober; being drunk only increased the risk of rape.²⁵ This argument is circular; of course a woman's intoxication is relevant to establishing the offence, but her proposal that this criticism is 'more benign' than outright blaming is not persuasive. On Reece's argument, a woman is responsible for avoiding a risk by not getting drunk in the first place – which places undue weight on her prior behaviour.

Admittedly, assigning blame and responsibility merge into one another due to the strong focus on a woman's prior behaviour. Reece identifies a 'threshold' ranging from responsibility to blame displaying varying 'degrees of harshness'.²⁶ This indicates the existence of a common sense notion of responsibility that every adult has for their own safety. But in the context of serious crimes, it is unfair that a drunken woman is responsible, albeit only partly, for her rape. Would a victim of a mugging who had left themselves open to attack be treated the same?²⁷ Michael White believes so, and advocates that women

put themselves at risk and ought to take personal responsibility because, sceptically, 'everyone's a victim; yet no one is responsible.'²⁸ But is it reasonable for the law to expect women to engage in risk avoidance? Perhaps it rightfully 'recognizes the reality of adults assuming partial responsibility for their own decision-making.'²⁹ However, when is a woman's decision her own? She may have succumbed to social pressure to 'let loose' and drink.³⁰ Is it so shocking for women to put 'enjoyment and fun above their safety'?³¹ It is unacceptable to place the burden of 'avoiding a bad situation' onto a woman herself.³² We ought not to be preoccupied with why, but with determining factually, whether she was raped. No matter what reckless disregard is shown for one's own safety it is unfair to label someone responsible for a violation of her own body.³³ Reece states that there is 'very little reason to believe that people blame rape victims more than other crime victims',³⁴ yet in the context of rape myths in relation to extremely drunk victims, there is much to suggest the contrary.

2.1 Rape Myths and Extreme Drunkenness

Alcohol is used to 'telegraph sexual messages'.³⁵ A drunken woman is an 'acceptable target' for sexual assault³⁶ because they symbolise 'sexual disinhibition and promiscuity',³⁷ thereby creating the myth that women who are drunk are 'less respectable'³⁸ in contrast to a 'pure and moral woman'.³⁹ Disapproval historically stems from the associated dangers of

²² Miranda Horvath and Jennifer Brown (eds), *Rape: Challenging Contemporary Thinking* (Willan 2009) 6.

²³ Helen Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33 OJLS 445, 446–450.

²⁴ *ibid* 452.

²⁵ *ibid* 469.

²⁶ *ibid* 472.

²⁷ Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (5th edn, OUP 2012) 36.

²⁸ Michael White, 'On Rape and Personal Responsibility' *The Guardian* (London, 17 August 2008)

<<http://www.theguardian.com/politics/blog/2008/aug/12/michaelwhitespoliticalblog221>> accessed 20 October 2014.

²⁹ Campbell-Moriarty (n 14) 843.

³⁰ Emily Finch and Vanessa E Munro, 'The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited' (2004) *Crim LR* 789, 792.

³¹ Shana L Maier, 'The Complexity of Victim-Questioning Attitudes by Rape Victim Advocates' (2012) 18 *Violence Against Women* 1413, 1421.

³² *ibid*.

³³ Jessica Valenti, 'Real Equality is When Women Have the Right to be as Drunk and Stupid as Men' *The Guardian* (London, 24 October 2014) <<http://www.theguardian.com/commentisfree/2014/oct/24/real-equality-is-when-women-have-the-right-to-be-as-drunk-and-stupid-as-men>> date accessed 20 October 2014.

³⁴ Reece (n 23) 446.

³⁵ Barbara C Leigh, 'A Thing so Fallen, and so Vile: Images of Drinking and Sexuality in Women' (1995) 22 *Contemporary Drug Problems* 415, 425.

³⁶ Karen M Kramer, 'Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes' (1994) 47 *Stan L Rev* 115, 121.

³⁷ Leigh (n 35) 416.

³⁸ Mary White Stewart, Shirley A Dobbin and Sophia I Gatowski, 'Real Rapes and Real Victims: The Shared Reliance on Common Cultural Definitions of Rape' (1996) 4 *Fem LS* 159, 160.

³⁹ Leigh (n 35) 419.

alcohol with the loss of sexual restraint.⁴⁰ A popular myth in this respect is the 'pedestal myth' that women should always act virtuously.⁴¹

Given the popular 'courtship' role alcohol plays, it is unsurprising that alcohol is present in over a third of rape cases⁴² when the predominant attitude is that intoxicated women present an opportunity to have sex.⁴³ The problem is one of attitude *and* evidence where alcohol is key. Many myths display a gender biased attitude: that women are capable of saying no regardless of the level of intoxication; by drinking women are asking to be raped; and that women cry rape because of drunken regrets.⁴⁴ The first is problematic because alcohol impairs cognitive and motor skills meaning that drunken women pay less attention to cues that would alert them to a dangerous situation.⁴⁵ The effects of alcohol can render victims incapable of forming any coherent judgment let alone being able to adamantly express their wishes. Moreover, victims' memories can be 'discredited as unreliable' because their credibility is destroyed.⁴⁶ The presence of alcohol 'constructs victims as liars'.⁴⁷

These myths are based upon gender expectations and create 'double standards'.⁴⁸ A drunken rapist is less culpable; a drunken victim more so.⁴⁹ Richardson and Campbell found that the offender was blamed less when he was drunk whereas a victim was held more responsible because she 'signals' her sexual availability by holding a drink.⁵⁰ This upholds the myth that women fail to articulate their sexual desires,

which 'pervades the social and legal interpretations of consent'.⁵¹ As one member of society asks: If you deliberately put yourself into a situation in which your freedom or capacity is likely to be less, surely this is relevant?⁵² This erroneously assumes that all drinking is voluntary and thereby displays a 'reckless disregard for one's own safety'.⁵³ Adherence to such myths invites condemnation of the victim,⁵⁴ which leads us to consider the influence of morality in a 'culture of disapproval of intoxicated excuses'.⁵⁵

The problem is wrongly depicted as one of extremely intoxicated and immoral women, rather than immoral men choosing 'to have sex with unaware, and unresponsive women'.⁵⁶ The morality implicit in this myth is that in contrast to sober victims, the victim is 'the author of her own misfortune'.⁵⁷ Nothing, however, warrants the adoption of this moral high ground by the public. All humans engage in risky behaviour because many people drink alcohol. It was found in one study that the respondents who drank excessively did not sympathise with the victim as was expected.⁵⁸ It is hypocritical to displace one's distaste for the behavioural effects of alcohol onto rape victims, although perhaps 'excessive' drinking constitutes different things to different people.⁵⁹ Nevertheless, the same scrutiny is not given to drunken vandalism or criminal damage. Victims of rape are therefore the scapegoat for the undesirable effects of the social concern of drunken recklessness, because rape, as a product of this phenomenon, is a severe crime. This allocation of responsibility to a woman for

⁴⁰ *ibid* 412.

⁴¹ Stewart, Dobbin and Gatowski (n 38) 161.

⁴² Kelly, Lovett and Regan (n 3) 80.

⁴³ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 226.

⁴⁴ Jo Lovett and Miranda A H Horvath, 'Alcohol and Drugs in Rape and Sexual Assault' in Horvath and Brown (eds), *Rape: Challenging Contemporary Thinking* (n 22) 155.

⁴⁵ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 220.

⁴⁶ Anneke Meyer, 'Too Drunk To Say No – Binge Drinking, Rape and the Daily Mail' (2010) 10 *Feminist Media Studies* 19, 22.

⁴⁷ *ibid* 25.

⁴⁸ Kramer (n 36) 117.

⁴⁹ *ibid* 115.

⁵⁰ *ibid* 117.

⁵¹ *ibid* 117.

⁵² Emily Finch and Vanessa E Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials involving Intoxicants' (2007) 16 *Social and Legal Studies* 591, 601.

⁵³ *ibid* 595.

⁵⁴ *ibid* 598.

⁵⁵ A Wall and R Schuller, 'Sexual Assault and Defendant/Victim Intoxication: Jurors' Perceptions of Guilt' (2000) 30 *Journal of Applied Social Psychology* 253, 270.

⁵⁶ Maggie Wykes and Kirsty Welsh, *Violence, Gender and Justice* (Sage 2009) 120.

⁵⁷ Finch and Munro, 'The Demon Drink' (n 52) 606.

⁵⁸ Kerry Ferguson and Carol Ireland, 'Attitudes Towards Victims and Perpetrators of Hypothetical Rape Scenarios Involving Intoxication: An Application to the UK' (2012) 4 *Journal of Aggression, Conflict and Peace Research* 96, 103.

⁵⁹ *ibid* 103.

her prior behaviour is unjustifiable because the drinking can be attributed to a cultural peer pressure and a desire to 'fit in' – a decision to drink is not always a product of 'free' will, and freedom to consent to sex is not necessarily present.⁶⁰

However, the ambiguous influence of alcohol clouds accountability.⁶¹ It is difficult to pinpoint blame in a sexual encounter that takes place in an 'intoxicated fog' where it is one person's word against another.⁶² Evidential difficulties increase reliance on rape myths because we must make coherent sense of the facts; a woman's behaviour cannot be free from scrutiny when it is necessary to make sense of events.⁶³ The more ambiguity, the greater the double standard and a victim is perceived as accountable when alcohol introduces the possibility of a 'reasonable doubt' because it is difficult for the prosecution to establish a case.⁶⁴

2.2 *A Binge Drinking Culture: Reinforcing Rape Myths*

Grubb and Turner state that, given a lack of recent empirical research on rape myth acceptance, it is important to assess the attitudes prevailing today.⁶⁵ In 2014, the recent phenomenon of binge drinking reinforces adherence to rape myths towards extremely drunken victims. One myth is that 'drug assisted rape' constitutes the spiking of drinks with Rohypnol, but according to Horvath this is rare.⁶⁶ The culprit is alcohol-induced extreme intoxication.⁶⁷ Rape involving alcohol occurs in social interactions such as dates and parties, involving shared alcohol

consumption.⁶⁸ Alcohol is not administered surreptitiously, which illustrates the evolving nature of rape myths alongside societal opinion and cultural behaviour. Perpetrators 'seek out' voluntarily intoxicated 'targets'⁶⁹ as was argued by the prosecution in *R v Evans*.⁷⁰ An offender 'uses the intoxication rather than the intoxicant as a facilitator.'⁷¹ Thus, 'has culture changed so substantially that current legal concepts of consent no longer fit?'⁷² This can be answered affirmatively – we should allow a presumption of non-consent where extreme intoxication was voluntary. The law's protective function is undermined by this loophole. It is no longer the means by which a victim is intoxicated, but the state of intoxication that deems a woman worthy of the law's protection.⁷³

Our 'new culture of intoxication' is described as a change in the 'culturally acceptable and desirable state of intoxication.'⁷⁴ Newspaper commentaries reveal the consolidation of rape myths regarding extremely drunk victims following this change. Meyer criticises the Daily Mail for making 'persistent connections between binge drinking and casual sexuality.'⁷⁵ It evidences an 'underlying culture of blame'⁷⁶ saturated with the belief that women are 'responsible for their own safety.'⁷⁷ One study of university students found that 'an intoxicated woman is perceived as transgressing a sex-role stereotype and may be less deserving of societal protection.'⁷⁸ In support of this, extremely drunken women are 'ugly' and treated with repulsion

⁶⁰ Finch and Munro, 'The Sexual Offences Act' (n 30) 795.

⁶¹ Georgina S Hammock and Deborah R Richardson, 'Perceptions of Rape: The Influence of Closeness of Relationship, Intoxication and Sex of Participant' (1997) 12 *Violence and Victims* 237, 238.

⁶² Ryan (n 13) 407.

⁶³ Finch and Munro, 'The Demon Drink' (n 52) 600.

⁶⁴ Hammock and Richardson (n 61) 238.

⁶⁵ Amy Grubb and Emily Turner, 'Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance use on Victim Blaming' (2012) 17 *Aggression and Violent Behavior* 443, 450.

⁶⁶ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 220.

⁶⁷ Mark Townsend and Gaby Hinsliff, 'New Drink Laws Spark Rape Fears – Police Chief Warns That Attackers will Target Binge-Drinking Women' *The Guardian* (London, 27 November 2005) <<http://www.theguardian.com/uk/2005/nov/27/drugsandalcohol.ukcrime>> accessed 3 November 2014.

⁶⁸ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 220.

⁶⁹ *ibid* 221.

⁷⁰ [2012] EWCA Crim 2559 [7].

⁷¹ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 225.

⁷² Campbell-Moriarty (n 14) 843.

⁷³ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 223.

⁷⁴ Fiona Measham and Kevin Brain, '"Binge" Drinking, British Alcohol Policy and the New Culture of Intoxication' (2005) 1 *Crime, Media, Culture* 262, 268.

⁷⁵ Meyer (n 46) 23.

⁷⁶ *ibid* 26.

⁷⁷ *ibid* 26.

⁷⁸ Ferguson and Ireland (n 58) 101.

by members of the public⁷⁹ because they have lost their self-respect and dignity.⁸⁰ The binge drinking phenomenon prevents justice where a woman is 'very drunk', as opposed to a mere presence of intoxication, because she is accorded greater responsibility for her actions.⁸¹ Excessive drinking encourages a blame culture because it 'constitutes irresponsible behaviour'⁸² with the effect of excusing male responsibility, and obscuring the real problem of male rape.⁸³ Meyer suggests that new 'cultural discourses do not simply reinvigorate old rape myths' but even 'produce the new one that the cause of rape is female binge drinking.'⁸⁴

On the other hand, there is increasing support for female victims who were drunk and a strong criticism of blame culture,⁸⁵ suggesting that a 'binge drinking' culture is not as self-reinforcing as Meyer believes. Horvath and Lovett point out that excessive drinking by young women has not increased, despite some articles suggesting otherwise.⁸⁶ There is no drastic culture change: 'drinking levels between young people have remained relatively stable, therefore the predominant focus on women is unwarranted.'⁸⁷ However, a binge drinking culture still portrays the participating women as 'asking for it'⁸⁸ because inappropriate behaviour signals a loose woman who gets what she deserved.⁸⁹ This reinforces rape myths

towards drunken victims. To reiterate, women want social acceptance, and drinking facilitates this;⁹⁰ and the other side of the 'double standard' is that a woman shouldn't drink if she wants to avoid being raped.⁹¹ This double standard is 'unfair'⁹² because even where the victim was under pressure to accept drinks, a voluntary acceptance of alcohol is believed to signal sexual encouragement.⁹³ If this commends responsibility for her victimisation⁹⁴ we are unfairly holding her to a standard she cannot reach. It is apt to say that a woman's responsibilities are 'limitless'.⁹⁵

As a result, the depth to which rape myths transcend everyday life should not be underestimated; 'this is just how things go at parties ... if our man is found guilty, so must hundreds of thousands of others, probably tonight.'⁹⁶ The perpetrator is viewed not as a rapist, but as 'ungentlemanly' or 'a git'.⁹⁷ This frequency indicates that an overt 'victim blaming' has transformed into something more subtle.⁹⁸ If alcohol-facilitated sex is unquestionably ingrained in everyday sexual encounters in 2014, it is difficult to ascertain at which point the use of alcohol in sex is truly criminal.⁹⁹ It is more common than we might think. In a 2012 study a third of students had experienced alcohol-related non-consensual sex, which according to Gunby demonstrates a significant public health issue.¹⁰⁰ These rape myths may infiltrate the decision making of the

⁷⁹ Richard O de Visser and Elizabeth J McDonnell, "'That's OK. He's a Guy': A Mixed Methods Study of Gender Double Standards for Alcohol Use' (2012) 27 *Psychology & Health* 618, 626–628.

⁸⁰ *ibid* 630.

⁸¹ Ferguson and Ireland (n 58) 102.

⁸² Meyer (n 46) 26.

⁸³ *ibid* 29.

⁸⁴ *ibid* 31.

⁸⁵ Julie Bindel, 'Blame the Rapist not the Victim' *The Guardian* (London, 19 February 2010) <<http://www.theguardian.com/lifeandstyle/2010/feb/19/blame-the-rapist>> accessed 4 January 2016; Jessica Valenti, 'If You Can't Talk About Rape Victims Without Blaming Them, Don't Talk About Rape' *The Guardian* (London, 17 November 2014) <<http://www.theguardian.com/commentisfree/2014/nov/17/rape-blaming-victims-talk>> accessed 29 November 2014.

⁸⁶ Antonia C Lyons, Sue I Dalton and Anna Hoy, "'Hard Core Drinking': Portrayals of Alcohol Consumption in Young Women's and Men's Magazines' (2006) 11 *J Health Psych* 223, 224.

⁸⁷ Lovett and Horvath, 'Alcohol and Drugs in Rape and Sexual Assault' (n 44) 127.

⁸⁸ Meyer (n 46) 23.

⁸⁹ Stewart, Dobbin and Gatowski (n 38) 161.

⁹⁰ Kramer (n 36) 122.

⁹¹ *ibid* 122.

⁹² *ibid* 122.

⁹³ Finch and Munro, 'The Demon Drink' (n 52) 599.

⁹⁴ *ibid* 599.

⁹⁵ Wykes and Welsh (n 56) 120.

⁹⁶ Finch and Munro, 'The Demon Drink' (n 52) 603.

⁹⁷ *ibid* 603.

⁹⁸ Maier (n 31) 1418.

⁹⁹ Miranda Horvath and Jennifer Brown, 'Do You Believe Her and is it a Real Rape?' in Horvath and Brown (eds), *Rape: Challenging Contemporary Thinking* (n 22) 325.

¹⁰⁰ Clare Gunby, Anna Carline and Mark A Bellis and others, 'Gender Differences in Alcohol-Related Non-Consensual Sex; Cross-Sectional Analysis of a Student Population' (2012) 12 *BMC Public Health* 216, 9.

criminal justice system more readily¹⁰¹ especially if rape myths need not be openly acceded to. It is easy to 'fall prey to the social tendency to place at least some degree of responsibility for rape prevention on the woman.'¹⁰² For example, adherence to the view that women need to make 'better choices' merely disguises the opinion that when women drink they put themselves at 'greater risk.'¹⁰³ There is a fine line between helping women avoid the risk of harm, and questioning the responsibility of their behaviour.¹⁰⁴ The extent to which this is accurate will be evaluated in the next section, which considers whether members of the police and Crown Prosecution Service are free from the permeating influence of rape myths.

3 RAPE MYTHS AND ALCOHOL AT THE POLICE AND CROWN PROSECUTION STAGE: CONVINCING THE 'GATEKEEPERS' TO JUSTICE

The police and Crown Prosecution Service (CPS) are not immune to the influence of rape myths towards drunken victims. Attrition is created by more victims reporting rape but too few of these resulting in a conviction¹⁰⁵ due to 'no-criming' (the decision to take no further action) and reluctance by the CPS to prosecute.¹⁰⁶ 82% of cases are lost at the point of investigation, with only 18% proceeding to prosecution.¹⁰⁷ Is the reason for this justice 'chasm' a 'culture of scepticism' and a fear of false allegations¹⁰⁸

or the evidential difficulties of establishing a consistent account that will 'win' in court?¹⁰⁹

3.1 The Police

The fact that the police are *still* failing to record reported rapes¹¹⁰ and that approximately 20% of those recorded by the police are 'no-crimes' reflects the trend of disbelieving attitudes towards intoxicated victims.¹¹¹ The belief that intoxicated women are to blame for provoking sexual violence¹¹² because they do not fit the stereotype of a sober virgin violated by an unknown attacker¹¹³ was 'dominant' before the Sexual Offences Act 2003.¹¹⁴ If a woman voluntarily drank alcohol and left a club with a suspect, this 'dirt' was evidence of her 'immorality'.¹¹⁵ Vulnerable and intoxicated victims struggled to 'convince' when they were viewed as 'young and stupid'.¹¹⁶ A third of women were discredited based upon their level of intoxication because only 'loose women' drink to excess.¹¹⁷ Any claim was an attempt to 'downplay' her sexual meanderings out of 'embarrassment'.¹¹⁸ Strong adherence to myths on the part of the police, for example that a woman expresses sexual availability by voluntarily accepting a drink, 'significantly predicts victim blaming'.¹¹⁹ These views support findings that the more intoxicated a victim is, the less credibility she is afforded because it is reasonable to believe she was interested in sex.¹²⁰ Furthermore, despite some officers

¹⁰¹ Grubb and Turner, 'Attribution of Blame' (n 65) 449.

¹⁰² Maier (n 31) 1418.

¹⁰³ *ibid* 1420.

¹⁰⁴ *ibid* 1421.

¹⁰⁵ Temkin and Krahé (n 1) 9.

¹⁰⁶ Susan J Lea, Ursula Lavers and Steve Shaw, 'Attrition in Rape Cases: Developing a Profile and Identifying Relevant Factors' (2003) 43 *Brit J Criminol* 583, 583.

¹⁰⁷ Jennifer M Brown, Carys Hamilton & Darragh O'Neill, 'Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors' (2007) 13 *Psychology, Crime and Law* 355, 361.

¹⁰⁸ Kelly, Lovett and Regan (n 3) xi.

¹⁰⁹ Jeanne Gregory and Sue Lees, *Policing Sexual Assault* (Routledge 1999) 89.

¹¹⁰ HMIC, 'Crime-Recording: Making the Victim Count' (November 2014) <<https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/crime-recording-making-the-victim-count.pdf>> accessed 14 January 2016, 18.

¹¹¹ M Hester, 'From Report to Court: Rape Cases and the Criminal Justice System in the North East' (University of Bristol in association with the Northern Rock Foundation, 2013) 15.

¹¹² J Jordan, *The Word of a Woman? Police, Rape and Belief* (Palgrave Macmillan 2004) 83–84.

¹¹³ Temkin and Krahé (n 1) 38.

¹¹⁴ L Kelly, 'Routes to Injustice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases' *Child and Woman Abuse Studies Unit* (October 2001) <<https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2014/04/Rapelitrev.pdf>> accessed 4 January 2016, 23.

¹¹⁵ Harris and Grace (n 2) 19.

¹¹⁶ Jan Jordan, 'Worlds apart? Women, Rape and the Police Reporting Process' (2001) 41 *Brit J Criminol* 679, 695.

¹¹⁷ Jan Jordan 'Beyond Belief? Police, Rape and Women's Credibility' (2004) *Crim Just* 29, 33–38.

¹¹⁸ Jordan, *The Word* (n 112) 115.

¹¹⁹ Emma Sleath and Ray Bull, 'Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample – Differences Between Police Officers With and Without Special Training' (2012) 39 *Crim Just and Behavior* 646, 658–659.

¹²⁰ Regina A Schuller and Anna Stewart, 'Police Responses to Sexual Assault Complaints: The Role of Perpetrator/Complainant Intoxication' (2000) 24 *Law and Human Behavior* 535, 545.

emphasising an overriding duty 'to investigate',¹²¹ it is undermined by the belief that intoxicated victims falsely cry rape.¹²² Many believe false allegations are frequent¹²³ and a significant proportion of cases are no-crimes¹²⁴ where intoxication raises a suspicion of fabrication.¹²⁵ Victims will lie about the extent of their drinking in anticipation of disbelief, which causes the police to doubt the credibility of the whole claim.¹²⁶ In Jordan's study half of the victims were drunk and nearly three quarters of these claims were regarded as false.¹²⁷ This 'dominant and destructive' belief in false accusations assumes intoxicated victims make excuses for 'immoral behaviour'¹²⁸ and insensitively promotes re-victimisation.¹²⁹

On the other hand, adherence to rape myths has been reduced¹³⁰ following the Sexual Offences Act 2003 which encouraged the police to adopt a victim-focused 'culture' of belief from the moment a rape is reported.¹³¹ The police appreciate that consent is absent when a victim is too drunk to make a decision.¹³² This is logical when alcohol is present 'in at least a third' of cases and approximately 20% of victims are drunk.¹³³ The supportive attitude desired by victims is growing.¹³⁴ In 2013, 'most cases involving a drunken victim were recorded as crimes'¹³⁵ which indicates an appreciation that extreme intoxication signifies vulnerability¹³⁶ and an awareness of the social 'context' in which drunken

women are taken advantage of.¹³⁷ However, the police require 'a rational victim with a consistent story' and a 'victim-focused' culture of belief may be undermined by an insistent focus on evidential consistency.¹³⁸ Historically, a lack of evidence was the reason in almost 40% of cases for the decision to 'no-crime' or take 'no further action'.¹³⁹ When drunkenness inhibits a precise recollection of events, there is only a 'small chance' of the case proceeding because the police presume this evidence to be insufficient.¹⁴⁰ For example, conflicting CCTV evidence may unfairly indicate that events were not quite as an intoxicated woman remembered.¹⁴¹ Some officers still equate sober victims with a coherent account¹⁴² which offsets the initial benevolence to record the crime and reinforces the erroneous and limited understanding of 'real rape' as a sober victim attacked by an unknown man.¹⁴³

Nonetheless, the police adopt a 'rational legal logic' which outweighs any personal prejudice.¹⁴⁴ This logic understands the attitudes of potential jurors without a corresponding institutional belief in the myths.¹⁴⁵ Officers cannot help but to 'draw on their own theories of human behaviour' to predict an

¹²¹ Harris and Grace (n 2) 24.

¹²² Kelly (n 114) 23.

¹²³ Lea, Lanvers and Shaw (n 106) 592.

¹²⁴ Kelly (n 114) 19.

¹²⁵ Harris and Grace (n 2) 16.

¹²⁶ Jordan, *The Word* (n 112) 119.

¹²⁷ *ibid* 97.

¹²⁸ *ibid* 67.

¹²⁹ *ibid* 98.

¹³⁰ Jordan, 'Beyond Belief' (n 117) 50.

¹³¹ Hester (n 111) 11.

¹³² *ibid* 15.

¹³³ *ibid*.

¹³⁴ Sara Payne, 'Rape: The Victim Experience Review' (Home Office, November 2009) 12.

¹³⁵ Hester (n 111).

¹³⁶ Jordan, *The Word* (n 112) 105.

¹³⁷ Vivien Stern, 'The Stern Review: A report by Baroness Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales' (Government Equalities Office, 2010) 59.

¹³⁸ Hester (n 111).

¹³⁹ Lea, Lanvers and Shaw (n 106) 592.

¹⁴⁰ *ibid* 593.

¹⁴¹ Hester (n 111) 14.

¹⁴² V Munro and L Kelly, 'A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales' in Horvath and Brown (eds), *Rape: Challenging Contemporary Thinking* (n 22) 288.

¹⁴³ *ibid* 295.

¹⁴⁴ Brown, Hamilton and O'Neill (n 107) 369.

¹⁴⁵ S Caroline Taylor & Leigh Gassner, 'Stemming the Flow: Challenges for Policing Adult Sexual Assault with Regard to Attrition Rates and Under-reporting of Sexual Offences' (2010) 11 *Police Practice and Research* 240, 245.

outcome.¹⁴⁶ Rape myths subconsciously influence wider decision making¹⁴⁷ when they are weighing up the likelihood of a case's success in front of a jury.¹⁴⁸ There is a difference between judging reckless behaviour with immediate suspicion, and appreciating the slim possibility of a conviction where alcohol is a key factor. Such integrity may save victims from the trauma of the trial, but the police should be 'evidence-gatherers rather than truth-seekers' when such judgments should be left for the jury.¹⁴⁹ We cannot trust the police to distinguish fairly between cases that can realistically be advanced and those that cannot – the police *expect* around 25% of complaints to be false.¹⁵⁰ Dismissive comments that it was merely a 'drunken one night stand' prevail among some officers.¹⁵¹ The prioritisation of strong evidence threatens to rekindle a dampened 'core of disbelief' because although a poor recollection of events is detrimental to any victim of crime, a hazy memory of drunken blackouts inevitably invites scrutiny.¹⁵² It is therefore important to balance evidential priorities with the need to foster the culture of victim support at all costs.

3.2 The CPS

In 2002, approximately half of all cases referred to the CPS were discontinued for lack of evidence¹⁵³ because the 'focus on the victim' approach assesses the likelihood of a successful prosecution in front of a jury¹⁵⁴ by predicting what 'impression' the witness

will make and her credibility.¹⁵⁵ According to prosecutors, alcohol is 'pertinent' to a successful prosecution because it diminishes credibility on the assumption that drunken women are less 'respectable' and therefore less believable.¹⁵⁶ A fear of false allegations compounds this difficulty: prosecutors admit that they believe 'false accounts' are more common in rape.¹⁵⁷ For example, contradictory CCTV evidence can undermine an intoxicated victim's account that she was insensible if it displays her 'functioning normally'¹⁵⁸ and will be a 'primary factor' in the decision to advise a 'no-further-action'.¹⁵⁹ The CPS must adopt a 'proactive' role in building a case rather than fixate on 'weaknesses' in credibility.¹⁶⁰ To cut off cases prematurely based on the myth that an intoxicated victim must be 'causally responsible' defies justice.¹⁶¹ To use 'winnability' as a determining factor risks placing an adversarial gain above a proper investigative function.¹⁶²

However, do prosecutors unconsciously rely on personal prejudice, or merely anticipate those of the jurors?¹⁶³ Assessing a 'realistic chance of conviction' is objective,¹⁶⁴ but some element of subjectivity is inevitable.¹⁶⁵ Focus on a case's evidential success cannot be separated from prejudicial attitudes towards prior behaviour.¹⁶⁶ For example, one prosecutor feared that the jury would be critical of a woman's decision to spend the night in a bedroom with her rapist. This assumes that a choice to be alone with the perpetrator

¹⁴⁶ S O'Keeffe, J Brown and E Lyons, 'Seeking Proof or Truth: Naturalistic Decision-making by Police Officers when Considering Rape Allegations' in Horvath and Brown (eds), *Rape: Challenging Contemporary Thinking* (n 22) 250.

¹⁴⁷ Taylor and Gassner (n 146) 247.

¹⁴⁸ Temkin and Krahé (n 1) 40.

¹⁴⁹ O'Keeffe, Brown and Lyons (n 146) 252.

¹⁵⁰ Jacqueline Wheatcroft, Graham Wagstaff & Annmarie Moran, 'Re-victimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4 Victims and Offenders 265, 268.

¹⁵¹ Payne (n 134) 12.

¹⁵² Jordan, *The Word* (n 112) 64–65.

¹⁵³ HMIC and HMCPSI, 'A Report on the Joint Inspection into the Investigation and Prosecution of Cases involving Allegations of Rape' (London, April 2002) <https://www.justiceinspectors.gov.uk/cjji/wp-content/uploads/sites/2/2014/04/ARC_20020401.pdf> accessed 14 January 2016, 97.

¹⁵⁴ Brown, Hamilton and O'Neill (n 107) 361.

¹⁵⁵ Gregory and Lees (n 109) 73.

¹⁵⁶ Brown, Hamilton and O'Neill (n 107) 365.

¹⁵⁷ Candida Saunders, 'The Truth, The Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape' (2012) 52 Brit J Criminol 1152, 1167.

¹⁵⁸ *ibid* 1162.

¹⁵⁹ Brown, Hamilton, and O'Neill (n 107) 367.

¹⁶⁰ HMIC and HMCPSI (n 153) 9.

¹⁶¹ Brown, Hamilton, and O'Neill (n 107) 357.

¹⁶² Gregory and Lees (n 109) 89.

¹⁶³ Brown, Hamilton and O'Neill (n 107) 362.

¹⁶⁴ Crown Prosecution Service, *The Code for Crown Prosecutors* (January 2013)

<http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf> accessed 18 December 2014, 6.

¹⁶⁵ Kelly (n 114) 26.

¹⁶⁶ Brown, Hamilton and O'Neill (n 107) 365.

signifies responsibility for the encounter.¹⁶⁷ Similarly, if a woman was ‘willing’ to engage with the accused a jury was presumed reluctant to convict, suggesting adherence to the myth that force must be involved for a victim’s account to be reliable.¹⁶⁸ The long-term risk of an adherence to these myths within the CPS is that only stereotypically ‘real’ rape cases reach prosecution¹⁶⁹ thereby encouraging rapists to target drunken women.¹⁷⁰

On the other hand, the CPS explicitly states that extreme drunkenness can negate capacity to consent and reject the myth that victims who drink alcohol ‘are asking to be raped’.¹⁷¹ Specialist prosecutors are educated about these myths to promote impartiality,¹⁷² and prosecutors’ use of a ‘merits-based approach’ to avoid such myths has led to a successful conviction where a drunken complainant’s recollection was ‘patchy’.¹⁷³ Similarly, the CPS’s guidance on how to deal with ‘false allegations’ shows that a belief in falsity has diminished¹⁷⁴ as the discontinuance of a case due to insufficient evidence does not now signify a belief that the victim is lying.¹⁷⁵ The CPS displays a keen wish to disprove claims of falsity. In one case, less than concrete evidence protected the victim from false accusations: footage from phones revealed that a heavily intoxicated and vulnerable young woman had been taken advantage of.¹⁷⁶

3.3 Policy Initiatives

Government initiatives have had a ‘positive impact’ on improving the treatment of drunken victims at each stage of the criminal justice process.¹⁷⁷ The CPS has specialist rape prosecutors who must ‘build the strongest possible cases’¹⁷⁸ and shift the focus from the ‘credibility of the victim to that of the overall allegation.’¹⁷⁹ Building a strong case positively deflects scrutiny away from credibility, which from a drunken victim’s hazy account may be at risk. It is promising that a ‘second opinion’ is sought if a case is deemed weak because it prevents personal adherence to rape myths, such as drunken women cry rape out of regret, hindering a genuine case.¹⁸⁰ The strategic response of specialist officers in the police to protect vulnerable groups,¹⁸¹ following the statement by ACPO that intoxicated victims are at risk of being taken advantage of,¹⁸² indicates awareness of a ‘culture change’ regarding the rise in binge drinking among young people.¹⁸³ The recognition that a ‘high consumption of alcohol’ may indicate a lack of consent under the SOA implies that the police are more astute to understand that drunken victims are at risk of exploitation, and are thus protected by the law when she does not have the capacity to consent.¹⁸⁴

¹⁶⁷ *ibid* 365.

¹⁶⁸ Harris and Grace (n 2) 24.

¹⁶⁹ Taylor and Gassner (n 145) 247.

¹⁷⁰ Beatrix Campbell, ‘Stern Morphs into Pollyanna – The Rape Review Does a Diservice to Women From Whom Police and Courts Have Averted Their Gaze’ *The Guardian* (London, 16 March 2010)

<<http://www.theguardian.com/commentisfree/2010/mar/16/stern-rape-report-conviction-rate>> accessed 12 November 2014.

¹⁷¹ Crown Prosecution Service, ‘CPS Policy for Prosecuting Cases of Rape’ (September 2012)

<http://www.cps.gov.uk/publications/docs/rape_policy_2012.pdf> accessed 12 November 2014, 6.

¹⁷² *ibid* 15.

¹⁷³ Crown Prosecution Service, ‘Violence against Women and Girls Crime Report’ (2010/11).

<http://www.cps.gov.uk/publications/docs/CPS_VAW_report_2011.pdf> accessed 12 November 2014, 28.

¹⁷⁴ A Levitt and CPS Equality and Diversity Unit, ‘Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations’ (Joint Report to the Director of Public Prosecutions 2013) 19.

¹⁷⁵ Payne (n 134) 20.

¹⁷⁶ Levitt and CPS Equality and Diversity Unit (n 174) 24.

¹⁷⁷ Munro and Kelly (n 142) 295.

¹⁷⁸ Stern (n 137) 84.

¹⁷⁹ Alison Saunders and Martin Hewitt, ‘Joint CPS and Police Action Plan on Rape’ (2014)

<http://www.cps.gov.uk/publications/equality/vaw/rape_action_plan.pdf> accessed 19 December 2014, 3.

¹⁸⁰ Stern (n 137) 84.

¹⁸¹ *ibid* 78.

¹⁸² ACPO and CPS, ‘Guidance on Investigating and Prosecuting Rape’ (2010: Abridged edition)

<http://www.acpo.police.uk/documents/crime/2011/20110303%20CBA.%20Guidance%20for%20Investigating%20and%20Prosecuting%20Rape_Public%20Facing_2010.pdf> accessed 17 December 2014, 28–29.

¹⁸³ Stern (n 137) 59.

¹⁸⁴ ACPO and CPS (n 182) 90.

Overall, the initial response to rape is improving.¹⁸⁵ In particular, specialist training targets 'myth busting'.¹⁸⁶ For example, the belief that drunken irresponsibility runs the risk of rape or that drunken women are always capable of saying no.¹⁸⁷ However, Sleath argues that specialist training does not necessarily stop victim blaming by individual police officers.¹⁸⁸ Although 'attitudes are changing for the better',¹⁸⁹ within a growing culture of victim-orientated belief, the concern is maintaining a consistent implementation of policy.¹⁹⁰ Specialist officers can be educated about the need to reject stereotypes but can it overcome the gut feeling of a police officer that an intoxicated victim is merely regretful?¹⁹¹ It may be that expectations of false complaints are 'firmly entrenched'.¹⁹² Despite a policy of belief, some individuals will *always* be 'sceptical of a victim who has been drinking'.¹⁹³

On the other hand, there have been efforts by numerous forces to consistently demonstrate a culture of belief: the 'We Can Stop It' consent awareness campaign makes explicit reference to the context of drunken victims being vulnerable to rape.¹⁹⁴ This is a step closer to cementing a culture of support and demonstrates to the public that the authorities 'mind and care'.¹⁹⁵ The best efforts to render victim-blaming 'unacceptable' are most effective when led from above; chief crown prosecutors and chief constables must set an example for others to follow.¹⁹⁶ For

example, the Joint National Rape Conference between the police and CPS introduces 'toolkits' that set out situations where a victim may have been incapacitated through drink. It directs police and prosecutors to ask how the suspect knew consent was present and given with full capacity.¹⁹⁷ This concrete institutionalisation of the presumption that the 'victim always be believed'¹⁹⁸ will reduce the risk of officers and prosecutors acting on their assumption that a drunken victim is lying, and ensure victims are treated like any other victim of a serious crime: with 'sympathy and understanding'.¹⁹⁹

To conclude, police and prosecutors now recognise intoxicated rape as one of a myriad of contexts in which rape occurs which accounts for the steady decline in 'drop-outs' at the initial stages of investigation.²⁰⁰ Attentions are directed towards assessing a viable chance of a prosecution, but will not override an initial belief in the truth of her claim. The coordinated approach of the CPS and the police reflects a change in 'community expectations' following the SOA 2003 to provide intoxicated victims with complete support, from report to prosecution.²⁰¹ Taking advantage of a drunken victim who lacks capacity to consent is accepted by the police and CPS as 'real rape'.²⁰² Thus, responsibility for the continuing decrease in the number of convictions lies in the hands of the jury.²⁰³

¹⁸⁵ Miranda A H Horvath, Stephen Tong and Emma Williams, 'Critical Issues in Rape Investigation: An Overview of Reform in England and Wales' (2011) 1 J Crim Just Research 1, 5.

¹⁸⁶ HMIC and HMCPSP, 'Forging the Links: Rape Investigation and Prosecution' (February 2012) <<https://www.justiceinspectorates.gov.uk/hmic/media/forging-the-links-rape-investigation-and-prosecution-20120228.pdf>> accessed 14 January 2016, 50.

¹⁸⁷ CPS, 'Violence' (n 173) 28.

¹⁸⁸ Sleath and Bull (n 119) 661.

¹⁸⁹ Stern (n 137) 8.

¹⁹⁰ Horvath, Tong and Williams, 'Critical Issues' (n 185) 8.

¹⁹¹ Gregory and Lees (n 109) 60.

¹⁹² Jordan, *The Word* (n 112) 60.

¹⁹³ Payne (n 134) 13.

¹⁹⁴ Scotland Police, 'We Can Stop It: Rape Awareness' (2014) <<http://www.scotland.police.uk/whats-happening/campaigns/2014/we-can-stop-it-rape-awareness>> accessed 11 December 2014.

¹⁹⁵ Jennifer Brown, 'We Mind and we Care but Have Things Changed? Assessment of Progress in the Reporting, Investigating and Prosecution of Allegations of Rape' (2011) 17 J Sexual Aggression 263, 264.

¹⁹⁶ Payne (n 134) 13.

¹⁹⁷ Crown Prosecution Service, 'CPS and Police Focus on Consent at First Joint National Rape Conference' (28 January 2015) <http://www.cps.gov.uk/news/latest_news/cps_and_police_focus_on_consent_at_first_joint_national_rape_conference/index.htm> accessed 31 January 2015.

¹⁹⁸ HMIC (n 110) 52.

¹⁹⁹ Stern (n 137) 56.

²⁰⁰ Brown, Hamilton, and O'Neill (n 107) 366.

²⁰¹ Jordan, *The Word* (n 112) 219.

²⁰² Stern (n 137) 59.

²⁰³ Hester (n 111) 3.

4 THE LIMITS OF THE SEXUAL OFFENCES ACT 2003 AND JUDICIAL DIRECTIONS: REINFORCING RAPE MYTHS

A person ‘consents if he agrees by choice, with the freedom and capacity to make that choice.’²⁰⁴ This test for consent is bolstered by presumptions. Unless evidence can be raised to the contrary,²⁰⁵ consent is absent if the complainant was: ‘asleep or unconscious’;²⁰⁶ or ‘stupefied or overpowered’ by surreptitious administration of an intoxicant.²⁰⁷ The interpretation of ‘capacity’ and the evidential presumptions permit rape myths to infiltrate the justice process to the detriment of voluntarily intoxicated victims. This is attributed to two factors: the statutory lack of protection for incapacitated victims who are not unconscious, and the reluctance of the judiciary to explicitly describe the circumstances in which capacity is absent. Careful regard must be had to the ‘context’ of each case to maintain the correct ‘balance’ between protecting vulnerable young women from exploitation, and respecting autonomy to give intoxicated consent freely.²⁰⁸ Yet it is necessary that the judiciary grapples with the issue of capacity directly, in the absence of statutory protection for intoxicated victims, to strike this fair balance.

4.1 *Capacity and Consent*

The SOA aimed to introduce ‘clarity and certainty’.²⁰⁹ However, the definition of consent is vague and open to interpretation.²¹⁰ Firstly, ‘freedom’ and ‘choice’ are philosophically ambiguous.²¹¹ To what extent is alcohol-fuelled consent ‘freely’ given if alcohol

induces behavioural change and distorts perceptions to dangerous situations?²¹² These words do not ‘challenge’ rape myths²¹³ because they encourage the assumption that a woman’s freedom to control her level of inebriation can translate into a free decision to consent.²¹⁴ Similarly, the conclusive and evidential presumptions of non-consent²¹⁵ are premised around ‘blamelessness’: the absence of voluntary intoxication suggests that voluntarily intoxicated victims are ‘blameworthy’.²¹⁶ If drinking is to symbolise sexual availability, then she must account for that availability being taken advantage of. This constitutes a ‘moral hierarchy’ of rape, because rape obtained by fraud is ‘irrebuttable’²¹⁷ and more ‘serious’ than manipulating an intoxicated woman.²¹⁸ The absence of ‘those too affected by alcohol’ as attributed to difficulties of proof is unpersuasive.²¹⁹ Rather, it disguises the ‘moral’ high-ground taken against those who voluntarily engage in ‘risky’ behaviour, because the law as it stands appears to protect only the ‘innocent’²²⁰ and not those who are the ‘author of their own misfortune’.²²¹ Involuntary intoxication falls within the presumptions because deliberately intoxicating a woman for the sole purpose of sex is regarded as ‘immoral’. Yet equally manipulative are those men who seek to take advantage of a woman’s drunken state, regardless of it being voluntarily or involuntarily induced.²²²

On the other hand, voluntarily intoxicated victims are not unprotected. If alcohol leads to unconsciousness they are saved by an evidential presumption. However, despite the protection for an

²⁰⁴ Sexual Offences Act 2003, s 74.

²⁰⁵ *ibid* s 75(1)(c).

²⁰⁶ *ibid* s 75(2)(d).

²⁰⁷ *ibid* s 75(2)(f).

²⁰⁸ Ryan (n 13) 429.

²⁰⁹ Home Office (n 9) 6.

²¹⁰ Emily Finch and Vanessa E Munro, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ (2006) 26 LS 303, 309.

²¹¹ Jennifer Temkin and Andrew Ashworth, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ (2004) Crim LR 328, 336.

²¹² Sharon Cowan, ‘Freedom and Capacity to Make a Choice – A Feminist Analysis of Consent in the Criminal Law of Rape’ in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law – Feminist Engagements* (Routledge Cavendish 2007) 55.

²¹³ Temkin and Ashworth, ‘The Sexual Offences Act’ (n 211) 342.

²¹⁴ Emily Finch and Vanessa E Munro, ‘Intoxicated Consent and the Boundaries of Drug Assisted Rape’ (2003) Crim LR 773, 786.

²¹⁵ Sexual Offences Act 2003, ss 75, 76.

²¹⁶ Temkin and Ashworth, ‘The Sexual Offences Act’ (n 211) 339–340.

²¹⁷ Sexual Offences Act 2003, s 76(2)(b).

²¹⁸ Temkin and Ashworth, ‘The Sexual Offences Act’ (n 211) 336–337.

²¹⁹ *ibid* 337.

²²⁰ *ibid* 339–340.

²²¹ Finch and Munro, ‘The Demon Drink’ (n 52) 606.

²²² Temkin and Ashworth, ‘The Sexual Offences Act’ (n 211) 377.

involuntarily stupefied victim a drunken stupor short of unconsciousness is insufficient.²²³ Perhaps section 75 of the SOA could cover situations where peer pressure 'caused' the victim to drink more than intended, or where the encouragement to have another drink overcame her resistance.²²⁴ This argument is unlikely to be pursued in court²²⁵ because some evidence of consent would easily be raised.²²⁶ It risks undermining autonomy if 'free will' could be destroyed by an ambiguous social pressure²²⁷ and defeats the purpose of the Act to base consent on a 'communicative understanding' in which a 'yes' is not always freely given.²²⁸ Thus, this demands that the law go one step further by appreciating that within 'infinite' sexual encounters²²⁹ voluntary intoxication can render a woman's refusal unintelligible and destroy her ability to say no.²³⁰ This would recognise the 'hook-up' culture in which predatory men take advantage of vulnerable women, without surreptitious administration of alcohol.²³¹ It would recognise that consent is inextricably linked to alcohol as a social facilitator.²³²

4.2 Judicial Interpretation

The judiciary's interpretation of 'capacity' does little to challenge derogatory assumptions of intoxicated victims.²³³ In *R v Dougal* a voluntary intoxicated victim could not remember whether she had consented or not due to memory loss and the defendant was acquitted because it was impossible to establish non-

consent.²³⁴ Despite the fact that the victim was incapable of making it back to her room unaided in her extreme inebriation, her 'capacity' to consent to the sex that followed was unquestioned by the trial judge.²³⁵ It was therefore held in *R v Bree*, a similar case in which the victim had vomited and suffered memory loss, that any issue of incapability had to be left to the jury.²³⁶ The Court of Appeal acknowledged that 'capacity was integral to establishing consent',²³⁷ but precise detail was lacking. The Court held that capacity to consent can temporarily be lost in extreme intoxication or remain and that capacity may 'evaporate well before unconsciousness',²³⁸ but refused to identify this specific point.²³⁹ This reasoning was progressed in *R v Wright* in which the victim was said to be 'as good as unconscious',²⁴⁰ and in *R v Kamki* in which the various 'stages of consciousness' included a 'dim awareness of reality' where a person could be incapable of making a choice.²⁴¹ Frustratingly, it is not explained what a victim in a 'dim awareness of reality' would look like. Such a reluctance to provide concrete examples is odd: the cases follow a consistent pattern of vomiting, incoherent speech, and lack of awareness.²⁴² The 'grey' area in-between tipsiness and comatose can easily be coloured in.²⁴³ For example, the victim in *Bree* was 'lying on the floor and continuously vomiting',²⁴⁴ and in *Kamki*, she had been sick on her own clothes.²⁴⁵ It is logical to question why sex would be desirable with a woman who had just

²²³ Sexual Offences Act 2003, s 75(2)(f).

²²⁴ Finch and Munro, 'The Sexual Offences Act' (n 30) 795.

²²⁵ C Gunby, A Carline and C Beynon, 'Alcohol-Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and its Impact on Practice' (2010) 74 JCL 579, 594.

²²⁶ Office For Criminal Justice Reform, 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (Consultation Paper, Spring 2006) 15.

²²⁷ Finch and Munro, 'The Sexual Offences Act' (n 30) 795.

²²⁸ N Lacey, 'Beset by Boundaries: The Home Office Review of Sex Offences' (2001) Crim LR 3, 11.

²²⁹ *R v Bree* [2007] EWCA Crim 804 [36], [2008] QB 131 (Sir Igor Judge P).

²³⁰ Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy' (2008) 41 Akron L Rev 923, 948.

²³¹ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 221.

²³² Cowan, 'Freedom and Capacity to Make a Choice' (n 212) 52.

²³³ Finch and Munro, 'Breaking Boundaries' (n 210) 307.

²³⁴ (Unreported) 24 November 2005, Crown Court at Swansea.

²³⁵ *ibid*.

²³⁶ (n 229) [39] (Sir Igor Judge P).

²³⁷ *ibid* [23].

²³⁸ *ibid* [34].

²³⁹ D Warburton, 'Rape, Consent and Capacity' (2007) 71 JCL 394, 395.

²⁴⁰ [2007] EWCA Crim 3473.

²⁴¹ [2013] EWCA Crim 2335 [17] (McCombe LJ).

²⁴² *Dougal* (n 234); *Bree* (n 229); *R v H* [2007] EWCA Crim 2056.

²⁴³ S Wallerstein, '"A Drunken Consent is Still Consent" – or is it? A Critical Analysis of the Law on a Drunken Consent to Sex Following Bree' (2009) 73 JCL 318, 332.

²⁴⁴ (n 229) [6] (Sir Igor Judge P).

²⁴⁵ (n 241) [4] (McCombe LJ).

profusely vomited and was in an extremely vulnerable state. The judiciary should not fear to interpret such vulnerability, lack of self-control and memory black-outs as ‘proof’ that it was at this point that she was incapable of consenting.²⁴⁶

In the above cases, the judiciary did not positively endorse rape myths that a victim’s irresponsible behaviour was deemed ‘irrelevant’²⁴⁷ and subjective consent could not be assumed by ‘quiet submission’.²⁴⁸ The victim’s bodily ‘incoordination’ signified an inability to communicate, not a drunken woman’s openness to sex.²⁴⁹ However, Sir Igor Judge P’s comment that drunken consent is still consent²⁵⁰ is open to interpretation. It may innocently reinforce the view that drunken women can consent to sex or imply that a victim’s prior ‘fault’ in deciding to drink means her consent cannot be vitiated.²⁵¹ Such sweeping remarks risk ‘legitimising drunken sex’ rather than addressing the harm caused to inebriated women²⁵² and panders to the assumption that men must be protected from the wily temptations of women.²⁵³ This would imply that the problem is one of ‘female drinking and not male rape.’²⁵⁴ Indeed, the tone used to describe Bree was unduly ‘positive’.²⁵⁵ By describing him as an ‘unselfish man of good character’ this implies that it is the victim who is at fault.²⁵⁶ The absence of neither positive nor negative commentary on the victim, as part of a ‘non-interventionist’ stance, disguises judicial ‘disregard’ for the ‘sexual autonomy’ of women.²⁵⁷

The cases do not, however, challenge rape myths²⁵⁸ – in particular, that myth that drunken women are responsible for the consequences of their recklessness and their reasoning threatens the protection of women’s autonomy by dismissing precise guidance as ‘patronising interference’.²⁵⁹ Perhaps it is fair to place ‘morning-after-morals’ firmly out-with the scope of the judgment if Bree had taken enough care to ascertain consent.²⁶⁰ This is logical if one adheres to the view that it is not for the law to ‘moralise on the ethics’ of drunken sex, being a ‘societal’ rather than criminal concern.²⁶¹ However, if consent is to be premised on a ‘positive communicative standard’,²⁶² then asking for a condom does not demonstrate a careful consideration of consent, nor a mutual and respectful communication between the parties – her ‘encouraging’ responses as the basis for his advances conflict with her account that she ‘curled in a ball’ to escape.²⁶³

Kamki, on the other hand, is to be welcomed for the statement that it is unnecessary to include this commentary on ‘drunken intent’ as part of the guidance when capacity is ‘obviously’ lacking.²⁶⁴ The direction rightfully placed emphasis on the fact that alcohol can leave the victim in a condition in which she is ‘incapable of making a choice’ regardless of whether alcohol was drunk voluntarily.²⁶⁵ To support this, it is argued that out of fairness to both parties,²⁶⁶ a middle ground for a model direction is the common law guidance given in *R v Malone*, that there is no need for ‘positive communication’ of non-consent.²⁶⁷ If extreme inebriation renders her unable to ‘physically

²⁴⁶ Wallerstein (n 243) 334.

²⁴⁷ *Bree* (n 229) [26] (Sir Igor Judge P).

²⁴⁸ *ibid* [18].

²⁴⁹ *ibid* [8].

²⁵⁰ *ibid* [32].

²⁵¹ Wallerstein (n 243) 326–329.

²⁵² *ibid* 343.

²⁵³ G Firth, ‘Not an Invitation to Rape: The Sexual Offences Act 2003, Consent and the Case of the “Drunken” Victim’ (2011) 62 NILQ 99, 117.

²⁵⁴ *ibid* 114.

²⁵⁵ P Rumney and R Fenton, ‘Intoxicated Consent in Rape: *Bree* and Juror Decision-Making’ (2008) 71 MLR 271, 284.

²⁵⁶ *Bree* (n 229) [7] (Sir Igor Judge P).

²⁵⁷ Rumney and Fenton (n 255) 289.

²⁵⁸ Firth (n 253) 113.

²⁵⁹ *ibid* 113.

²⁶⁰ Warburton (n 239) 395.

²⁶¹ Gunby, Carline and Beynon (n 225) 597.

²⁶² Cowan, ‘Freedom and Capacity to Make a Choice’ (n 212) 62.

²⁶³ *Bree* (n 229) [18] (Sir Igor Judge P).

²⁶⁴ (n 241) [18] (McCombe LJ).

²⁶⁵ *ibid* [17].

²⁶⁶ Temkin and Krahé (n 1) 175.

²⁶⁷ [1998] 2 Cr App R 447, 452 (Roch LJ).

resist', this is not consent.²⁶⁸ Equally, *R v Lang*'s emphasis on her ability to 'understand' the situation should be made apparent in a model direction.²⁶⁹ These words of 'understanding' and 'communication' better protect drunken victims in a modern social context²⁷⁰ and are respectfully incorporated into the Crown Court Benchbook which states that:

There are various stages of unconsciousness from wide awake to a dim awareness of reality. In a state of dim and drunken awareness you may not be in a condition to make a choice. It must be considered whether the complainant was in any condition to make a choice and whether she did in fact exercise a choice ... it is not necessary for her to communicate that agreement, provided that in her mind she was agreeing.²⁷¹

The direction is welcomed for its clear emphasis on the fact that capacity may not be present in a lucid state of awareness, and that consent is premised on a subjective state of mind – a victim who does not want sexual intercourse, but does not know how to communicate her wishes in an extremely inebriated state²⁷² will not be deprived of respect for her autonomy. By requiring the jury to consider whether the victim was in 'any condition to make a choice' stresses the importance that sexual consent is something that is to be mutually communicated and equally desired.²⁷³

It is difficult to determine the precise moment alcohol dissolves capacity, when it varies from person to person²⁷⁴ but it is wrong to dismiss the problem as

one easily resolved by the 'common sense' of the jury.²⁷⁵ Admittedly there is no-one better placed to analyse the complexity of human behaviour than a subsection of society who will bring their own individual experiences of complex sexual encounters, but a model direction should 'steer' the jury in the right direction by warning of the dangers of rape myths rendering their 'common sense' useless.²⁷⁶ Unfortunately, there is a caveat: the difficulty in dispelling rape myths from the minds of jurors. A perceived 'common sense' may be lax regarding drunken victims²⁷⁷ and there is a risk that the direction will only 'entrench myths in the minds of the jury.'²⁷⁸ Jurors do not like 'being pushed' when they assess cases on a 'gut reaction,' rather than a judicial direction.²⁷⁹

Moreover, can the judiciary overcome their personal prejudicial attitudes and apply the model direction?²⁸⁰ In *R v H Hallett LJ* expressed her own 'disapproval' at the recklessness of the victim²⁸¹ and the consequences of 'young people roaming the streets vulnerable through drink.'²⁸² However, such disparaging attitudes are not prevalent. The Judicial College's Seminar Programme 'educates' judges about rape and suggests that some do show real 'passion and commitment' to the area.²⁸³ The problem is maintaining a consistent judicial application of a model direction – evidence reveals that whilst some judges are keen to provide clear assistance with 'capacity', others continue to emphasise the amount the victim had drunk and the behaviour of the victim according to witnesses as the only evidence from which the jury should reach their conclusion.²⁸⁴

²⁶⁸ *ibid.*

²⁶⁹ (1976) 62 Cr App R 50, 52 (Scarman LJ).

²⁷⁰ *R v Campbell* [2014] EWCA Crim 870 [23] (Pitchford LJ).

²⁷¹ Judicial Studies Board, *Crown Court Bench Book: Directing the Jury* (2010) 374–375.

²⁷² *Bree* (n 229) [8] (Sir Igor Judge P).

²⁷³ Finch and Munro, 'Breaking Boundaries' (n 210) 304.

²⁷⁴ Liberty, 'Response to the Office for Criminal Justice Reform Consultation: Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (August 2006) 6.

²⁷⁵ *Bree* (n 229) [24] (Sir Igor Judge P).

²⁷⁶ Jennifer Temkin, "'And Always Keep A-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13 New Crim L Rev 710, 720.

²⁷⁷ Wallerstein (n 243) 342.

²⁷⁸ Temkin, 'And Always Keep A-Hold of Nurse' (n 276) 725.

²⁷⁹ Gunby, Carline and Beynon (n 225) 595.

²⁸⁰ Temkin, 'And Always Keep A-Hold of Nurse' (n 276) 729.

²⁸¹ Emily Finch and Vanessa E Munro, 'Intoxication, Capacity and Consent' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010) 149.

²⁸² (n 242) [1].

²⁸³ Philip N S Rumney and Rachel Anne Fenton, 'Judicial Training and Rape' (2011) 75 JCL 473, 473.

²⁸⁴ Gunby, Carline and Beynon (n 225) 588.

Overall, a fear of ‘patronising influence’ affords undue weight to the idea that women can freely seek intoxicated sex and too little to the fact that it is the moral duty of the law to uphold a woman’s right to refuse when she is inebriated, regardless of the means by which she came to be so. Indeed, it undermines the fact that bodily autonomy is eroded when a drunken woman’s inability to express her consent effectively is exploited.²⁸⁵ Nonetheless, the judicial model direction is to be welcomed in its attempts to caution the jury about the reliance on personal stereotypes and assumptions to the disadvantage of victims. However, the likelihood of a workable judicial direction to protect voluntarily incapacitated victims and discourage the reliance on rape myths within the jury will be discussed in the following section. It is unfortunate that the reach of the law may be limited; and whether further legislative clarification would provide adequate protection for vulnerable women forms the basis of the discussion on reform in the following section.

5 THE JURY: THE PREVALENCE OF RAPE MYTHS

As few as 6% of rape cases result in a conviction²⁸⁶ and one factor that impedes a successful prosecution is a complainant’s drunken behaviour.²⁸⁷ The jury represent the final stage of the attrition process as the ultimate arbiter of guilt or innocence. An acquittal or conviction determines the types of cases that police and prosecutors allow to proceed to trial, typically stranger rape involving sober victims.²⁸⁸ It is proposed that when determining the defendant’s reasonable belief in consent,²⁸⁹ the jury’s consideration of ‘all the circumstances’²⁹⁰ includes the belief that extremely intoxicated women always remain capable of expressing consent.²⁹¹ Women who engage in reckless

behaviour by drinking to excess are deemed at least partially responsible for the consequences. The success of any reform, such as a myth-busting judicial direction, must be viewed in light of the unyielding legitimacy of alcohol as a tool of seduction.

5.1 Establishing ‘Consent’

A person ‘consents if he agrees by choice with the freedom and capacity to make that choice.’²⁹² Torrey argues that any bias on the part of an individual juror ‘distorts’ the evaluation of evidence²⁹³ and this is accurate regarding the manner in which jurors determine the existence of consent. Stereotypical assumptions by the jury help them to ‘make sense’ of contradictory evidence – one person’s word against another – where a victim was so intoxicated that she was unsure whether she consented or not.²⁹⁴

Firstly, ‘freedom, capacity and reasonableness’ are undefined, thereby inviting jurors to draw upon personal beliefs when evaluating behaviour.²⁹⁵ What is ‘reasonable’ in all the circumstances necessarily entails a scrutiny of both complainant and defendant’s behaviour. ‘Reasonable’ belief is judged with reference to ‘appropriate’ socio-sexual behaviour²⁹⁶ and the frequent presence of alcohol in sexual relations.²⁹⁷ Finch and Munro found that in assessing a belief that was ‘reasonable’ jurors included ‘an examination of the conduct of the complainant leading up to the intercourse.’²⁹⁸ If the actions of the accused were not so intensely scrutinised, Lord Falconer’s confidence that the jury would have ‘no difficulty’ in understanding that the test requires them to consider ‘any steps the defendant took to ascertain consent’ would be justified, where there reality is that it is misguided.²⁹⁹ This scrutiny leads to reliance on irrelevant extra-legal factors, such as the sexual

²⁸⁵ Jesse Elvin, ‘Intoxication, Capacity to Consent, and the Sexual Offences Act 2003’ (2008) 19 King’s LJ 151, 153–4.

²⁸⁶ Harris and Grace (n 2) x.

²⁸⁷ Jennifer Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 J Law and Soc’y 219, 225.

²⁸⁸ Barbara Krahé and Jennifer Temkin, ‘Addressing the Attitude Problem in Rape Trials: Some Proposals and Methodological Considerations’ in Horvath and Brown, *Rape: Challenging Contemporary Thinking* (n 22) 302.

²⁸⁹ Sexual Offences Act 2003, s 1(c).

²⁹⁰ *ibid* s 1(2).

²⁹¹ Lovett and Horvath, ‘Alcohol and Drugs in Rape and Sexual Assault’ (n 44) 155.

²⁹² Sexual Offences Act 2003, s 74.

²⁹³ Morrison Torrey, ‘When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions’ (1991) 24 U California Davis L Rev 1013, 1051.

²⁹⁴ Louise Ellison and Vanessa E Munro, ‘Getting to (Not) Guilty: Examining Jurors’ Deliberative Processes In, and Beyond, the Context of a Mock Rape Trial’ (2010) 30 LS 74, 79.

²⁹⁵ Gunby, Carline and Beynon (n 225) 586.

²⁹⁶ Finch and Munro, ‘The Sexual Offences Act’ (n 30) 802.

²⁹⁷ Cowan, ‘Freedom and Capacity to Make a Choice’ (n 212) 63.

²⁹⁸ Finch and Munro, ‘Breaking Boundaries’ (n 210) 308.

²⁹⁹ HL Deb 2 June 2003, vol 648, col 1073 (Lord Falconer).

expectations of those participating in social drinking events,³⁰⁰ and detracts from the most important requirement: a woman's subjective state of mind at the moment of sexual intercourse.³⁰¹ A jury 'scrutinises' a complainant's prior behaviour³⁰² thereby encouraging the assumption that excessive alcohol consumption signifies sexual willingness.³⁰³ The belief that a voluntarily intoxicated woman is 'loose' distorts the fact of her inebriation into an 'indirect communication of her willingness' to engage in sex³⁰⁴ – if she has previously drank with the defendant, the belief in consent is deemed 'reasonable'.³⁰⁵

Secondly, the lack of guidance detailing the exact moment capacity can be lost leads to the presumption that as long as a victim was conscious, notwithstanding trouble walking and slurring of words, she could 'still have said no.'³⁰⁶ Jurors expect a victim to be 'assertive'³⁰⁷ but this does not appreciate the common position of an intoxicated victim who is physically unable to communicate her dissent because of the alcohol's sedative effect. For example, in *Bree* the victim expressed her inability to stop the encounter, despite her wishes for it to stop.³⁰⁸ The means of measuring capacity are numerous: some determine capacity too widely by examining the complainant's behaviour over 'the entire evening' which provides scope to consider flirting and drinking. Others consider drinking habits and alcohol tolerance, which understands that individual reactions to alcohol vary, but cannot accurately predict an individual's reaction at the time of the intercourse. The correct

determination of capacity is therefore by reference to 'responsiveness at the actual time of intercourse', which reduces the scope for reliance on suggestive behaviour and instead focuses on whether an intoxicated victim was in any competent position to consent. There is some positive recognition by jurors that drunkenness can 'eliminate' the freedom and capacity to consent where a 'rational judgment' cannot be made. But the absence of guidelines on the level of 'consciousness or communication' that is required creates a test that is too unpredictable. It is open to distortion by those who insist that a 'clear' expression of dissent is required,³⁰⁹ which is precisely what the law sought to avoid.³¹⁰

5.2 Victim Blaming

Stereotypical beliefs about 'appropriate' female sexual behaviour prevail to the detriment of women who consume alcohol.³¹¹ Many view intoxicated women as promiscuous.³¹² For example, a drunken woman is deemed 'likely to flirt a lot'.³¹³ In contrast to men however, women who act in this manner are criticised for their lack of 'self-respect'.³¹⁴ If women show disregard for their own bodily integrity, why should we expect men to respect their sexual autonomy?³¹⁵ A victim is therefore held to a higher level of responsibility when drunk³¹⁶ because she is the author of her own misfortune by inviting rape.³¹⁷ This 'double-standard' infiltrates the jury room.³¹⁸ Finch and Munro discovered a general belief that a voluntarily intoxicated woman must bear some responsibility³¹⁹ even where a decision to drink is not

³⁰⁰ Finch and Munro, 'Breaking Boundaries' (n 210) 318.

³⁰¹ Warburton (n 239) 395.

³⁰² Temkin and Ashworth, 'The Sexual Offences Act' (n 211) 342.

³⁰³ Kramer (n 36) 121.

³⁰⁴ Louise Ellison and Vanessa E Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13 New Crim L Rev 781, 791.

³⁰⁵ Finch and Munro, 'Breaking Boundaries' (n 210) 308.

³⁰⁶ *ibid* 314.

³⁰⁷ Ellison and Munro, 'Stranger in the Bushes' (n 304) 791.

³⁰⁸ (n 229) [8] (Sir Igor Judge P).

³⁰⁹ Finch and Munro, 'Breaking Boundaries' (n 210) 314–316.

³¹⁰ Finch and Munro, 'The Demon Drink' (n 52) 591.

³¹¹ Sharon Cowan, 'The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex' (2008) 41 Akron L Rev 899, 911.

³¹² Ellison and Munro, 'Stranger in the Bushes' (n 304) 798.

³¹³ Finch and Munro, 'The Demon Drink' (n 52) 598.

³¹⁴ De Visser and McDonnell (n 79) 630.

³¹⁵ Lovett and Horvath, 'Alcohol and Drugs in Rape and Sexual Assault' (n 44) 155.

³¹⁶ Deborah Richardson and Jennifer L Campbell, 'Alcohol and Rape: The Effect of Alcohol on Attributions of Blame for Rape' (1982) 8 Personality and Social Psychology Bulletin 468, 474.

³¹⁷ Temkin and Krahé (n 1) 120.

³¹⁸ *ibid* 99.

³¹⁹ Emily Finch and Vanessa E Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study' (2005) 45 Brit J Criminol 25, 30–31.

entirely voluntary because she was under social ‘pressure’ from the defendant, her submission *still* signals ‘sexual encouragement.’

This is a ‘lose-lose’ situation: if a female is to avoid responsibility for her own victimisation she must show resistance. Unfortunately, this leads to the assumption that if a woman can ‘stand her ground’ and refuse a drink, she must be capable of the same regarding sex thereafter. For a society that openly accepts the normalisation of plying a woman with alcohol to ‘loosen her up’ it is entirely unjust that jurors can criticise a woman ‘for failing to stand her ground.’ Finch and Munro attribute such harsh views to distaste for women seeking to displace all responsibility for intoxicated behaviour, when she should be ‘responsible enough to say no’ initially.³²⁰ The fear of false rape claims is stoked by sensationalised newspaper accounts that women regret foolish decisions and cry rape.³²¹ For example, references were made to complaints against footballers by ‘stupid girls who have had a few drinks’ which is reflective of the Ched Evans media furore.³²²

5.3 *Immorality vs Criminality: An Arbitrary Distinction*

Adherence to rape myths by jurors impedes justice for intoxicated victims. By attributing at least some responsibility to the complainant, the jury are reluctant to criminalise a defendant’s behaviour even where a defendant ‘deliberately sought to take advantage’ of her voluntary intoxication.³²³ Mock jurors believe taking advantage of an extremely intoxicated woman is ‘reprehensible’ if it is the defendant’s sole motivation, yet insufficient to warrant criminal sanction.³²⁴ This begs the question: what factors will be enough to render conduct *criminal* as opposed to

immoral? In an American study, if a defendant bought the drinks he was blameworthy³²⁵ because it was concerned with the defendant feeling ‘owed’ sex.³²⁶ Motivation is therefore a significant factor in distinguishing between the ‘malevolent’ criminal intent of plying somebody with alcohol to facilitate sex and merely ensuring she would be ‘happier’ to consent.³²⁷ This distinction is unrealistic when the role of alcohol as sexual facilitator is widely accepted.³²⁸ This dividing line between facilitation and encouragement is arbitrary because a woman’s consent cannot be determined by how she came to give intoxicated consent, but whether she is capable of making the choice to freely consent in an extremely inebriated state.³²⁹ The fact of voluntary alcohol consumption as evidence is manipulated to accord with jurors’ own misconceptions of socio-sexual scripts. For example, ensuring a woman gets drunk in order to have sex with her is not ‘rape’ but merely ‘ungentlemanly’.³³⁰

Meyer’s claim that these views within society produce the ‘new myth’ that rape is caused by ‘female binge drinking instead of male rape’³³¹ is accurate. A disapproval of ‘drunkenness and intoxicated excuses’³³² unfairly focuses on the responsibilities of women for rape prevention.³³³ If justice is to be achieved the disapproval of sexual intercourse with ‘unaware and unresponsive women’³³⁴ must be championed. This would better reflect the reality of predatory men taking advantage of vulnerable, drunken women.³³⁵ Many members of society remain trapped in the stereotype that only men who surreptitiously administer drugs with the sole motive of procuring sex deserve to be labelled a rapist. They fail to acknowledge that men use the ‘intoxication

³²⁰ Finch and Munro, ‘The Demon Drink’ (n 52) 599–600.

³²¹ Saunders (n 157) 1162; Jennifer Temkin, ‘Reporting Rape in London: A Qualitative Study’ (1999) 38 Howard Journal 17, 28.

³²² Ellison and Munro, ‘Stranger in the Bushes’ (n 304) 796.

³²³ Finch and Munro, ‘Juror Stereotypes’ (n 319) 31.

³²⁴ *ibid* 32.

³²⁵ Kellie Rose Lynch, Nesa E Wasarhaley, Jonathan M Golding and others, ‘Who Bought the Drinks? Juror Perceptions of Intoxication in a Rape Trial’ (2013) 28 J Interpersonal Violence 3205, 3217.

³²⁶ *ibid* 3218.

³²⁷ Finch and Munro, ‘The Demon Drink’ (n 52) 602.

³²⁸ Horvath and Brown, ‘Do You Believe Her and is it a Real Rape?’ (n 99) 325.

³²⁹ Sexual Offences Act 2003, s 74.

³³⁰ Finch and Munro, ‘The Demon Drink’ (n 52) 603.

³³¹ Meyer (n 46) 31.

³³² Wall and Schuller (n 55) 270.

³³³ Maier (n 31) 1418.

³³⁴ Wykes and Welsh (n 56) 120.

³³⁵ Horvath and Brown, ‘The Role of Drugs and Alcohol’ (n 8) 221.

rather than the intoxicant as a facilitator' to the same effect.³³⁶

5.4 Reform

By what means can an 'effective' and 'workable' resolution be achieved to prevent the prejudicial effect of rape myths at the jury stage?³³⁷ The Crown Court Benchbook's model direction is 'workable'. It addresses the erroneous assumption that an inebriated woman always retains the capacity to consent by stating that drunkenness can 'remove a capacity to exercise a choice', whilst balancing this against the statement that alcohol can simply 'remove inhibitions'.³³⁸ The fact that it highlights this distinction counters the claim that the model direction leans too far in favour of complainants.³³⁹ Indeed, it does not lean far enough in their favour. In order to be of utmost effectiveness, efforts to dispel myths via a judicial direction must be absolutely clear to avoid 'entrenching' stereotypical attitudes in confusion prose.³⁴⁰ This is important with regards to evidence that jurors have difficulty understanding complex judicial directions.³⁴¹ Clear, unequivocal language should state that 'contributory negligence' by a claimant is irrelevant. For example, 'you cannot assume that a woman is consenting to sex just because'³⁴² the complainant got 'drunk in male company'.³⁴³ The recent initiative by Vera Baird of a 'Court Observers Panel' in Newcastle is promising as it aims to identify which rape myths are still relied upon to the detriment of the victim³⁴⁴ and would permit us to establish the success of the judicial direction in practice, if there is a resulting conviction.

Alternatively, general expert witness testimony like that permitted in some US states may provide an effective means of educating jurors. Ellison's study only disputed the effectiveness of expert testimony in the context of claimant 'demeanour' and 'delayed reporting';³⁴⁵ it did not mention intoxicated victims. A forensic toxicologist could explain the varying effects of alcohol on capacity to consent to eliminate the myth that positive dissent is always possible, notwithstanding a high level of intoxication.³⁴⁶ Allowing expert testimony was strongly objected to on the basis that the defence would equally be allowed to call expert evidence, leading to 'two sets of [conflicting] evidence' which would make the jury's task harder in deciding which was most persuasive.³⁴⁷ However, the support for this objection rested on the basis that the expert evidence would be of little use in an individual case.³⁴⁸ On the contrary, the effects of extreme intoxication follow a consistent pattern of victim behaviour, for example vomiting and difficulty walking.³⁴⁹ Written expert evidence, with 'simple statistics', would demonstrate such behavioural patterns.³⁵⁰

However, in light of the abandonment of plans for general expert testimony by the Government,³⁵¹ more drastic measures may be warranted. For example, screening potential jurors and asking questions that would ascertain whether the victim's voluntary drinking would lead them to hold the victim accountable or lead to adverse judgments about her

³³⁶ *ibid* 225.

³³⁷ Finch and Munro, 'The Sexual Offences Act' (n 30) 802.

³³⁸ Judicial Studies Board (n 271) 374.

³³⁹ David Wolchover and Anthony Heaton-Armstrong, 'Rape Trials' *Criminal Law and Justice Weekly* (April 2010) <<http://www.criminallawandjustice.co.uk/features/Rape-Trials>> accessed 18 February 2015.

³⁴⁰ Temkin, 'And Always Keep A-Hold of Nurse' (n 278) 733.

³⁴¹ Cheryl Thomas, 'Are Juries Fair?' (Ministry of Justice Research Series 1/10, 2010) v.

³⁴² Temkin, 'And Always Keep A-Hold of Nurse' (n 278) 733.

³⁴³ Judicial Studies Board (n 271) 356.

³⁴⁴ Vera Baird, 'Northumbria PCC Rape Scrutiny Panel' (13 February 2015) <<http://www.northumbria-pcc.gov.uk/northumbria-pcc-rape-scrutiny-panel>> accessed 16 February 2015.

³⁴⁵ Louise Ellison and Vanessa E Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 *Brit J Criminol* 363, 374.

³⁴⁶ American Prosecutors Research Institute, 'Prosecuting Alcohol-facilitated Sexual Assault' (2007) <http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf> accessed 18 February 2015, 59.

³⁴⁷ *Liberty* (n 274) 10.

³⁴⁸ *ibid* 10.

³⁴⁹ *R v Dougal* (n 234); *R v Bree* (n 229); *R v H* (n 242).

³⁵⁰ Justice, 'Response to OJCR Consultation Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (August 2006) 7.

³⁵¹ Office For Criminal Justice Reform, 'Convicting Rapists and Protecting Victims' (n 226) 16.

credibility.³⁵² By adopting this US-based ‘*voir dire*’ procedure,³⁵³ those members of society who hold prejudicial attitudes towards ‘women who drink in a bar with a man’ will be kept away from the jury room to begin with. It would remind the jury that the case is not merely one of ‘drunken sex’; it may be rape.³⁵⁴

By assessing the merits of such measures it is clear that education *from the start* is necessary. A wider societal education is the most effective and workable proposal. When the posters forming part of the Home Office’s recent campaign to dispel myths within society were shown to jurors³⁵⁵ the message of the posters, to demonstrate a mutual understanding of consent, was ‘well understood’.³⁵⁶ Contrary to professional legal opinion, this gives cause for optimism.³⁵⁷ It implies that the public’s pre-existing assumptions and stereotypes are not immune to change because ignorance of the reality of intoxicated consent can be challenged.

Overall, the combined good sense of a jury to recognise when capacity to consent is lacking ought to be fairly recognised.³⁵⁸ Yet in order to preserve and safeguard their good judgment, a judicial direction warning of the dangers of rape myths may be desirable. It demonstrates a powerful message from those highest in authority that prejudicial attitudes towards appropriate female behaviour and alcohol have no place in the jury room.³⁵⁹ Simplicity in the direction, alongside a written copy, must be ensured to enable jurors to fully comprehend its meaning.

This must be balanced, in the final section on reform, against the proposal that a detailed judicial

direction outlining the circumstances in which capacity may be lacking regarding drunken victims, is preferable alongside the benefits of wider societal education.

6 THE BENEFITS OF LEGISLATIVE REFORM: A JOINT EFFORT

The Government’s decision to abandon further legislative action,³⁶⁰ due to the Court of Appeal’s ambiguous acknowledgment in *Bree* that capacity may ‘evaporate’ before unconsciousness was considered to be a sufficient clarification,³⁶¹ was a ‘missed opportunity’.³⁶² Injustice for voluntarily intoxicated victims lies both in the ‘manner’ in which cases are handled³⁶³ and in the substantive law itself. It is proposed that a statutory definition of capacity and an evidential presumption of non-consent for extremely intoxicated victims are necessary to reduce the prejudicial effects of rape myths within the CJS.³⁶⁴ The law is a powerful symbolic tool to demonstrate when sex with intoxicated women is wrongful,³⁶⁵ but so too is societal education.

6.1 Evidential Presumptions and Capacity: Balancing Autonomy

Tadros proposes that consent should be abandoned in favour of a standard built upon respect for autonomy³⁶⁶ by ‘differentiating’ rape offences and specifying the different ways rape can be committed.³⁶⁷ He argues that evidential presumptions, premised around non-consent, do not capture the harm suffered, for instance, the exploitation of an intoxicated woman.³⁶⁸ The following discussion challenges this view. A differentiation approach risks over-complication of a law that is already complex to jurors. His desire for a

³⁵² C Mallios and T Meisner, ‘Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias’ Strategies: The Prosecutors’ Newsletter on Violence Against Women (July 2010 Issue 2)

<http://www.ncdsv.org/images/AEquitas_EducatingJuriesInSexualAssaultCasesPart1_7-2010.pdf> accessed 18 February 2015, 3.

³⁵³ *ibid* 2.

³⁵⁴ American Prosecutors Research Institute (n 346) 1.

³⁵⁵ Temkin and Krahé (n 1) 99.

³⁵⁶ *ibid* 110–11.

³⁵⁷ Gunby, Carline and Beynon (n 225) 592.

³⁵⁸ Finch and Munro, ‘Breaking Boundaries’ (n 210) 314.

³⁵⁹ Temkin, ‘And Always Keep A-Hold of Nurse’ (n 276) 732.

³⁶⁰ Criminal Justice System, ‘Convicting Rapists and Protecting Victims – Justice for Victims of Rape’ (Response to Consultation: November 2007) 11.

³⁶¹ *Bree* (n 229) [36] (Sir Igor Judge P).

³⁶² Firth (n 253) 99.

³⁶³ Office For Criminal Justice Reform, ‘Convicting Rapists and Protecting Victims’ (n 226) 14.

³⁶⁴ Rumney and Fenton (n 255) 286.

³⁶⁵ Lacey (n 228) 13.

³⁶⁶ Victor Tadros, ‘Rape Without Consent’ (2006) 26 OJLS 515, 518.

³⁶⁷ *ibid* 536.

³⁶⁸ *ibid* 524.

'context driven' approach, like that in Australia,³⁶⁹ can be achieved by a simple reworking of the existing evidential presumptions alongside a statutory definition of capacity, which would clarify that sexual autonomy is destroyed when a woman's extreme intoxication is taken advantage of.³⁷⁰

In debating the practicality of an evidential presumption, we must 'retain scepticism about extremely intoxicated consent, whilst avoiding a rigid rule negating the possibility of drunken consent.'³⁷¹ Autonomy is the overarching theme. Wertheimer defines sexual autonomy thus: negative autonomy protects a person from unwanted sexual relations and positive autonomy allows a person to engage in intoxicated sexual relations freely. We can 'zealously' protect an agent's negative autonomy via high standards of valid consent, at the expense of an individual's positive autonomy.³⁷² In considering how far the law should intervene, the right balance must be struck between protecting an extremely intoxicated woman from being taken advantage of and recognising her freedom to voluntarily engage in drunken sexual relations.³⁷³ The reluctance in *Bree* to specifically state the level of intoxication at which capacity is lost implies a high level falling just short of unconsciousness.³⁷⁴ This weighs unduly in favour of positive autonomy and fails to appreciate that intoxicated victims cannot always make rational decisions. Their capacity to make a choice is not adequately respected.³⁷⁵ Some state paternalism to the detriment of positive autonomy is justified to address this imbalance in the form of an evidential presumption.

As the Government initially proposed,³⁷⁶ a presumption of non-consent in cases of extreme voluntary intoxication constitutes a 'necessary and proportionate' interference in private sexual relations.³⁷⁷ There is no difference between the incapacitated state of an involuntarily intoxicated complainant³⁷⁸ and a person who reaches the same level voluntarily.³⁷⁹ Distinguishing between a 'deserving and undeserving victim' fuels the myth that intoxicated women are responsible for the consequences of their 'immoral' behaviour³⁸⁰ and furthers the socially 'acceptable' encouragement of alcohol consumption to procure sex.³⁸¹ The law should make clear that drunken consent is not always valid: people are responsible for their behaviour only when they have full mental capability. Intoxication weakens the ability to reason, so intoxicated victims are *not always* capable of consenting to sex.³⁸² Erasing the dubious moral distinction between victims of drink spiking and women who choose to consume alcohol for enjoyment would condemn men's predatory reactions to women's voluntary drinking and recognise the violation of negative autonomy.³⁸³ It would not disproportionately affect a defendant's 'reasonable belief' in consent – a separate defence – if he reasonably lacked awareness that she was extremely intoxicated.³⁸⁴

Further to the comment that the judiciary should fill in the grey area on behaviour constitutive of a lack of capacity,³⁸⁵ the law ought to aid them by specifically defining capacity. According to Firth, a statutory definition may be defined by 'knowledge' and 'understanding'.³⁸⁶ This appreciates that the ability to reason can be distorted by alcohol and reflects the consensus within the judiciary that extreme

³⁶⁹ Crimes Act 1958 (as amended by the Crimes (Rape) Act 1991), s 36 (Australia).

³⁷⁰ Tadros (n 366) 528.

³⁷¹ Cowan, 'The Trouble with Drink' (n 311) 909.

³⁷² Wertheimer (n 15) 376.

³⁷³ *ibid* 376.

³⁷⁴ Firth (n 253) 112.

³⁷⁵ *ibid* 112.

³⁷⁶ Home Office (n 9) 18.

³⁷⁷ *ibid* 97.

³⁷⁸ Sexual Offences Act 2003, s 75.

³⁷⁹ Firth (n 253) 114.

³⁸⁰ *ibid* 115.

³⁸¹ Centre LGS, 'Response to the Office for Criminal Justice Reform Consultation Paper: Convicting Rapists and Protecting Victims of Rape – Justice for Victims of Rape' (AHRC Research Centre for Law, Gender and Sexuality, July 2006) 7.

³⁸² Wertheimer (n 15) 381.

³⁸³ Firth (n 253) 114.

³⁸⁴ *ibid* 114.

³⁸⁵ See section 4, 'The Limits of the Sexual Offences Act 2003 and Judicial Directions: Reinforcing Rape Myths'.

³⁸⁶ Firth (n 253) 116.

drunkenness is capable of destroying capacity to consent.³⁸⁷ A definition of capacity defined by understanding and competence would apply to the common case of a victim who is vomiting profusely, unable to walk, or has suffered memory blackouts.³⁸⁸ They are 'strong' indicators of incapacity as proof of extreme intoxication.³⁸⁹ These symptoms demonstrate a lack of physical and mental functioning and should be included as examples within the rebuttable presumption of non-consent.³⁹⁰

The presumption might be modelled on the California Penal Code which deems capacity to be absent when 'a person is prevented from resisting by any intoxicating substance.'³⁹¹ This is similarly worded to the evidential presumption of non-consent in situations of involuntary stupefaction.³⁹² However, this approach has many short-comings. Reference to resistance would be desirable where the victim was physically incapable of resisting,³⁹³ yet this standard is ambiguous: it does not say whether it includes physical or verbal resistance, or both. It is argued that to satisfy this standard the victim must be virtually comatose or almost unconscious.³⁹⁴ This implies only physical resistance which invites adherence to the view that a drunken woman remains capable of *saying* 'no'.³⁹⁵ However, it would mean that those who do not satisfy the presumption, for instance those who are unable to communicate their wishes verbally, would be judged instead under the general definition of capacity outlined above. Still, a standard must be reached that is sufficiently flexible to cover unique cases, not by reference to a standard that places undue weight on physical resistance. More preferable is Kramer's proposal of non-consent where 'the ability to affirmatively communicate unwillingness or

willingness is hindered by intoxication enough to cause observable physical weakening or impaired verbal ability.'³⁹⁶ Like the Government's original proposal of 'too affected by alcohol',³⁹⁷ the word 'hindered' is more generous than 'resistance' and does not risk excluding some complainants from protection. A reference to 'physical weakening' or 'impaired verbal ability' covers common cases where the victim cannot walk unaided, is vomiting whilst lying on the floor, or is unable to verbally communicate her consent because of the alcohol's sedative effect.³⁹⁸

What is the appropriate means of determining the level at which one can conclude that capacity is lacking? According to Ryan, the 'significant' factors are the 'level' and 'display' of extreme intoxication. If severe intoxication is not apparent, capacity to consent cannot be evaluated.³⁹⁹ Therefore any widely applicable grid system would be undesirable given that the varying levels of intoxication can affect people differently.⁴⁰⁰ The incorporation of a flexible sliding scale would allow the jury to consider the level of intoxication and a corresponding level of explicit consent: the more intoxicated a victim appears or the more alcohol she has drunk, the more affirmative a yes must be.⁴⁰¹ Considerations would include: the amount of alcohol consumed; the level of intoxication demonstrated; the explicitness of consent; and evidence of non-consent such as resistance or ambivalence.⁴⁰² It would not be as stringent as the Californian Code because it would allow 'partial incapacity', encompassing verbal communication difficulties without a strict 'out of it' standard.⁴⁰³ Fears of false claims are misguided: a woman who drinks 'regularly' and has only 'one glass of wine' would not be able to claim she was too intoxicated to consent.⁴⁰⁴

³⁸⁷ *R v Kamki* (n 241) [17] (McCombe LJ).

³⁸⁸ *R v Dougal* (n 234); *R v Bree* (n 229); *R v H* (n 242).

³⁸⁹ Wallerstein (n 243) 334.

³⁹⁰ Cowan, 'The Trouble with Drink' (n 311) 917.

³⁹¹ California Penal Code 2005, s 261(a)(3) PC.

³⁹² Sexual Offences Act 2003, s 75(f).

³⁹³ *Bree* (n 229) [8] (Sir Igor Judge P).

³⁹⁴ Ryan (n 13) 416.

³⁹⁵ Lovett and Horvath, 'Alcohol and Drugs in Rape and Sexual Assault' (n 44) 155.

³⁹⁶ Kramer (n 36) 152.

³⁹⁷ Home Office (n 9) 20.

³⁹⁸ *R v Kamki* (n 241); *R v Bree* (n 229).

³⁹⁹ Ryan (n 13) 429.

⁴⁰⁰ Rumney and Fenton (n 255) 288.

⁴⁰¹ Christine Chambers Goodman, 'Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent' [2009] Brigham Young University L Rev 57, 58.

⁴⁰² *ibid* 91.

⁴⁰³ *ibid* 89.

⁴⁰⁴ *ibid* 60.

It is possible that three or four drinks on an empty stomach or on a low weight victim would render her extremely intoxicated, which, at first blush, would render the scale defective. This raises the important point that context is crucial and the scale should be used only as guidance, not as determinative, to the standard of consent required in order to maintain sensitivity to the individual characteristics of the complainant.

The presumption would not deem *all* intoxicated consent invalid. The interference is not patronising because it appreciates that women can consent to sexual relationships whilst intoxicated.⁴⁰⁵ The presumption outlined above achieves the correct balance between positive and negative autonomy. It would cover only those whose positive autonomy is absent because they are incapable of making a 'real' decision.⁴⁰⁶ Furthermore, it would not operate unfairly to an accused – men may bear the 'greater legal burden' but women 'bear greater emotional burdens' when her bodily integrity is exploited.⁴⁰⁷ An evidential presumption would be rebuttable: a defendant can still raise evidence of consent. The correct balance between the interests of the defendant and the victim would be respected: the House of Commons did not think it 'unreasonable' that it fell to the defendant to show sufficient evidence of consent.⁴⁰⁸

Some 'interference' with the balance of autonomies is a price worth paying if the instances of men seeking to take advantage of drunken women can be reduced. If the law were to continue to adopt a 'hands off' approach, male disregard for women's sexual autonomy is perpetuated.⁴⁰⁹ These are 'compelling' reasons that justify state interference as

proportionate to the harms it seeks to redress.⁴¹⁰ Until the law recognises this, the view that extremely intoxicated victims always remain capable of consent 'legitimises predatory behaviour'.⁴¹¹ The evidential presumption would be 'symbolically powerful' in demonstrating that taking advantage of an extremely intoxicated woman is criminal behaviour.⁴¹²

6.2 Education

Legislative reform alone is not the 'cure'.⁴¹³ Poster campaigns and advertisements on rape myths⁴¹⁴ go some way towards abolishing prejudicial attitudes, but do not go far enough. Effective reform requires the support of educational institutions to improve understanding of the law.⁴¹⁵ Recent efforts to educate young people on the meaning of consent include a bill proposed in California that defines when 'yes means yes' for universities to follow when investigating allegations. It states that consent requires a 'conscious and voluntary agreement'.⁴¹⁶ This will tackle the attitude that intoxicated victims must always be able to consent to sex where it is most rife – in youth culture.⁴¹⁷ An extremely inebriated person who is unable to physically resist or speak coherently cannot satisfy the requirement for a clear and communicative 'yes'.

In England, Oxford and Cambridge Universities have introduced compulsory 'Sexual Consent Workshops'.⁴¹⁸ Awareness at university level is desirable because it is this age group that is likely to be engaging in binge drinking as part of the university culture, in which voluntarily intoxicated women can be taken advantage of.⁴¹⁹ Awareness between young people is on the increase. The media discussions regarding a 'Sexual Consent App' illustrate logical

⁴⁰⁵ Wertheimer (n 15) 396.

⁴⁰⁶ Wallerstein (n 243) 335.

⁴⁰⁷ *ibid* 400.

⁴⁰⁸ Home Affairs Committee, *Sexual Offences Bill* (HC 2002–03; HC639) 12.

⁴⁰⁹ Rumney and Fenton (n 255) 289.

⁴¹⁰ Munro, *Constructing Consent* (n 230) 953.

⁴¹¹ Wallerstein (n 243) 337.

⁴¹² Centre LGS (n 381) 7.

⁴¹³ Rumney and Fenton (n 255) 286.

⁴¹⁴ Temkin and Krahé (n 1) 99.

⁴¹⁵ Firth (n 253) 115.

⁴¹⁶ Associated Press in Sacramento, 'California Adopts Historic "Yes Means Yes" Rule on Sexual Consent' *The Guardian* (London, 29 September 2014) <<http://www.theguardian.com/world/2014/sep/29/yes-means-yes-california-sexual-consent>> accessed 1 November 2014.

⁴¹⁷ De Visser and McDonnell (n 79) 626–628.

⁴¹⁸ Sally Weale, 'New Cambridge Students to Attend Compulsory Sexual Consent Workshops' *The Guardian* (London, 19 September 2014) <<http://www.theguardian.com/education/2014/sep/19/new-cambridge-university-students-attend-compulsory-sexual-consent-workshops>> accessed 20 September 2014.

⁴¹⁹ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 221.

reasoning behind its invention, notwithstanding its impracticability. It demonstrates the benefits of informing young people of the need for mutual and positive consent *at the time* of intercourse – a woman's intoxicated flirting is irrelevant.⁴²⁰ It was proposed that the App include a 'sobriety level' including 'mildly intoxicated and pretty wasted' which indicates a growing knowledge that increasing intoxication diminishes capacity to consent.⁴²¹

Efforts to educate the public on the meaning of consent have a positive impact.⁴²² Withey found that knowledge of the law on rape was poor amongst students⁴²³ but after receiving rape awareness classes, was 'dramatically' improved.⁴²⁴ The majority of students stated that rape law education would have a great impact on rape prevention.⁴²⁵ This belief suggests that education on the requirement of consent and capacity would be more useful than sole warnings of the dangers of rape myth reliance. The law should clearly guide the public on what constitutes criminal behaviour, such as sex with women who are too drunk to consent. Education on the basic legal requirements, without a specific discussion of rape myths towards intoxicated victims, would alleviate fears that an explicit flagging of rape myths risks entrenching stereotypical assumptions.⁴²⁶

Rape myths will be ousted from the law's domain because a confident understanding of the law reduces the need to refer to stereotypes to make sense of sexual encounters befuddled by alcohol use when interpreting ambiguously drafted definitions.⁴²⁷ A focus on a clear, communicative standard of consent demonstrates that intoxicated victims are as worthy of the law's

protection as any other victim of serious crime, because her bodily autonomy is invaded.⁴²⁸ Education on consent must be given in schools and universities to educate teenagers on realistic sexual encounters where the lines of consent are 'blurred' by alcohol.⁴²⁹ 68% of those in Withey's study thought rape law education should be taught in school in subjects like Personal Social Health and Economic education (PSHE).⁴³⁰ This should be implemented by educating the public as early as possible, so that there is less scope for rape myths towards intoxicated victims to cement in the minds of potential jurors.

7 CONCLUSION

The damaging influence of rape myths at each stage of the Criminal Justice Process, from the initial police investigation to the final deliberation of the jury, is significantly detrimental to the interests of justice. Voluntarily intoxicated victims of rape are deemed responsible, if not entirely blameworthy, for the consequences of their 'immoral' behaviour.⁴³¹ However, following the Sexual Offences Act 2003, the police and CPS have made consistent efforts to instigate a victim-focused culture of belief.⁴³² Examples of this are: the introduction of Specialist Rape Prosecutors; the 'We Can Stop It' consent awareness campaign; and the introduction of 'toolkits' for use by the police and crown prosecutors in determining consent and capacity.⁴³³ There is cause for optimism in this shifting tide towards treating victims with 'sympathy and understanding' at the initial stages of the Criminal Justice System.⁴³⁴ This is because fewer genuine cases will fail at the first hurdle and will progress one step further to justice. Unfortunately, much remains to be done for the final stage: the jury.

⁴²⁰ Jinan Younis, 'Why All Students Need Sexual Consent Education' *The Guardian* (London, 18 July 2014) <<http://www.theguardian.com/commentisfree/2014/jul/18/all-students-need-sexual-consent-education-british-universities>> accessed 30 September 2014.

⁴²¹ Erica Buist, 'Can 'Sexual Consent' App Good2Go Really Reduce Assaults on Campus?' *The Guardian* (London, 30 September 2014) <<http://www.theguardian.com/technology/shortcuts/2014/sep/30/consent-app-good2go-bad>> accessed 30 September 2014.

⁴²² Elena L Klaw, Kimberly A Lonsway, Dianne R Berg and others, 'Challenging Rape Culture: Awareness, Emotion and Action through Campus Acquaintance Rape Education' (2005) 28 *Women and Therapy* 47, 50–58.

⁴²³ Carol Withey, 'Rape and Sexual Assault Education: Where is the Law?' (2010) 13 *New Crim L Rev* 802, 813.

⁴²⁴ *ibid* 816.

⁴²⁵ *ibid* 818.

⁴²⁶ Temkin, 'And Always Keep A-Hold of Nurse' (n 276) 725.

⁴²⁷ Temkin and Ashworth, 'The Sexual Offences Act 2003' (n 211) 336.

⁴²⁸ Elvin (n 285) 153.

⁴²⁹ Temkin and Krahé (n 1) 211.

⁴³⁰ Withey (n 423) 822–824.

⁴³¹ Maier (n 31) 1418.

⁴³² Jordan, 'Beyond Belief' (n 117) 33–38.

⁴³³ Crown Prosecution Service, 'CPS and Police Focus on Consent' (n 197).

⁴³⁴ Stern (n 137) 56.

In order to safeguard the culture of belief within the police and CPS from the discouraging yet pragmatic anticipation of a likely conviction,⁴³⁵ initiatives to reduce rape myths amongst jurors are urgent. It is only by educating potential jurors that the CPS can lead evidentially uncertain, yet genuine, cases to justice.

Drunken sex can be subject to fair regulation and the line can be drawn between varying levels of intoxication. The most appropriate measure is a statutory evidential presumption of non-consent for voluntarily intoxicated victims who are 'hindered by intoxication enough to cause observable physical weakening or impaired verbal ability.'⁴³⁶ Equally, the ambiguous definition of consent no longer 'fits' the culture we live in.⁴³⁷ The increasing presence of alcohol in rape⁴³⁸ cannot be realistically divorced from a binge-drinking youth culture in which predatory men take advantage of drunken women.⁴³⁹ In order to pinpoint the moment that alcohol facilitated sex is truly criminal, the meaning of 'capacity' must be legislatively clarified.⁴⁴⁰ If such reforms were implemented, convictions for rape would be likely to increase and the attrition rate would be reduced. This is because an evidential presumption would positively counteract rape myths on the face of the law itself, by confidently asserting that voluntarily intoxicated victims can be raped. Given the Government's reluctance to rework the law in the near future, we must put our faith in the judiciary to reduce the process of attrition at the trial stage by dispelling rape myths from the decision-making process. In order to facilitate the jury's reaching of a conclusion free from prejudice, the model direction that encompasses words of 'communication' and 'understanding' ought to be used

in every case.⁴⁴¹ The law would move away from stereotypical assumptions of appropriate female behaviour in socio-sexual relations because it positively stresses the importance that sexual consent be mutually communicated and equally desired.⁴⁴²

The judiciary is to be commended for its willingness to explain that capacity to consent may be destroyed by extreme alcohol consumption, but it must go further and explain that memory blackouts, instability, and vomiting are 'proof' that this is the moment a woman is rendered incapable.⁴⁴³ The 'grey' area in-between tipsiness and comatose can be coloured in.⁴⁴⁴ This approach is preferable to explicit cautions on rape myths regarding intoxicated victims,⁴⁴⁵ due to fears that this will entrench assumptions in the mind of the jury.⁴⁴⁶ Indeed, explicit references to rape myths via poster campaigns have had only limited success in significantly changing societal attitudes.⁴⁴⁷ However, ignorance of the reality of intoxicated consent can be challenged via wider societal education, by educating young people on the importance of mutual consent in sexual consent workshops and lessons on the basic features of capacity. Finally, a correct balance is achievable between positive and negative autonomy. Women would be neither 'patronised' nor deterred from seeking freely intoxicated sex if the rebuttable presumption of non-consent as advanced were created.⁴⁴⁸ A woman's right to refuse sex where she is incapable of consenting because of extreme inebriation must be subsumed under the law's protective cloak. Only in this sense can respect for bodily autonomy of the vulnerable be truly safeguarded.⁴⁴⁹

⁴³⁵ Temkin and Krahé (n 1) 40.

⁴³⁶ Kramer (n 36) 152.

⁴³⁷ Campbell-Moriarty (n 14) 843.

⁴³⁸ Hester (n 111) 15.

⁴³⁹ Horvath and Brown, 'The Role of Drugs and Alcohol' (n 8) 221.

⁴⁴⁰ Horvath and Brown, 'Do you Believe Her and is it a Real Rape?' (n 99) 325.

⁴⁴¹ Judicial Studies Board (n 271) 374–375.

⁴⁴² Finch and Munro, 'Breaking Boundaries' (n 210) 304.

⁴⁴³ *R v Dougal* (n 234); *R v Bree* (n 229); *R v H* (n 242).

⁴⁴⁴ Wallerstein (n 243) 332.

⁴⁴⁵ Judicial Studies Board (n 271) 356.

⁴⁴⁶ Temkin, 'And Always Keep A-Hold of Nurse' (n 280) 725.

⁴⁴⁷ Gunby, Carline and Beynon (n 225) 592.

⁴⁴⁸ *Bree* (n 229) [35] (Sir Igor Judge P).

⁴⁴⁹ Cowan, 'Freedom and Capacity to Make a Choice' (n 212) 69.

THE DEMOCRATIC DEFICIT OF THE EU

*Philip Parry**

1 INTRODUCTION

It would appear that David Cameron undermined the entire constitutional order of the European Union when he said in his Bloomberg speech that it is 'national parliaments, which are, and will remain, the true source of real democratic legitimacy and accountability'.¹ Indeed, much like any other political system the EU is not without its faults. However, it is the extent of these faults that leave it with a serious 'democratic deficit' that is difficult to contend with on a supranational scale.

This article will define what is meant by a 'democratic deficit' by emphasising it as a lack of democratic legitimacy. It will then analyse Cameron's quote in more depth. Factors in support of the legitimacy of the EU will then be discussed, primarily the ability of national parliaments to theoretically leave the EU, the output legitimacy of the EU and the increased role given to both the European Parliaments and national parliaments. Factors which outweigh its legitimacy and contribute to the 'democratic deficit' will then be considered, including poor popular representation, secrecy in essential institutions and above all, a complete lack of policy direction and leadership contestation.

2 'DEMOCRATIC LEGITIMACY'

In order to decide whether there is such a 'democratic deficit' in the EU, we must first consider what is meant by 'democratic legitimacy' because an absence of democratic legitimacy arguably results in a deficit. Bartolini provides a good starting point, defining democratic legitimacy as the 'principles and procedures through which collectivised and binding decisions must be accepted by those who have not

participated in making them'.² As Moravcsik concedes, involving EU citizens in the 'full range of government policies would impose costs beyond the willingness of any modern citizen to bear'.³ Where it is assumed individuals lack the knowledge to pursue their best interests, tasks must be delegated to elected political authorities who can carry them out effectively.⁴ Representatives of such political authorities should have a public mandate, and one of the most basic ways this can be achieved is through a direct popular vote.

Contextually speaking, Cameron's quote is extracted from part of his speech in which he was advocating the need for national parliaments, with their mandate obtained through a popular vote, to have a 'bigger and more significant role' in EU policymaking. He argued that this was because national parliaments are the 'true source' of democratic legitimacy within the EU.⁵ However, his implication that the EU does not have any institutions which are a 'true source' of legitimacy is a point of contention when the directly elected European Parliament is considered. Furthermore, his emphasis on the unrivalled democratic legitimacy of national parliaments is also debatable, especially as the House of Lords continues to sit in the UK Parliament as an entirely unelected chamber.

One might interpret Cameron's opinion as his concern that sovereignty remains ultimately with national parliaments, not the EU. This gives weight to the notion that there is indeed a 'democratic deficit' within the constitutional order of the EU. Before discussing this deficit, however, it is essential to

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¹ David Cameron, 'EU Speech at Bloomberg' *Cabinet Office* (London, 23 January 2013) <<https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>> accessed 1 November 2014.

² Stefano Bartolini, 'The Nature of the EU Legitimacy Crisis and Institutional Constraints: Defining the Conditions for Politicisation and Partisanship' in Olaf Cramme (ed), *Rescuing the European Project: EU Legitimacy, Governance and Security* (Policy Network 2009) 57.

³ Andrew Moravcsik, 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis' (2004) 39 *Gov't & Oppos* 336, 344.

⁴ *ibid.*

⁵ Cameron (n 1).

investigate firstly how the EU might support claims to its legitimacy and accountability.

3 THE EU'S CLAIM TO DEMOCRATIC LEGITIMACY

One of the most important arguments in defence of the EU's democratic legitimacy is the notion that each member state has agreed to transfer some of their government's law-making power to the EU. Longo and Murray have argued that the EU is a 'hybrid polity', defining it as an organisation that 'derives much of its legitimacy indirectly from the nation-state governments'.⁶ Signatories have made a positive choice to give up some of their legislative sovereignty but theoretically, and likely with popular support through the means of a referendum, any member state can leave at any point and regain full sovereignty of their legislature. Until the EU makes it impossible for member states to leave, it is difficult to contend that there is a democratic deficit while membership continues to be voluntary.

The Treaty on European Union reinforces the EU's legitimacy by making an unequivocal reference to the fact it is 'founded on representative democracy'.⁷ It outlines the way it will achieve this: 'citizens are directly represented at Union level in the European Parliament', and member states are 'represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves directly accountable either to their national Parliaments, or to their citizens'.⁸ This 'twin-fold'⁹ or 'dual'¹⁰ basis of democratic legitimacy means that while most institutions are not directly elected by popular vote, their legitimacy comes the fact that they are constituted in part by representatives of governments elected nationally and these representatives have ultimately derived their authority from EU citizens.

It is still easy to criticise the lack of directly elected institutions when considering the legitimacy of the EU. However, Menon and Weatherill contend that legitimacy is also derived from the efficiency with which the EU operates.¹¹ Scharpf's distinction between input and output democracy is important to consider here: he concedes that the EU is fairly criticised for its lack of input democracy, but is not given enough credit for the quality and legitimacy of its output.¹² Menon and Weatherill provide a useful example here to support Scharpf's view, arguing that the achievement of creating a single market is an 'obvious source of output legitimation that can be taken as a justification for an apparent absence of orthodox input legitimacy enjoyed by key supranational decision-makers'.¹³ Moreover, with signature to the Treaty on European Union and the Treaty on the Functioning of the European Union,¹⁴ the member states themselves have agreed to the collectivised achievement of such an objective.¹⁵

The adoption of the Treaty of Lisbon saw the European Parliament given a central role in the decision-making process. As the institution which represents EU citizens at Union level, it is a significant development in countering claims of a democratic deficit. The TFEU provides that the 'ordinary legislative procedure' consists of the 'joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission'.¹⁶ Although the Commission does retain the ultimate right over sole policy initiation, both Parliament and the Council act as a system of checks and balances over each other and legislation is passed only with a majority vote. Agreement must be reached between the representatives of EU citizens, the European Parliament, along with the representatives of

⁶ Michael Longo and Philomena Murray, 'No Ode to Joy? Reflections on the European Union's legitimacy' (2011) 48 Int Politics 667, 686.

⁷ Consolidated Version of the Treaty on European Union (TEU) [2012] C 326/01, art 10(1).

⁸ *ibid* art 10(2).

⁹ Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2013) 71.

¹⁰ Alan Dashwood and others, *Wyatt and Dashwood's European Law* (6th edn, Hart 2011) 73.

¹¹ Anand Menon and Stephen Weatherill, 'Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union' (2007) LSE Law, Society and Economy Working Papers 13/2007 <<https://www.lse.ac.uk/collections/law/wps/WPS13-2007MenonandWeatherill.pdf>> accessed 18 January 2016.

¹² Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).

¹³ Menon and Weatherill (n 11) 8.

¹⁴ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] C 326/01 art 289.

¹⁵ Menon and Weatherill (n 11) 8.

¹⁶ TFEU (n 14) art 289.

national governments, the Council, or the legislation shall not pass.¹⁷

The Treaty of Lisbon also gave an enhanced role to national parliaments in the decision-making process.¹⁸ The TEU now provides that national parliaments 'contribute actively to the good functioning of the Union';¹⁹ they will now have draft legislation forwarded to them for a period of eight weeks in which to review it. National parliaments then have an option to 'yellow card' the draft Act if it does not fit within the principles of subsidiarity outlined in the TEU: that the EU can only act so far in an area which doesn't fall within its competence if it could not be achieved at member state level, or would be better achieved at Union level.²⁰ In accordance with Protocol (No 2) of the Treaty of Lisbon, member states can then collaborate, usually with a significant minority, to see the legislation reviewed or amended.²¹ The EU has taken clear initiative to recognise the importance of national parliaments as institutions; it clearly adds a further dimension to counter the accusation of the existence of a democratic deficit. However, it would appear to add weight to Cameron's statement that national parliaments which remain the 'true source' of democratic legitimacy.

4 THE EU'S 'DEMOCRATIC DEFICIT'

The EU has clearly made a significant effort in trying to maintain its democratic legitimacy. However, as Longo and Murray argue, it could be said that the EU is simply a 'system that constantly has to justify itself to citizens' and introduce new legitimacy measures, all the while struggling to be accepted in the face of a lack of public support.²² It is unfortunate, but it will become clear, why this is indeed the case.

Holzhacker argues that the lack of democratic legitimacy in the EU is as a result of two factors. The first is that of poor 'representative mechanisms'.²³ As

long as the European Parliament remains the only directly elected institution this will certainly be the case; the EU cannot claim to represent the people if the people can only hold one institution directly in account. The second is that legitimacy is also undermined by poor 'deliberative' mechanisms.²⁴ For example, two areas which undermine this 'deliberative democracy'²⁵ is the previously discussed fact that it is the Commission which enjoys the sole privilege of initiating legislation for deliberation, and the secretive methods of discussion within the Council.

Historically there has been a significant scarcity of information about the inner workings of the Council. While there has recently become an increased range of data available to scholars studying the field, there are still 'many dark corners waiting to be revealed'.²⁶ One such study is that of Golub, who sought to address the extent to which national bargaining is successful in the Council. He compared two hypotheses: firstly that no Member State achieves more of its preferences than any other; and that larger Member States do achieve more of their preferences than smaller ones.²⁷ Although he conceded that there was no clear empirical evidence to support either hypothesis, the sheer fact that he even entertains the idea that larger nations might achieve more of their preferences because of who they are indicates an undesirable degree of disillusionment and scepticism of the Council's democratic legitimacy. Furthermore, it is concerning that it requires the research of a significant number of academic researchers simply to decipher the inner workings of the Council. It certainly leaves the average EU citizen with little hope of understanding, or any motivation to do so.

It is clear that the Council is not as transparent as it should be, and this undermines one of the initial commitments in the TEU, that 'decisions are taken as closely as possible to the citizen'.²⁸ For 'arguably the

¹⁷ *ibid* art 29.

¹⁸ Protocol (No 1) on the Role of National Parliaments in the European Union [2012] OJ C 326/203.

¹⁹ TEU (n 7) art 12.

²⁰ *ibid* art 5.

²¹ Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2012] OJ C 326/206.

²² Longo and Murray (n 6) 668.

²³ Ronald Holzhacker, 'Democratic Legitimacy and the European Union' (2007) 29 J Eur Int 257.

²⁴ *ibid*.

²⁵ *ibid* 261.

²⁶ Daniel Naurin and Helen Wallace, 'Introduction: from Rags to Riches' in Olaf Cramme (ed), *Rescuing the European Project: EU Legitimacy, Governance and Security* (Policy Network 2009).

²⁷ Johnathan Golub, 'How the European Union does not work: national bargaining success in the Council of Ministers' (2012) 19 JEPP 1294.

²⁸ TEU (n 7) preamble.

most powerful of the institutions involved in the day-to-day decision making of the EU²⁹ to conflict with one the founding principles is a troubling outcome.

The complexity of the constitutional order of the EU is also a factor that cannot be overlooked along with the psychological distance that remains in the minds of some EU citizens. In his Bloomberg speech, Cameron also contended that there is not, in his view, 'a single European *demos*'.³⁰ The geographical area which the EU has jurisdiction is too great, and there is an inherent lack of a shared identity with so many differing cultures. An important theme of the rejected 2004 Treaty establishing a Constitution for Europe was to 'give the EU greater coherence and identity'. This was an inherent factor considering that many EU citizens would vote in referenda for a supranational constitution, which implied a shared European identity. Scicluna reasons that with its rejection, the people essentially rejected the idea of this shared identity and above all, a European *demos*.³¹ It is impossible for a supranational organisation like the EU to claim any sort of democratic legitimacy over people who feel no connection with the extent of its jurisdiction.

The absence of a developed party system at the EU level also serves to decrease its legitimacy.³² MEPs sit in broad groups of political alignment in the European Parliament, not as part of the national party they represent. As a result, parties will not come with a 'coherent overall agenda that is readily discernible to voters, nor will it be discernible within the parties themselves'.³³ It is difficult for voters to associate with broader European parties and this is arguably a contributing factor to the decreasing turnout.³⁴

Above all, the EU cannot be democratically legitimate until a focus on policy choice is given to its citizens. The crux of Follesdal and Hix's criticism of the EU is its lack of 'contestation for political

leadership over policy', a factor which they suggest is an 'essential element of even the 'thinnest' theories of democracy'.³⁵ Indeed, they are correct. Without a contest for leadership there is an implicit lack of varying stances regarding the 'basic direction of EU policy agenda'.³⁶ Voters cannot choose between 'rival candidates for executive office', decide between 'rival policy agendas' or 'throw out elected representatives for their policy positions or actions'.³⁷ It is precisely this, Craig argues, which means contending political packages are not offered to voters and a coherent policy agenda is subsequently absent.³⁸

Currently national parties disassociate themselves from the direction of EU policy agenda and focus on the national agenda;³⁹ their only clear EU policy is often simply on whether or not a member state should remain a member of the EU. One might consider the rise of EU-sceptic political parties to be a direct consequence of this; on the surface, a vote against a supranational organisation acting without approved direction from citizens seems attractive and it is certainly indicative of the lack of belief in the democratic legitimacy of the EU.

5 CONCLUSION

The EU does, in some respects, command a degree of democratic legitimacy and accountability. Each member state has ultimately transferred some of their government's law-making power to the EU to make supranational decisions on its behalf. Theoretically, member states retain the ability to take this power back at any time but legitimacy is indirectly derived from governments until then. Binding commitments to representative democracy in the TEU and the theory of output legitimacy also reinforce the EU's position as an external actor on a government. The authority of national parliaments has also been acknowledged with their enhanced role in the legislative procedure since the Treaty of Lisbon.

²⁹ Naurin and Wallace (n 26) 1.

³⁰ Cameron (n 1).

³¹ Nicole Scicluna, 'When Failure isn't Failure: European Union Constitutionalism after the Lisbon Treaty' (2012) 50 JCMS 441.

³² *ibid.*

³³ *ibid.*

³⁴ European Parliament, 'Results of the 2014 European elections' (1 July 2014) <<http://www.europarl.europa.eu/elections2014-results/en/turnout.html>> accessed 2 November 2014.

³⁵ Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533.

³⁶ *ibid* 552.

³⁷ *ibid.*

³⁸ Craig (n 9) 73.

³⁹ *ibid.*

However, it is the extent to which the 'democratic deficit' takes its toll on the constitutional order of the EU that far outweighs the legitimising factors. The lack of directly elected institutions is a crippling problem when considering their accountability, and the lack of transparency of the inner workings of the Council along with the unelected Commission acting as the sole initiator of legislation is a concerning prospect. By far the most significant area of democratic deficit is the lack of 'contestation for political leadership over policy', as Follesdal and Hix have argued.⁴⁰ When one combines this with the

absence of a developed party system then it is impossible to have a true contest for policy direction within the EU.

Perhaps Cameron's quote about national parliaments being the 'true source of real democratic legitimacy' would be better suited if it was replaced with the phrase 'ultimate source'. Unless the EU's constitutional order changes dramatically over the course of the next few treaties, member states will be subject to a crippling 'democratic deficit', that is, for as long as they choose to stay.

⁴⁰ Follesdal and Hix (n 35).

COMMERCIAL INTEGRITY, *CHRISTUS CONSUMATOR* AND THE CIRCUMSPECTIVE *HAUTE BOURGEOISIE*: THE COMMON LAW AS A CONTESTED TRADITION IN VICTORIAN BRITAIN

Benjamin Lloyd*

1 INTRODUCTION

This article will initially elucidate two key religiously influenced traditions which were upheld by the common law in the early nineteenth century, before examining how the Victorian ‘commercial crisis’, resulting from the various banking scandals of the period, contested and ultimately conquered these traditions.¹ This will entail scrutiny of the significant growth of commerce which characterised the era, and the religious and social responses to the implications of this progression. Subsequent discussion will address similar banking crises which have plagued the early twenty-first century, and delineate the admittedly one-sided contestation which produced a dissimilar and less satisfying response than its predecessor.

In the early nineteenth century the common law criminalised far less behaviour than in modern times. The foundations of this lay in two traditions of the common law at the time. First, criminalisation was a burden borne by lower-class citizens, prejudicially labelled the ‘criminal classes’,² and thus did not extend to commercial impropriety. Second, apart from rare exceptions such as murder,³ prosecutions were brought by private individuals, and thus were entirely reliant upon parties having both the ability and the willingness to prosecute. However, these traditions were affected substantially by the occurrence of several high-profile banking collapses in the latter half of the century. In 1858 the ‘disastrous management’⁴ of the Royal

British Bank lead to the institution’s failure and consequences which Sir Frederic Thesiger assured the court were ‘wide spread ruin.’⁵ Similar collapses of ‘the bankers’ bank’⁶ Overend and Gurney, the City of Glasgow Bank, and Strahan, Paul and Bates culminated in the belief that society was in the midst of a commercial crisis. This article will proceed by initially examining the effect which this commercial crisis imparted to the tradition that criminalisation was exclusively applied to the lower classes.

2 THE DANGER PRESENTED BY THE WORLD’S FIRST CAPITALIST SYSTEM

As succinctly put by Black and MacRaild the nineteenth century was a century of ‘striking change[,] radically different from what had come before’.⁷ The period warrants this description as it provided the setting for the rapid expansion of commerce as a consequence of large-scale industrialisation and the ‘world’s first capitalist system’.⁸ However, as noted by Wilson, an unwanted by-product of capitalism is a motivation to participate in ‘dishonest and deceitful practices’.⁹ The reason for this is explained by Adam Ferguson: ‘the individual considers his community so far only as it can be rendered subservient to his personal advancement or profit’.¹⁰ Commercial society promotes material gain above considerations of community, thus without the regulation of dishonest behaviour associated with pursuing material gain, individuals actively participate in undermining

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¹ David M Evans, *The Commercial Crisis, 1847–1848* (Letts, Son & Steer 1848) 1.

² Sarah Wilson, *The Origins of Modern Financial Crime* (Routledge 2014) 210.

³ Douglas Hay and Francis Snyder, ‘Using the Criminal Law, 1750–1850: Policing, Private Prosecution and the State’ in Douglas Hay and Francis Snyder (eds), *Policing and Prosecution in Britain 1750–1850* (OUP 1989) 27.

⁴ David M Evans, *Facts, Failures and Frauds: Revelations, Financial, Mercantile, Criminal* (Groombridge & Sons 1859) 268.

⁵ *ibid* 289.

⁶ Geoffrey Elliott, *The Mystery of Overend & Gurney: A Financial Scandal in Victorian London* (Methuen 2007) 1.

⁷ Jeremy Black and Donald M MacRaild, *Nineteenth Century Britain* (Palgrave Macmillan 2002) xvii.

⁸ Michael Lobban, ‘Nineteenth Century Frauds in Company Formation: *Derry v Peek* in Context’ [1996] LQR 287, 288.

⁹ Wilson, *The Origins of Modern Financial Crime* (n 2) 118.

¹⁰ Adam Ferguson, *An Essay on the History of Civil Society* (first published 1767, 8th edn, Edinburgh University Press 1966) 429.

community. Not only did this create a 'bad moral atmosphere',¹¹ it provided the cause of several banking scandals as bankers acted selfishly and in ignorance of risk in their roles as loan financiers¹² and 'dynamic entrepreneurs'.¹³ This subsequently triggered grave consequences for their institutions, oftentimes resulting in outright bankruptcy. Moreover, the effects also extended to other occupants of the commercial market place. For instance the collapse of Overend and Gurney resulted in around 200 companies declaring bankruptcy,¹⁴ leading to it being labelled 'the most notorious bank run in history'.¹⁵ The response of the common law was, as articulated by Taylor, a move from the toleration of commercial impropriety to criminalisation.¹⁶ This entailed the criminalisation of persons within the upper echelons of society, and, vitally, the establishment of financial crime in its own right. This article contends that the common law was forced to alter its traditions and criminalise commercial impropriety in order to protect the integrity of the fragile financial market place and the national interest in it.

An opposing position could highlight the common law tradition of punishing equitable wrongs associated with the improper administration of trusts and positions of responsibility¹⁷ as the motive for punishing bankers for irresponsible conduct. Then, due to the fact that the nature of banking requires that money be entrusted to a third party, the reasonable conclusion is that this elevates the banker to a position of responsibility, wherein the banker is fixed with the traditional duties of trustees. If credence were to be given to this assertion, then it would act as evidence of the common law applying a set of rigid traditions irrespective of contestations. However, the professional nature of the relationship subsisting between parties, and the bankers' close proximity to

the enterprise economy suggest that this influence was minute in comparison to that of protection of commercial integrity. This is further illustrated by the criminalisation of banking misconduct, which is commonly used to communicate the social opprobrium of certain behaviour, in contrast with the lesser consequences of breach of trust.¹⁸

Alternatively, some may contend that expansion of the common law to criminalising financial abuse was consistent with the tradition of criminalising simpler forms of misappropriation and embezzlement. This contention posits that by criminalising commercial impropriety, the common law was merely asserting its traditional duty of punishing instances of 'wickedness'¹⁹ within a developing society, by focusing on 'traditional qualities of fairness, honesty and trust'.²⁰ However, the influence of commerce is apparent in the expansion of criminalised conduct to include irresponsible conduct. The far-reaching nature of liability was evident in the trial and conviction of both the Royal British Bank and the City of Glasgow Bank defendants for offences of misstated financial health.²¹ This expansion of liability constituted a shift away from the common law's traditional punishment of self-serving rapacity of other's property, and instead focused on the responsibility of maintaining commercial integrity.²²

Following this firm conclusion that the common law did indeed depart from its previously embedded traditions in order to safeguard commercial integrity, this article will progress to exploring how this migration and preference reordering was affected by various underlying contestations.

¹¹ Evans (n 1) 5.

¹² Wilson, *The Origins of Modern Financial Crime* (n 2) 135–136.

¹³ Ben Pettet, *Company Law* (2nd edn, Pearson Longman 2005) 173.

¹⁴ Jon Henley, 'Show Us the Money' *The Guardian* (London, 19 September 2007) <<http://www.theguardian.com/money/2007/sep/19/business>> accessed 17 December 2015.

¹⁵ Treasury Committee, *The Run on the Rock* (HC 2007–2008) 8.

¹⁶ James Taylor, *Boardroom Scandal: The Criminalisation of Company Fraud in Nineteenth Century Britain* (OUP 2013) 6.

¹⁷ Sarah Wilson, 'Tort Law, Commercial Actors, and Articulations of Nineteenth-Century Capitalism with Law: The Fraudulent Trustees Act 1857 in Context' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2012) 358.

¹⁸ Wilson (n 17) 354.

¹⁹ Evans (n 1) 11.

²⁰ Wilson (n 17) 358.

²¹ Sarah Wilson, 'The Pursuit of Socially Useful Banking In Twenty First Century Britain and Exploring Victorian Interactions Between Law, Religion and Financial Marketplace Values' (2013) 163 NLJ 54, 67.

²² *ibid* 68.

3 THE FLUCTUATING RELIGIOUS BASIS OF COMMON LAW TRADITION

3.1 *Evangelical Influence on the Common Law*

Although scholars such as Asa Briggs labelled the early nineteenth century as ‘the age of improvement’,²³ largely due to the aforementioned growth in commerce, Boyd Hilton argues that a more prudent title is the ‘age of atonement’.²⁴ Hilton justifies this contention on the basis that the dominant mode of thought at the time was an evangelical enthusiasm for the Christian doctrine of atonement.²⁵ He asserts that improvement was not regarded as a reward in itself, but was merely a feature of an underlying desire to attain salvation.²⁶ Despite the existence of variations within evangelical Christianity, the unifying factor which characterised this group of Christians was an emphasis on life as an ‘arena of moral trial’, whereby God judged men based on their reaction to ‘catastrophe’ and their continued faith in Christ’s atonement for the sins of humanity upon the Cross.²⁷ Hilton proposes that this transferred into the response to commerce as it influenced the socio-political values of *laissez-faire* and individualism.²⁸ He premised this assertion on the basis that as a person’s ‘passport to Paradise’²⁹ was adjudged based on their reaction to catastrophe, the common law was loath to intervene by preventing one of the most prominent catastrophes of the time: major commercial upheaval.³⁰ Concurring with Hilton’s conclusions would therefore necessitate conceding that the common law was not in fact a set tradition, but a set of rules which represented contemporary religious ideals.

3.2 *The Turn from Evangelicalism*

This article contends that the above concession warrants credence due to the reformulation of common law tradition relating to criminalisation of commercial impropriety, which occurred concurrently with the

‘theological transformation’³¹ of Christianity. According to various contemporary writers such as James Martineau, the popularity of evangelical doctrines waned in the second half of the nineteenth century, when Christians shifted their focus ‘from the Atonement to the Incarnation’.³²

This new emphasis upon ‘Christus Consumator’ as opposed to ‘Christus Redemptor’³³ ensured that Christians began to view Jesus ‘as man rather than as lamb’,³⁴ which entailed an attempt to emulate the manner in which he lived his life, rather than viewing him as merely the mechanism by which one achieved redemption. Hilton purports that it is highly probable that this theological transformation instigated the conversion from soteriological economics to the more socialist policies of the late nineteenth century, citing contemporary writer William Scott Holland who contended that ‘it was the incarnation ... with which they desired to see the laws of political economy brought into contact’.³⁵ A prime example of one such socialist policy was Government intervention in the arena of financial crime. Wilson states that this is evident due to the fact that the criminal trials attributed little significance as to whether their actions affected opportunities for salvation,³⁶ and instead embodied the sentiment that soundly practiced commerce ‘provided a framework of Christian discipline in ordinary life’.³⁷ This coherent narrative of a common law shaped by contesting approaches to religion shatters the illusion that the common law applied a set list of ever-present traditions through acknowledgement of the vulnerability of these traditions to fluctuation in the populace’s religious values.

However, as Hilton suggests, it is possible that instead of religion shaping attitudes toward commerce,

²³ Asa Briggs, *The Age of Improvement, 1783–1867* (2nd edn, Routledge 1999) 1.

²⁴ Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought 1785–1865* (OUP 1988) 1.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.* 8.

²⁸ *ibid.* 7.

²⁹ *ibid.* 5.

³⁰ *ibid.* back cover.

³¹ *ibid.* 5.

³² James Drummond and Charles B Upton, *The Life and Letters of James Martineau* (Nisbet 1902) 86–87.

³³ Vernon F Storr, *The Development of English Theology in the Nineteenth Century 1800–1860* (Longmans and Green 1913) 73.

³⁴ Hilton (n 24) 5.

³⁵ Wilfrid J Richmond, *Economic Morals: Four Lectures* (WH Allen 1890) xi.

³⁶ Wilson, ‘The Pursuit of Socially Useful Banking’ (n 21) 69.

³⁷ Hilton (n 24) 124.

the reality may have been the reverse.³⁸ Rather, an argument could be made that attitudes toward the significance of religion were manipulated by the *haute bourgeoisie* to attain a form of government which best represented their personal interests. As acknowledged by Wilson, British politics was dominated by the upper and middle classes in the nineteenth century,³⁹ offering them significant control over the development of the law and arguably Britain's core religious values were represented within these laws. Therefore it is necessary to explore what this powerful section of society would have to gain from a change in religious philosophy.

3.3 Causes of the Religious Turn

The evangelical philosophy which characterised the early nineteenth century and justified the *laissez-faire* approach to commercial 'catastrophe' allowed the social elite to rationalise its treatment of the poorer section of society by portraying it as their means of attaining redemption. Moreover, as the upper and middle classes were involved in commerce, evangelicalism allowed them to continue pursuing capitalist gain by any means necessary, whilst upholding the beneficial tradition that criminalisation was reserved for members of the 'criminal classes'. This precluded them having to recognise the 'respectable criminal'⁴⁰ from within their echelons of society.

The benefits provided by the evangelical ethos were evidently substantial, and therefore raise the question: if the elite did manipulate religious change to guarantee personal interests then why would they have opted to change from this advantageous position? The answer can potentially be linked to the source of the commercial crisis. In her analysis of the invention of the 'businessman criminal',⁴¹ Wilson highlights that 'it was not of course only bankers who engaged in misconduct in their professional lives', but it was the banking scandals which are widely credited as 'securing this social acceptance of business activity as criminal conduct.'⁴² Therefore, one must question what distinguished banking from other forms of commercial activity. The key distinction lies in the fact that banks were entrusted with financing the capitalist

system. Allowing conduct which disrupted its proper functioning, and caused a dangerous loss of confidence, was of great severity as the repercussions could have threatened the very capitalist system which it was entrusted with funding. Hence it can be asserted that the sheer extent of the banking collapses meant that the upper and middle classes could no longer protect their own from the indignity of criminalisation. Allowing continued engagement in 'dishonest and deceitful practices'⁴³ involved risking the system which guaranteed their wealth, and the exclusive social status gained from it.

An alternative theory as to the prominence of religion in contesting traditions arises, as the significant power of the *haute bourgeoisie* combined with the motive identified above supports the position that 'use' was made of religious values,⁴⁴ as opposed to the notion that a revolution of religious philosophy had demanded change. Irrespective of the balance between these two competing standpoints, it is evident that religion played some role in the contestation of the common law tradition. It is contentious as to whether it provided the reason for the transformation, or merely the vehicle by which the *haute bourgeoisie* manipulated change.

4 PUBLIC PROSECUTIONS FOR PUBLIC BENEFIT

Despite a substantial focus on the religious traditions discussed above due to their considerable significance, it would be remiss to neglect to mention the second common law tradition affected by the banking scandals which was briefly alluded to at the outset. Prior to the commercial crisis, a longstanding tradition of the common law was the private prosecution. If a crime took place, the common law regarded it as the duty of the victim to bring the case against the alleged offender. However, this tradition had to be softened in order to pursue the criminalisation of irresponsible conduct in banking scandals.

As there was no specific individual victim to identify from the banking collapses, prosecution relied upon the recognition of 'public interest in aspects of

³⁸ *ibid.*

³⁹ Wilson, 'The Pursuit of Socially Useful Banking' (n 21) 63.

⁴⁰ Martin J Miener, *Reconstructing the Criminal: Culture, Law, and Policy in England 1830–1913* (CUP 1990) 1.

⁴¹ Wilson, 'The Pursuit of Socially Useful Banking' (n 21) 65.

⁴² *ibid* 66.

⁴³ Wilson, *The Origins of Modern Financial Crime* (n 2) 118.

⁴⁴ Wilson, 'The Pursuit of Socially Useful Banking' (n 21) 65.

private enterprise',⁴⁵ in order for the State to provide public prosecutions. Not only did this provide an exception to the well-established tradition of a system reliant upon private prosecutions, Wilson further credits it with providing a growing sophistication in the comprehension of 'public policy' matters.⁴⁶ Consequently she states that this enhanced understanding of the public benefit provided support for establishing the Office of the Public Prosecutor in the late-nineteenth century.⁴⁷ Therefore this article asserts that a secondary effect of the reaction to the Victorian banking collapses was a departure from the prior tradition of private prosecutions, demonstrating that such traditions were not exempt from amendment nor failure.

Furthermore, it is submitted that the motivation behind this modified stance was guided by a shift in social attitudes; from the early-nineteenth century perspective which Atiyah asserts valued individualism and self-determination⁴⁸ to a more socialist outlook in the latter half of the century which placed greater emphasis on communal welfare. As acknowledged by Wiener 'criminal policy was very much part of general social policy'⁴⁹ in this era, therefore a criminal policy which recognised the benefit to the public in prosecuting on their behalf was likely to indicate that social opinion wished it so. Therefore when assessing the contestations which altered common law traditions the idea of 'satisfying public opinion'⁵⁰ must be incorporated, although it must be accepted that public opinion is likely to have been shaped by the religious, economic and political influences previously mentioned.

5 POTENTIAL VICTORIAN INSPIRATION FOR MODERN LAW REFORM

Despite the above analysis demonstrating that the common law is not a set list of immutable traditions, but instead a rule system which is contested by various

factors. This was not illustrated by any significant development in the regulation of commerce in the twenty-first century comparable to the regulation present in the nineteenth century. In 2007–2008 the 'first crisis of globalisation'⁵¹ occurred as a result of what is widely held to have been reckless and extensive debt-finance by financial institutions. However, despite the popularly held belief that this had been caused by irresponsible conduct on the part of those within the banking industry, no additional criminalisation of conduct ensued. Wilson criticised this on the basis that it allowed a misalignment between risk-taking and responsibility to continue unpunished⁵² by failing to consider the successful intervention of the Victorian common law in comparable circumstances. Although she concedes that Christian influences would be inappropriate in a modern day multi-faith society, Wilson asserts that the common law should have emulated the determination of Victorian common law to protect its social fabric from the hazards presented by banking.⁵³ It could perhaps be gleaned from the failure to do so that the common law is no longer contested and is now settled firmly in its traditions. However this article submits that the common law remains a contested tradition, however the influence of capitalism has developed to such a considerable extent that opposing influences have little power to resist. Religious figures were as prominent in the wake of 'the first crisis of globalisation' as they were at the time of the Victorian banking scandals with the Bishop of London appointing Ken Costa to 'start a dialogue' upon achieving 'ethical capitalism'⁵⁴ and the Archbishop of Canterbury condemning capitalist greed.⁵⁵ Moreover, public pressure was perhaps more outwardly expressed than at the time of the Victorian banking collapses in the form of the significant Occupy London movement. Hence it can be determined that although the authority of some of the various factors which influence common law development may have waned, and thus

⁴⁵ Wilson, *The Origins of Modern Financial Crime* (n 2) 118.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1985) 256.

⁴⁹ Wiener (n 39) 56.

⁵⁰ Lobban (n 8) 288.

⁵¹ Gordon Brown, *Beyond the Crash: Overcoming the First Crisis of Globalisation* (Simon & Schuster 2010) 1.

⁵² Wilson, *The Origins of Modern Financial Crime* (n 2) 2.

⁵³ Wilson, 'The Pursuit of Socially Useful Banking' (n 21) 73.

⁵⁴ Kamal Ahmed, 'Ken Costa: The City Must Rediscover Its Morality' *The Telegraph* (London, 5 November 2011) <<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8872354/Ken-Costa-The-City-must-rediscover-its-morality.html>> accessed 17 December 2015.

⁵⁵ Rowan Williams, 'Time For Us to Challenge the Idols of High Finance' *Financial Times* (London, 1 November 2011) <<http://www.ft.com/cms/s/0/a561a4f6-0485-11e1-ac2a-00144feabdc0.html>> accessed 17 December 2015.

failed to effect any recent change in this area, this has not dispelled their existence and ability to contest other common law traditions.

6 CONCLUSION

It can rationally be argued that the common law does not apply decisions according to a rigid set of traditions, but instead is shaped by an array of interconnected and competing influences. The key influences upon the common law at the time of the Victorian banking collapses were those of: a

compassionate view of the teachings of Christ; the sentiments of the *haute bourgeoisie* who dominated the political arena; and the need to protect the integrity of the fledgling capitalist system. Although these influences were not involved in contesting the common law's response to the banking crisis of the twenty-first century, this does not detract from the fact that contestation is still present at this time, albeit a contestation which many believe to have been comparatively inadequate.

MUST DO BETTER: THE LORDS' FRUSTRATION OF MUTUAL TRUST

Corey Krohman*

1 INTRODUCTION: A MISSED OPPORTUNITY

[The] inter-relationship between [the] contractual rights of employees, the common law[, the] contract of employment and the statutory regime has been ... vexed.¹

These difficulties were presented in *Johnson v Unisys Ltd*,² which marked the premature ending of the 'employment revolution'.³ This article argues that although their Lordships in *Johnson* were required to grapple with the inexorably vexatious relationship between the common law and statute, the majority's reasoning was based on false premises leading to 'curious distinctions and artificial results',⁴ barring subsequent development that could parallel changing societal attitudes towards employment relationships.⁵

To illustrate how the House of Lords closed off an opportunity for development it should have embraced, this article will discuss the importance of the implied term of mutual trust and confidence (the 'implied term') in providing protections for employees at dismissal. It will also demonstrate that *Johnson* could have been decided in a way that would complement the modern employment relationship and how barring such development has made workers vulnerable. Finally, potential reform will be proposed.

2 THE BASIS FOR DEVELOPMENT

The claimant in *Johnson* received damages for unfair dismissal. However, he suffered psychiatric injury from the manner of dismissal – not receiving a fair disciplinary hearing – and claimed damages in wrongful dismissal based on the implied term to not act in a way 'calculated ... to destroy ... the relationship of trust and confidence'⁶ in the employment relationship.⁷

The common law implies terms in contracts of employment, subjecting employers and employees to certain fundamental obligations – to prohibit damaging conduct⁸ and to protect employees from unacceptable employment practices.⁹ The implied term has been considered a 'powerful engine of movement'¹⁰ in modern employment contracts, and it was the predominant judicial contribution to the employment revolution.¹¹ However, *Johnson* marked the end of its development by refusing to incorporate the implied term for matters of dismissal because it would override the express terms of the contract of employment, and, further, it was deemed unnecessary because at dismissal the contract is over, rendering such terms moot.¹² Finally, *Johnson* decided that finding the employer in breach of the implied term would allow claimants to circumvent the will of Parliament, an outcome unacceptable for the majority.

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¹ David Cabrelli, *Employment Law in Context* (OUP 2014) 587.

² [2001] UKHL 13, [2003] 1 AC 518.

³ Lord Wedderburn, Roy Lewis and Jon Clarke, *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon 1983) 115.

⁴ Christopher Chapman, 'Compensating Employees for Injury to Feelings and Psychological Injury – Where do Stress Claims Stand After the House of Lords Judgments in *Dunnachie* and *Eastwood*?' [2005] *JIPL* 12; Gareth Thomas, *Smith and Wood's Industrial Law* (OUP 2003) 159.

⁵ *Johnson* (n 2) [35] (Lord Hoffmann).

⁶ *ibid* [32] (Lord Hoffmann).

⁷ *ibid*.

⁸ David Cabrelli, 'The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle?' [2005] *ILJ* 284, 299; *University of Nottingham v Eyett (No 1)* [1999] 2 All ER 437 (Ch) 442–444.

⁹ Douglas Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 *LQR* 604, 623; *Johnson* (n 2) [19] (Lord Steyn).

¹⁰ Mark Freedland, *The Personal Employment Contract* (OUP 2003) 166.

¹¹ *Johnson* (n 2) [36] (Lord Hoffmann).

¹² *ibid* [46] (Lord Hoffmann).

This created ‘an unworkable ... doctrinal distinction’¹³ between breaches before, and at the time of, dismissal.¹⁴

3 EMPLOYEE RIGHTS: AN INCIDENTAL DEVELOPMENT

Historically, ‘[s]tatutory protections for individual employees were ... conspicuous by their absence’,¹⁵ with noticeable state ‘abstention and neutrality’.¹⁶ Industrial relations consisted of ‘voluntary self-regulation by autonomous employers’,¹⁷ unions, and the development of wrongful dismissal by the judiciary. However, to undermine union strength the Industrial Relations Act 1971 was introduced. It provided increased state intervention – illustrated by the introduction of unfair dismissal – and marks the starting point of Parliament’s confusing association with employment law.¹⁸

Before *Johnson*, the protections afforded to employees at dismissal were contested.¹⁹ In the case of *Addis v Gramophone Co Ltd*, the House of Lords disallowed damages for ‘hurt feelings’,²⁰ narrowing the scope of wrongful dismissal. However, in *Malik v Bank of Credit and Commerce International SA* the House of Lords subsequently held that such damages could be awarded when there was a breach of the implied term, occurring *during* employment, providing employees additional protection.²¹ Lord Steyn in *Malik* emphasised the importance of assessing the impact of an employer’s hurtful behaviour, rather than employer’s intention. This afforded employees greater protection, because it made harm easier to

prove.²² Conversely, Lord Steyn cautioned that the implied term was a ‘default rule’, free to be excluded or modified.²³ This appears contradictory, raising doubts about judicial intention in protecting employees over contractual principles. Although *Malik* represents more contemporary legal jurisprudence surrounding the employment relationship,²⁴ noticeably departing from the master/servant rhetoric of *Addis*,²⁵ one cannot ignore the judiciary’s reluctance in undermining contractual freedom and an employer’s prerogative to dismiss.

The implied term initially appeared to be far-reaching and equiparated to the status of an express term, capable of curtailing the freedom of contract of the parties.²⁶ However, in *Johnson*, there was a reaffirmation of the dominance of express terms over implied terms, deeming express the rights to dismiss unfettered, ‘sacrosanct and free of [the] constraints’²⁷ the implied term could have imposed.²⁸ This affirmation of conventional contractual principles created an ‘exclusion zone’, precluding claimants from recovering damages for breaches occurring at dismissal and thereafter.²⁹ After three decades of development favouring employee rights, the House of Lords had rejected the idea that ‘creativity’³⁰ should be used to protect the implied term. Consequently, the ‘exclusion zone’ can further hinder employee protections because summary dismissal exposes employers to fewer liabilities than proper grievance investigations, and are thus a more attractive option.³¹

¹³ Cabrelli (n 1) 166.

¹⁴ Chapman (n 4) 20.

¹⁵ Wedderburn, Lewis and Clarke (n 3) 113.

¹⁶ *ibid* 123.

¹⁷ *ibid* 114.

¹⁸ William McCarthy (ed), *Legal Interventions in Industrial Relations: Gains and Losses* (Blackwell 1992) 83.

¹⁹ *ibid* 489; *Groom v Crocker* [1939] 1 KB 194 (CA); *Bailey v Bullock* [1950] 2 All ER 1167 (KB).

²⁰ [1909] AC 488 (HL).

²¹ [1998] AC 20 (HL) [36] (Lord Nicholls).

²² *ibid* [47].

²³ *ibid* [45].

²⁴ Cabrelli (n 1) 184.

²⁵ Douglas Brodie, ‘The Beginning of the End for *Addis v The Gramophone Company*?’ (2009) 38 ILJ 228, 228; *Addis* (n 20) 488.

²⁶ Freedland (n 10) 154–71; *United Bank Ltd v Akhtar* [1989] IRLR 507 (EAT); *White v Reflecting Roadstuds Ltd* [1991] ICR 733 (EAT); *Johnstone v Bloomsbury Health Authority* [1991] 2 WLR 1362 (CA).

²⁷ Brian Dowrick and Meryl Thomas, ‘The Heart of the Matter – Re-thinking Good Faith in Occupational Pension Schemes’ [2007] Conv 495, 509–510; Douglas Brodie, ‘Beyond Exchange: The New Contract of Employment’ (1998) 27 ILJ 79; *Reda v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747.

²⁸ Brodie, ‘Legal Coherence and the Employment Revolution’ (n 9).

²⁹ *Eastwood v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503 [40].

³⁰ *Johnson* (n 2) [43] (Lord Hoffmann).

³¹ *Gogay v Hertfordshire CC* [2000] IRLR 703 (CA).

4 CONTRACTUAL FREEDOM AND THE RIGHT TO FIRE

In *Johnson*, Lord Hoffmann submitted that the implied term could not contradict express dismissal prerogative.³² However, allowing a disciplinary hearing would not contradict this prerogative, it would merely restrict it.³³ Allowing disciplinary hearings would also adhere to the principles of natural justice.³⁴ Additionally, although Lord Hoffmann held that '[i]t would be jurisprudentially possible to imply a term' in *Johnson*,³⁵ the majority refused to do so. This perhaps represents the traditional judicial values of individualism and contractual freedom, inevitably aligned with employer interests.³⁶ It should be noted that, Lord Hoffmann, *obiter dictum*, suggested that Employment Tribunals had wide discretion in awarding damages.³⁷ If his Lordship could have known *Dunnachie v Kingston upon Hull City Council*³⁸ was to limit this discretion, he may well have strived to find a more equitable remedy.

Although contract law upholds the primacy of express terms over implied terms, it is submitted that both principles can effectively co-exist.³⁹ Before *Johnson*, the implied term was developed to complement express terms and to control 'the exercise of an employer's discretionary use of an express term.'⁴⁰ This development is consistent with the contractual duty to cooperate. The notion that:

where ... both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though

there may be no express words to that effect ...⁴¹

is analogous with the implied term. Both obligations require that parties conduct themselves to continue an effective contractual relationship. Additionally, arguing that the implied term does not apply at dismissal because contractual obligations cease is unsatisfactory. Employment contracts often oblige the parties to uphold certain obligations beyond the employment relationship.⁴² Shortly after *Johnson*, the House of Lords (with respect to post-termination victimisation) held that drawing 'an arbitrary line at the precise moment when the contract of employment ends'⁴³ would produce peculiar results.⁴⁴ Such logic could have been applied in *Johnson*. Had the House of Lords not created the 'exclusion zone', subsequent interpretations of *Johnson* would not have led to such outcomes.

5 PROTECTING RIGHTS THROUGH COMMON LAW DEVELOPMENT

Lord Hoffmann argued that further implied term development was impossible because the statutory scheme of unfair dismissal precluded parallel common law development because it would be contrary to the intention of Parliament.⁴⁵ This 'misunderstands the complex evolution of the common law' and its 'interplay with statute' regarding the employment relationship.⁴⁶ Firstly, wrongful dismissal is not mentioned in the unfair dismissal framework and is therefore not overridden.⁴⁷ Had Parliament intended on overriding wrongful dismissal, it would have expressly done so. It is contended, that since Parliament omitted mentioning compensation for 'hurt feelings' (while expressly mentioning 'hurt feelings'

³² *Johnson* (n 2).

³³ Cabrelli (n 1) 165; *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 (EAT).

³⁴ Brodie, 'Legal Coherence and the Employment Revolution' (n 9) 617.

³⁵ Anne Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278, 278.

³⁶ *ibid*.

³⁷ *Johnson* (n 2) [54] (Lord Hoffmann).

³⁸ [2004] UKHL 36, [2005] 1 AC 226.

³⁹ Diane Irving, 'The Role and Development of Mutual Trust and Confidence as an Implied Term of the Contract of Employment' [2008] 13 Cov LJ 22, 25.

⁴⁰ *United Bank Ltd* (n 26); *Johnstone* (n 26) 347 (Leggatt LJ).

⁴¹ *MacKay v Dick* (1881) 6 App Cas 251 (HL) 263.

⁴² *Wessex Dairies Ltd v Smith* [1935] 2 KB 80 (CA); *Nottingham University v Fishel* [2000] ICR 1462 (QB); *Ranson v Customer Systems plc* [2012] EWCA Civ 841, [2012] IRLR 769 [37].

⁴³ *Rhys-Harper v Relaxion Group* [2003] UKHL 33, [2003] ICR 867.

⁴⁴ Hannah White, 'Back to Square One' [2013] ELJ 16.

⁴⁵ *Johnson* (n 2) [54]–[59].

⁴⁶ Bob Hepple and Gillian S Morris, 'The Employment Act 2002 and the Crisis of Individual Employment Rights' (2002) 31 ILJ 245, 314.

⁴⁷ Employment Rights Act 1996, pt X.

in other Acts)⁴⁸ it did not intend such compensation to be available. However, the omission of reference to wrongful dismissal in the unfair dismissal legislation may indicate a legislative-judicial partnership, whereby Parliament deliberately leaves statutes open to ‘creative development’ by judges.⁴⁹ Thus it may be acceptable to take the position that the continued development of wrongful dismissal was to be permitted. It would also be contentious to believe that Parliament intended the common law to ‘be set in stone’⁵⁰ where the very nature of the common law is to ‘be sufficiently flexible to accommodate exceptional cases’⁵¹ and a changing society. This argument is consistent with the development of the remedy of compensation for ‘hurt feelings’ which is ‘now sometimes accepted as a recognisable psychiatric illness’ (and encompassed by the implied term).⁵² The Unfair dismissal framework was introduced merely to enhance employee protections and accommodate the changed employment relationship;⁵³ to *assume* the common law was not meant to develop congruently would be to refute a foundational purpose of the common law altogether.

Additionally, Parliament must ‘have been aware [that] the system it was creating was only capable of dealing effectively and justly with less serious cases’,⁵⁴ thus the House of Lords should have embraced further development of the implied term. Employment contracts will almost inevitably encompass inequality of bargaining power,⁵⁵ with employers dominant in dictating the terms of the contract and its termination processes. Although parties can freely enter into employment contracts, they differ from ‘simple

commercial exchanges in the market place’, by requiring ‘greater mutual dependence and trust’ and thus brining ‘greater opportunity for harm’.⁵⁶ In barring further implied term development, the House of Lords missed an opportunity to better protect employees at dismissal.⁵⁷ ‘For many workers, dismissal is a disaster’, and the impact dismissals have on employers and employees are incomparable.⁵⁸ Procedural restrictions surrounding dismissal would not override employer prerogative. Rather, cases where employers exercise their prerogative in a manner likely to cause harm (economically or otherwise) may decrease because of the potential legal consequences. Examples in Canadian employment law support this contention.⁵⁹ The initial concerns regarding increased litigation stemming from a greater range of circumstances in wrongful dismissal have not been realised.⁶⁰ Providing greater instances of protection does not automatically lead to successful claims, as the onus is still on the claimant to prove harm occurred as a consequence of breach of the implied term, which is an ‘uphill struggle for the claimant’.⁶¹

The majority in *Johnson* held that the limitations of compensation under unfair dismissal reflected Parliamentary intention to limit the scope of remedies for dismissal.⁶² This is troubling because it presumes Parliament intended a significant category of worker to be without dismissal protections. Workers outside the standard employment relationship (‘atypical workers’) have proliferated, while their protections remain unsatisfactory, despite the enactment of some statutory regulations.⁶³ Had *Johnson* allowed a wider

⁴⁸ Chapman (n 4) 18; Sex Discrimination Act 1975, s 66(4).

⁴⁹ Patrick Atiyah, ‘Common Law and Statute Law’ (1985) 48 MLR 1, 2.

⁵⁰ *Johnson* (n 2) [23] (Lord Steyn).

⁵¹ Andrew Phang, ‘The Crumbling Edifice? The Award of Contractual Damages for Mental Distress’ [2003] JBL 341, 463.

⁵² *Johnson* (n 2) [19] (Lord Steyn); *McLoughlin v O’Brien* [1983] 1 AC 410 (HL); *Walker v Northumberland County Council* [1995] ICR 702 (QB).

⁵³ *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22 [111] (Baroness Hale); Hugh Collins, ‘Compensation for Dismissal: In Search of Principle’ (2012) 41 ILJ 208, 225.

⁵⁴ *Johnson* (n 2) [23] (Lord Steyn).

⁵⁵ Douglas Brodie, ‘How Relational is the Employment Contract?’ [2011] 40 ILJ 232, 243.

⁵⁶ Douglas Brodie, ‘Protecting Dignity in the Workplace: The Vitality of Mutual Trust and Confidence’ [2004] 33 ILJ 349, 352.

⁵⁷ Brodie, ‘Legal Coherence and the Employment Revolution’ (n 9) 623.

⁵⁸ *Johnson* (n 2) [72] (Lord Millett).

⁵⁹ *Wallace v United Grain Growers* 152 DLR (4th) 1; *First National Properties Ltd v Highlands (District)* 178 DLR (4th) 505.

⁶⁰ *Watts v Morrow* [1991] 1 WLR 1421 (CA); Brodie, ‘The Beginning of the End for *Addis v The Gramophone Company*?’ (n 25) 231.

⁶¹ Brodie, ‘The Beginning of the End for *Addis v The Gramophone Company*?’ (n 25) 231.

⁶² *Johnson* (n 2) [77]–[79] (Lord Millett), [42]–[47] (Lord Hoffmann); ‘The Employment Act 2002’; Phang (n 51) 254; Employment Rights Act 1996, pt X.

⁶³ Judy Fudge, ‘Labour as a Fictive Commodity’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 124; The Agency Workers Regulations 2010 SI 2010/93.

scope of wrongful dismissal claims, there would be greater protections available to atypical workers and this would appropriately complement modern employment relationships. Fortunately, mutuality of obligation – antecedent to employee status – has become easier to establish, thus extending the protection of unfair dismissal to some atypical workers.⁶⁴

6 JUDICIAL RELUCTANCE: THE CAUSE OR THE SYMPTOM?

Since modern individualisation curtailed collective *laissez-faire*, statutory law has adapted to provide employees with rights that unions would historically have helped provide.⁶⁵ However, current employment law does not adequately protect workers from grievances arising from dismissal. The strength unions previously possessed diminished when the Industrial Relations Act 1971 provided promising individualisation ideology. However, by prohibiting implied term development, *Johnson* rendered the individualised nature of the modern worker vulnerable to potential abuses. Without unions and without sufficient dismissal safeguards, workers are becoming commodities – free to buy and be disposed of by employers according to their capital worth.⁶⁶ *Johnson* remains in force, and Parliament has remained mute on their Lordships' calls for reform.⁶⁷ Instead, Parliament has proposed reforms that have the potential to *lessen* already unsatisfactory dismissal protections.⁶⁸ By increasing Tribunal fees, Parliament has made justice more difficult to access, which is further exacerbated by the finding that fair disciplinary hearings are not a protected civil right within article 6 of the ECHR.⁶⁹ To remedy this, the Labour Party committed to 'scrap ... the Employment Tribunal system and replace it with a

fairer system eliminating barriers to redress.⁷⁰ However, just eliminating tribunals will not solve the inherent issues with dismissal law. Nor would further calls for removal of the statutory cap because the already insufficient £76,574 cap is rarely awarded.⁷¹

More radical changes are needed to alleviate the discrepancies in worker protections and further enhance dismissal regulations. Abandoning the contractual paradigm would serve to eliminate the competition created by imposing implied terms to override express terms. Abandonment would also be consistent with the special characteristics of the employment relationship. A new framework recognising 'personal relationships for the performance of work' could be implemented to accommodate a wider characterisation of worker.⁷² However, if the contractual paradigm is kept, the Natural Law approach of rectificatory justice should be implemented. By 'looking at the moral quality of the parties' past conduct' and the extent of harm done to the injured party, triers of fact would arguably be able to assess the correct amount of damages owed.⁷³ This system would accommodate extremely damaging cases, as well as more common breaches. A new democratically elected employment tribunal could be created, including trade union representatives to ensure workers' rights are adequately protected, and decisions could be considered on a 'just cause' basis by 'equally considering' employer and employee interests.⁷⁴

7 CONCLUSION: A TURNING IN THE LONG ROAD

Johnson was a missed opportunity to develop the implied term. So much is clear from the inadequate

⁶⁴ *McMeechan v Secretary of State for Employment* [1997] IRLR 353 (CA); *Drake v Ipsos Mori UK Ltd* [2012] IRLR 973 (EAT); *Pulse Healthcare v Carewatch Care* [2012] All ER (D) 113 (Aug) (CA).

⁶⁵ Brian Langille, 'Labour Law's Back Pages' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (OUP 2006) 20.

⁶⁶ Karl Marx and Friedrich Engels, *Manifesto of the Communist Party* (Progress 1967) 51.

⁶⁷ *Johnson* (n 2) [77] (Lord Hoffmann).

⁶⁸ Enterprise and Regulatory Reform Act 2013; Growth and Infrastructure Act 2013; Charlotte Stern, 'Tide Turns on Right to a Fair Hearing' [2012] ELJ 14.

⁶⁹ *ibid*; *Hameed v Central Manchester University Hospital NHS Foundation Trust* [2010] EWHC 2009 (QB), [2010] Med LR 412 [89]; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁷⁰ Richard Kenyon, 'Countdown to the General Election' [2014] ELJ 2, 5; Chuka Umunna, 'MP Speech to TUC Congress 2014' (8 September 2014) <<http://www.tuc.org.uk/congress/congress-2014/chuka-umunna-mp-speech-tuc-congress-2014>> accessed 29 November 2014.

⁷¹ Employment Act 2002; Phang (n 51) 246.

⁷² Mark Freedland and Nicola Kountouris, 'The Legal Characterization of Personal Work Relations and the Idea of Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 202.

⁷³ Henry Mather, *Contract Law and Morality* (Greenwood Press 1999) 45;.

⁷⁴ McCarthy (n 18) 95.

dismissal framework currently in force and the Law Lords' assumption that they had no jurisdiction to develop ameliorating doctrines. The law needs reform. The Labour Manifesto for the 2015 election included some promising proposals,⁷⁵ yet a radical overhaul of the employment law system appears to be required if the history of workers' struggles is to be fairly remedied. However, such change is doubtful as

'judges [and Parliament] are the product of a [specific] class and have characteristics of that class. They are not the stuff of which reformers are made, much less radicals.'⁷⁶ The election of a majority Conservative Government is unlikely to have made Parliament more radical in this respect. Therefore, neither the final court of appeal nor Parliament will likely agree that fundamental change is necessary.

⁷⁵ Labour Party, 'The Issues' <<http://www.labour.org.uk>> accessed 29 November 2014.

⁷⁶ John Griffiths, *The Politics of the Judiciary* (5th edn, Fontana Press 1995) 235; Wedderburn, Lewis and Clarke (n 3) 166.

REASONS TO ABANDON THE INSTITUTION OF MARRIAGE

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The persistent focus on coupledness by the law is evident in its feeble attempts to facilitate equality¹ by legitimising three relationships: the heterosexual marriage, same-sex marriage and civil partnerships. It will be argued marriage as a legal institution is patriarchal,² hetero-sexist³ and therefore same-sex marriage wrongfully serves as a mechanism to heterosexualise same-sex relationships. Moreover, it will be suggested abandoning marriage as a legal concept and replacing it with negotiated civil contracts would re-establish marriage as a social status, enabling the law to become reflective of modern families and relationships.⁴ Finally, so long as coupledness remains prominent, the law should promote civil partnerships and open them to heterosexual couples because it remains the only legal relationship status free from the gendered and restrictive connotations of marriage.⁵

Traditionally, legal marriage began as a socio-economic organisation⁶ and it quickly became apparent that it epitomises the worst gendered and

oppressive aspects of heterosexual relationships.⁷ For instance, feminist and LGBT scholars identified that marriage enshrined a wife as the property of her husband⁸ and so created the current marital roles of the subservient wife⁹ and dominant husband.¹⁰ Additionally, the sluggish protection of women against physical abuse,¹¹ and marital rape¹² demonstrates the view that a wife is akin to a parasite and so barely worthy of legal protection.¹³ More recently, the legacy of housewifery,¹⁴ and male breadwinning¹⁵ continues inequitably to feed the interests of men.¹⁶ This is because domestic work remains socially inferior to paid work,¹⁷ and despite increasing numbers of women entering the paid workforce, the remnants of the oppressive traditional marriage ensures women are not competing at the same occupational level as their male counterparts, earning 20.2% less in 2013.¹⁸ Consequently, together with parenting, coupledness stereotypes the woman as the most desirable caregiver in a marriage¹⁹ because in requiring spouses to work

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¹ Julie Bindel, 'Gay Marriage Doesn't Equal Equality. Here are 5 Things Still to Fight For' *The Guardian* (London, 11 December 2014) <<http://www.theguardian.com/commentisfree/2014/dec/11/gay-marriage-equality-tolerance-discrimination>> accessed 26 February 2015.

² Carole Pateman, *The Disorder of Women* (Polity Press 1995) 51.

³ Carol Smart, "'Can I Be Bridesmaid?'" Combining the Personal and Political in Same-Sex Weddings' (2008) 11 *Sexualities* 761.

⁴ Anne Barlow, Simon Duncan, Grace James and Alison Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart 2005) 26.

⁵ *ibid.*

⁶ Stephen Parker, 'The Marriage Act 1752: A Case Study in Family Law-Making' (1987) 1 *IJLPF* 133, 135.

⁷ Jeffry Weeks, Brian Heaphy and Catherine Donovan, *Same-Sex Intimacies Families of Choice and Other Life Experiments* (Routledge 2001) 193.

⁸ Parker (n 6) 135.

⁹ Rosemary Auchmuty, 'Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women' (2012) 20 *Fem LS* 71, 74.

¹⁰ Fran Olsen, 'The Politics of Family Law' in Henry J Krause (ed), *Family Law, Volume One* (Dartmouth 1992) 2.

¹¹ Pat Thane, *Happy Families? History and Family Policy* (British Academy 2010) 45.

¹² *R v R* [1992] 1 AC 599 (HL) 623 (Lord Keith).

¹³ Maria Bevacqua, 'Feminist Theory and the Question of Lesbian and Gay Marriage' (2004) 14 *Feminism & Psychology* 36, 36.

¹⁴ Susan Okin Miller, *Justice Gender and the Family* (Basic Books 1989) 149–151.

¹⁵ Andrew Bainham, 'Family Law in a Pluralistic Society' (1995) 22 *J Law and Soc'y* 234, 239.

¹⁶ Sarah Dickens, Martin Mitchell and William O'Connor, 'The Impact of the Civil Partnership Act on the Lives of Same-Sex Couples' (2009) 17 *Benefits* 237, 239.

¹⁷ Miller (n 14) 141.

¹⁸ Department for Culture Media & Sport, 'Secondary Analysis of the Gender Pay Gap: Changes in the Gender Pay Gap Over Time' (March 2014).

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/295833/Analysis_of_the_Gender_Pay_Gap.pdf> accessed 27 February 2015, 10.

¹⁹ *Townson v Mahon* [1984] FLR 690 (CA) 695 (Stephen-Brown LJ).

differentially to complement one another,²⁰ the typically female lower earner is forced to sacrifice her paid career to parent,²¹ thereby banishing her from the public sphere.²² Therefore, marriage makes a wife more susceptible to patriarchal dominance both in and outside her home²³ because it unjustly privatises care by deflecting state responsibility onto the woman.²⁴

Furthermore, until 2013 the law restrictively²⁵ defined marriage as a 'union of one man to one woman to the exclusion of all others.'²⁶ Religious groups contend this is because each of us are natural products of one man and one woman,²⁷ so the pro-creational relationship should be preserved and privileged above all others.²⁸ However, as Sullivan convincingly argues, restricting miraculous conception to infertile heterosexual married couples places legal limits on the power of God.²⁹ Aside from religion, others have maintained that marriage is the natural and therefore most stable relationship for raising children.³⁰ Yet, *W v W (Physical Inter-sex)* established that procreation is not an essential characteristic of a marriage, implying parenting is not intrinsically attributable to it.³¹ In addition, law has long accepted homosexuality³² as

natural on the spectrum of sexuality³³ and progressive reproductive technology, creating life out of the DNA of three people³⁴ and a genetically male wife giving birth³⁵ collectively demonstrate it is naïve to restrict marriage to heterosexuals on the basis of procreation and raising children.³⁶ Therefore, to argue marriage should preserve the 'natural' relationship being between a man and a woman is both irresponsible and untrue.

In addition, requiring consummation in heterosexual marriage as outlined in *W v W (Physical Inter-sex)*³⁷ and *Corbett v Corbett*,³⁸ unjustly projects a hierarchy of relationships where only one is worthy of having legitimate sex.³⁹ The very nature of consummation is phallocentric⁴⁰ because it requires 'ordinary and complete'⁴¹ penetrative sex.⁴² Likewise, in prohibiting adultery the law assumes marriage is an on-going monogamous sexual relationship⁴³ and that consummation finalises this.⁴⁴ First and foremost, this discriminatorily prevents asexual heterosexual spouses from having a valid marriage despite vowing to love and commit to one another.⁴⁵ Furthermore, by

²⁰ Drucilla Cornell, 'The Public Supports of Love' in Mary L Shandley (ed), *Just Marriage* (OUP 2004) 83.

²¹ Miller (n 14) 16.

²² Tracy E Higgins, 'Symposium of Unfinished Feminist Business: Reviving the Public/Private Distinction in Feminist Theorising' (2000) 75 Chi-Kent L Rev 847, 849.

²³ Olsen (n 10) 2.

²⁴ Meghan Murphy, 'Podcast: Can Marriage Ever be Feminist? An Interview with Nicola Barker' (Canada, 3 September 2012).

²⁵ Elizabeth R Cole and others, 'Against Nature: How Arguments About the Naturalness of Marriage Privilege Heterosexuality' (2012) 68 Journal of Social Issues 46, 49.

²⁶ *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 (P) 133.

²⁷ The Editors, 'Marriage's True Ends' in Andrew Sullivan (ed), *Same-Sex Marriage Pro & Con A Reader* (Vintage 2004) 56.

²⁸ *Wilkinson v Kitzinger (Same-sex marriage)* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295 [68] (Sir Mark Potter P).

²⁹ Andrew Sullivan, 'What You Do' in Andrew Sullivan (ed), *Same-Sex Marriage Pro & Con A Reader* (Vintage 2004) 84.

³⁰ Centre For Social Justice, 'Supporting Families, Strengthening Marriage: a Plan for a Meaningful Transferable Tax Allowance' (2013) <<http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/ttareport.pdf>> accessed 26 February 2015, 8.

³¹ [2001] Fam 111 (Fam) 142 (Charles J).

³² *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL).

³³ Bishop John Shelby, 'Blessing Gay and Lesbian Commitments' in Andrew Sullivan (ed), *Same-Sex Marriage Pro & Con A Reader* (Vintage 2004) 67.

³⁴ James Gallagher, 'UK Approves Three-Person Babies' *BBC News* (London, 24 February 2015)

<<http://www.bbc.co.uk/news/health-31594856>> accessed 27 February 2015.

³⁵ Czarina Ong, 'Hayley Haynes, Woman Who Was Genetically Born a Man Gives Birth to Healthy Twins' *Christian Today* (London, 4 February 2015).

<<http://www.christiantoday.com/article/hayley.haynes.woman.who.was.genetically.born.a.man.gives.birth.to.healthy.twins/47202.htm>> accessed 27 February 2015.

³⁶ Pateman (n 2) 213.

³⁷ (n 31) 143.

³⁸ *Corbett v Corbett (otherwise Ashley) (No 1)* [1971] P 83 (P) 105 (Ormrod J).

³⁹ Jonathan Herring, *Family Law* (Pearson 2013) 6.

⁴⁰ Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (Hart 2012) 49.

⁴¹ *D-E v A-G* (1845) 1 Rob Ecc 279, 295.

⁴² *Dennis v Dennis* [1955] P 153 (CA) 160 (Singleton LJ).

⁴³ Nicola Barker, *Not The Marrying Kind: A Feminist Critique of Marriage* (Palgrave Macmillan 2012) 25.

⁴⁴ Heather Brook, 'Just Married? Adversarial Divorce and the Conjugal Body Politic' (2004) 14 Feminism & Psychology 81, 85.

⁴⁵ Diduck and Kaganas (n 40) 37.

insulating marriage from non-heterosexual sex⁴⁶ in refusing to extend consummation for the purposes of the Civil Partnership Act 2004⁴⁷ and the Marriage (Same-Sex Couples) Act 2013⁴⁸ the law preserves the invisibility of sexual activity beyond the conjugal act⁴⁹ and underpins non-heterosexual penetrative and non-penetrative sex as a social taboo. However, in omitting the consummation requirement from the same-sex marriage and civil partnership legislation, the law has sexually liberated formal same-sex couples⁵⁰ rather than stifling them with old-fashioned consummation requirements.⁵¹ Thus, non-consummation and the absence of adultery conveys same-sex relationships as both conventional and creative.⁵² It is therefore submitted the law should remove the sexual tie from heterosexual married couples, or at the very least allow heterosexual couples to enter civil partnerships, where consummation is not required, so people are free to choose the right institution for their individual relationship.

Up until 1973,⁵³ the law did not require the parties of marriage to be of different sexes,⁵⁴ although as Tatchell outlines, attempts of same-sex marriages failed because marriage was strongly presumed to be between a man and a woman.⁵⁵ Nevertheless, the eventual clarification of the gender requirement shows a concern in law to restrict coupledness to two genders to maintain social order.⁵⁶ Thankfully, the law has

finally accepted that gender is fixed at birth.⁵⁷ By no longer requiring transgender women and men who transition during marriage to divorce,⁵⁸ it is suggested the marital relationship is no longer the lynchpin of gender, because in valuing substance over matter, the law consequently diminishes the gender requirement.⁵⁹ Nonetheless, the spousal veto – which gives the spouse a veto over the continuation of the parties' marriage or civil partnership following gender-reassignment surgery⁶⁰ – reinforces that entering a formal relationship sinisterly compromises gender freedom, as was already inferred by Lord Nicholls in *Bellinger v Bellinger*.⁶¹ The veto reiterates the oppressive nature of the gender binaries imposed by law because it absurdly confers one spouse control over the relationship status of the couple based on their spouse wishing to change their gender, yet does not subject significant anatomical changes like plastic surgery to a spousal veto.⁶² Thus, such provisions underline the inherent danger of coupledness promoting unequal power distributions in marriages, especially as in a recent survey only 41.46% of trans individuals have the initial support of their spouse.⁶³

Subsequently, the introduction of same-sex marriage specified marriage as the ideal relationship,⁶⁴ and, although disputed by Sir Mark Potter,⁶⁵ this is reinforced by the view that civil partnerships are routinely viewed as secondary to marriage⁶⁶ and not as

⁴⁶ Andrew Sharpe, 'English Transgender Law Reform and the Spectre of Corbett' (2002) 10 Fem LS 65, 71.

⁴⁷ HL Deb 17 November 2004, vol 666, col 1479.

⁴⁸ HC Deb 5 February 2013, vol 558, col 147.

⁴⁹ Nicola Barker, 'Sex and the Civil Partnership Act: The Future of (non) Conjugalities?' (2006) 14 Fem LS 241, 251.

⁵⁰ Bainham (n 15) 237.

⁵¹ Frank Brown, 'Why Marry?' in Andrew Sullivan (ed), *Same-Sex Marriage Pro & Con A Reader* (Vintage 2004) 133.

⁵² Brian Heaphy, Carol Smart and Anna Einarsson, *Same-Sex Marriages: New Generations, New Relationships* (Palgrave Macmillan 2013) 40.

⁵³ Marriage Act 1949, sch 1.

⁵⁴ Matrimonial Causes Act 1973, ss 11–12.

⁵⁵ BBC Question Time interview with Peter Tatchell, Gay Rights Activist, Theresa Villiers MP, Vernon Coaker MP, John O'Dowd, Minister for Education in the Stormont Executive, Ian Paisley Jr, MP and Maajid Nawaz, Political Activist (Belfast, 23 May 2013).

⁵⁶ Celia Kitzinger and Sue Wilkinson, 'The Rebranding of Marriage: Why We Got Married Instead of Registering a Civil Partnership' (2004) 14 Feminism & Psychology 127, 132.

⁵⁷ *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 [83] (Lord Rodger).

⁵⁸ *Corbett v Corbett* (n 38) 103.

⁵⁹ Miller (n 14) 170.

⁶⁰ Marriage (Same-Sex Couples) Act 2013, sch 5, pt 1, s 2(6B).

⁶¹ (n 57) [28] (Lord Nicholls).

⁶² Kat Gupta, 'Why the Marriage (Same-Sex) Act 2013 Does Not Bring Marriage Equality: the Case of Trans People' *Inherently Human* (31 July 2013) <<https://inherentlyhuman.wordpress.com/2013/07/31/why-the-marriagesame-sex-act-2013-does-not-bring-marriage-equality-the-case-of-trans-people/>> accessed 26 February 2015.

⁶³ Zoë Kirk-Robinson, 'Spouse Reactions to Transsexuality' *T-Vox* (2013) <http://www.t-vox.org/docs/Spouse_Reactions_to_Transsexuality.pdf> accessed 28 February 2015, 6.

⁶⁴ Barlow and others (n 4) 26.

⁶⁵ *Wilkinson v Kitzinger* (n 28) [50].

⁶⁶ Kitzinger and Wilkinson (n 56) 136.

a legitimate alternative to it, despite what the judiciary⁶⁷ and Government contend.⁶⁸ Thus the creation of two similar, yet legally distinct, institutions for same-sex couples instead of extending traditional marriage demonstrates a bizarre attempt to heterosexualise same-sex couples⁶⁹ by simultaneously regulating them against a heterosexual backdrop and separating them based on their sexual orientation.⁷⁰

Furthermore, assimilating reasons for the relational aim of marriage,⁷¹ it also irresponsibly assumes the meaning of marriage is universally agreed⁷² and the same to all.⁷³ Such assumptions and the focus on the 'special'⁷⁴ status of marriage is arguably a clever ploy to quieten LGBT and feminist activists⁷⁵ tackling issues of suppression, like the residue of Local Government Act 1988, s 28. Section 28 once formally prohibited the 'promotion' of homosexuality by local authorities and schools and thus prevented them from educating future generations that homosexual relationships could provide a stable and credible family unit. Although section 28 had been repealed,⁷⁶ there remains a 'residue' left behind meaning a deeply ingrained legal distaste for and attitude of opprobrium

towards of non-heterosexual people and relationships.⁷⁷

There is also the continued exclusion of minorities by the law. For example, polyamorous relationships have been opened up to ridicule⁷⁸ by being pushed further from the norm and therefore left unprotected from harmful misconceptions of polyamory⁷⁹ as an 'unmitigated disaster'.⁸⁰ Nevertheless, affording same-sex couples the status of marriage indicates a move from tolerance to acceptance.⁸¹ So if law does in fact send messages,⁸² it appears the move is a positive social step in tackling homophobia by promoting equality.⁸³ However, it seems preserving the traditional concept of marriage has been used as a weapon against the right to substantive equality and equal access to the same collective institution⁸⁴ and has led to further exclusions and distractions from other LGBT and feminist issues.⁸⁵

Additionally the creation of civil heterosexual marriage⁸⁶ and the 'quadruple lock' (allowing religious bodies who do not wish to conduct same-sex ceremonies an exemption from anti-discrimination laws) already indicate an eroding relationship between legal marriage and religion.⁸⁷ It is therefore arguable

⁶⁷ *R and F v United Kingdom* (App no 35748/05); *Parry v United Kingdom* (App no 42971/05) ECHR 35748/05, 13.

⁶⁸ Department for Culture Media & Sport, 'Civil Partnership Review (England and Wales): a Consultation' (January 2014). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274449/140122_CP_con_doc_pdf__docx.pdf> accessed 1 March 2015.

⁶⁹ Peter Tatchell, 'Civil Partnerships are Divorced From Reality' *The Guardian* (London, 19 December 2005) <<http://www.theguardian.com/world/2005/dec/19/gayrights.planningyourwedding>> accessed 17 February 2015.

⁷⁰ Dickens, Mitchell and O'Connor (n 16).

⁷¹ Michael Hand, 'Framing Classroom Discussion of Same-Sex Marriage' (2013) 63 *Educational Theory* 497, 501.

⁷² Miller (n 14) 172.

⁷³ Auchmuty (n 9) 105.

⁷⁴ HC Deb 5 February 2013, vol 558, col 146.

⁷⁵ Julie Bindel, 'Gay Marriage is Not About Equality But a Way of Keeping Women Quiet' *The Guardian* (London, 16 June 2014) <<http://www.theguardian.com/lifeandstyle/2014/jun/16/gay-marriage-equality-women-lesbian-couples-conservative-institution>> accessed 26 February 2015.

⁷⁶ Local Government Act 2003, sch 8(1) para 1.

⁷⁷ E.g. Audrey Gillan, 'Section 28 gone ... but not forgotten' *The Guardian* (London, 17 November 2003) <<http://www.theguardian.com/politics/2003/nov/17/uk.gayrights>> accessed 10 February 2016.

⁷⁸ *ibid.*

⁷⁹ Angie Becker Stevens, 'Polyamorous Relationships Are About More Than Just Couples' *Huffington Post* (Michigan, 3 December 2013) <http://www.huffingtonpost.com/angi-becker-stevens/polyamorous-relationships_b_4370026.html> accessed 28 February 2015.

⁸⁰ Eli Lehrer, 'Gay Marriage: Good; Polyamory: Bad' *Huffington Post* (Virginia, 28 October 2013) <http://www.huffingtonpost.com/eli-lehrer/gay-marriage-good-polyamo_b_4165423.html> accessed 28 February 2015.

⁸¹ Dickens, Mitchell and O'Connor, (n 16) 242.

⁸² Judith Masson, 'Caring for our Generations' in Gillian Douglas and Nigel Lowe (eds), *The Continuing Evolution of Family Law* (Jordan 2009) 241.

⁸³ Kitzinger and Wilkinson (n 56) 134.

⁸⁴ Weeks, Heaphy and Donovan (n 7) 188.

⁸⁵ Andrew KT Yip, 'Same-Sex Marriage: Contrasting Perspective Among Lesbian, Gay and Bisexual Christians' (2004) 14 *Feminism & Psychology* 173, 179.

⁸⁶ Marriage Act 1836.

⁸⁷ Marriage (Same-Sex Couples) Act 2013, s 2.

marriage should be abolished as a legal institution, but retained as a social and religious title.⁸⁸ The argument that legal marriage increases relationship stability⁸⁹ has been disproved by research revealing that pre-disposed characteristics of partners have more effect on the course of a relationship⁹⁰ than formal recognition does.⁹¹ Further it is increasingly clear that marriage today is no longer considered the final step of a relationship.⁹² At most it is a catalyst of a life-long commitment to another⁹³ and at least it is a personal choice⁹⁴ to confirm a pre-existing relationship.⁹⁵ In addition, the wedding, although framed by heterosexual connotations based in Disney fairytales,⁹⁶ is often stated as the focal point of the marriage in both civil and religious marriages.⁹⁷ So, it seems removing marriage as a legal institution would arguably make little substantial difference to many relationships. Consequently, it would pave the way for other types of emotional relationships to reap the benefits currently restricted to spouses and civil partners without being prohibited from them or having to succumb to matrimony to achieve them. It would have avoided the negative result in *Burden v United Kingdom* where two sisters attempted to claim the spousal allowance for inheritance tax.⁹⁸ Therefore as Lord Keith recognised

the law should promote a 'partnership of equals.'⁹⁹ But, it seems relying on the marital contract of gendered oppression determined by the patriarchy is insufficient in attaining equality as some largely similar but prohibited relationships suffer as is evident in *Burden*.¹⁰⁰ Hence, the law should promote equally negotiated contractual¹⁰¹ civil partnerships¹⁰² to allow couples to alleviate the socio-legal pressures of marriage¹⁰³ and to recognise the increasing diversity in familial forms in the UK today.¹⁰⁴

However, abolishing marriage as a legal concept poses substantial practical legal problems because of its global heterosexual legacy. Indeed, marriage as the 'bastion of heterosexual privilege'¹⁰⁵ is materialised in cross-border family rights to move and reside in the European Union. For instance, article 18 of the Citizens' Rights Directive provides heterosexual spouses with the right to move and reside with their husband or wife without obstacles.¹⁰⁶ However, article 18 also provides Member States with discretion as to the recognition of same-sex marriages and civil partnerships.¹⁰⁷ Regardless, once the European Union fully accedes to the European Convention on Human Rights¹⁰⁸ permitting such a distinction would

⁸⁸ Carol Smart, *The Ties that Bind: Law, Marriage, and the Reproduction of Patriarchal Relations* (Routledge & Keegan Paul 1984) 146.

⁸⁹ Centre for Social Justice, 'Why is the Government Anti-Marriage? Family Policy Derived From Strong Evidence Would Lead to Policies Which Supported Marriage' (2009) <http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/MarriagePaperFINAL_ii_.pdf> accessed 26 February 2015, 6.

⁹⁰ Alissa Goodman and Ellen Greaves, 'Cohabitation, Marriage and Relationship Stability' (Institute for Fiscal Studies Briefing Note BN107, 2010) 5.

⁹¹ Brain Heaphy, Carol Smart and Anna Einarsdottir, *Same-Sex Marriages: New Generations, New Relationships* (Palgrave Macmillan 2013) 149.

⁹² *Karner v Austria* (Application No 40016/98) [2003] 2 FLR 623 [41].

⁹³ John Eekelaar and Mavis Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 J Law and Soc'y 510, 520–521.

⁹⁴ Heaphy, Smart and Einarsdottir (n 52) 151.

⁹⁵ Kitzinger and Wilkinson (n 56) 140.

⁹⁶ Cole and others (n 25) 49.

⁹⁷ Smart (n 3) 774.

⁹⁸ (App No 13378/05) [2007] STC 252.

⁹⁹ *R v R* (n 12) 599, 616.

¹⁰⁰ Pateman (n 2) 40.

¹⁰¹ Lenore J Weitzman, 'To Love, Honor, and Obey? Traditional Legal Marriage and Alternative Family Forms' (1975) 24 Family Coordinator 531, 547.

¹⁰² Eleanor Wilkinson, 'Learning to Love Again: "Broken Families", Citizenship and the State Promotion of Coupledom' (2013) 49 Geoforum 206, 208.

¹⁰³ Charles Keidan and Rebecca Steinfield, 'Civil Partnerships Should be for Everyone, No Exceptions' *The Guardian* (London, 3 December 2014) <<http://www.theguardian.com/commentisfree/2014/dec/03/civil-partnerships-for-everyone-heterosexual-couples>> accessed 26 February 2015.

¹⁰⁴ John Eekelaar, 'Family Law and Social Policy' (Weidenfeld and Nicolson 1978) 156.

¹⁰⁵ Rosemary Auchmuty, 'What's So Special About Marriage? The Impact of *Wilkinson v Kitzinger*' [2008] CLFQ 474, 483.

¹⁰⁶ Directive 2004/38 on the right of citizens of the Union of their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

¹⁰⁷ *ibid.*

¹⁰⁸ Treaty of Lisbon amending the Treaty on European Union [2010] OJ C306/1, art 6.

potentially breach the article 8 ECHR right to private and family life¹⁰⁹ because the ‘landmark’¹¹⁰ case of *Schalk and Kopf v Austria* demonstrates a growing promotion of same-sex rights in Europe.¹¹¹ Nevertheless, in clinging to the traditional heterosexual family, the European Union remains silent on LGBT rights and so provides no incentive to Member States to recognise those emotional relationships other than marriage, despite this having critical implications for those outside of heterosexual marriage.¹¹² Therefore, it is submitted abolishing marriage in England and Wales may force the European Union to ensure Member States recognise legal relationships outside of marriage in order to continue its hard work in combatting obstacles that deter movement.¹¹³ Therefore, whilst the self-definition of relationships is not currently legal,¹¹⁴ utilising contract law to accord rights to those who require them to avoid the ‘legal straightjacket of wedlock’¹¹⁵ would legally endorse the idea that love knows no gendered, monogamous bounds.¹¹⁶

In conclusion, coupledness has long served as an oppressive legal mechanism to regulate the intimate lives of heterosexual couples and to exclude non-

heterosexual and gender minorities. Same-sex marriage is a positive step towards recognising and liberating the diversity of relations in the law and continuing to lower the importance of the sexual, procreational relationship to attain legal recognition would further promote equality across all legal relationships. However, it appears the law remains inherently gendered and epitomises heterosexual marriage as the norm and so continues to polarise minorities like those in polyamorous relationships and asexual relationships. It is therefore submitted the law should recognise more individuals and diversity by allowing people to enter freely negotiated contracts, as this approach would reflect the true relationship between the parties, whilst allowing those who still value marriage as a social and religious institution to identify as married if they so wish. Since coupledness would be inherently difficult to abolish in practice, and as it stands today it is oppressive to women and non-heterosexual, non-monogamous relationships, perhaps it should not be abolished in its entirety because through freely negotiated contracts it could become the beacon of substantive equality UK law is searching for.

¹⁰⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 8; Human Rights Act 1998.

¹¹⁰ Council of the European Union, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2nd edn, Council of Europe Publishing 2011) 83.

¹¹¹ (App No 3014/04) (2011) 29 BHRC 396 [55].

¹¹² Clare McGlynn, ‘Families and European Union Law’ in Rebecca Probert (ed), *Family Life and the Law Under One Roof* (Ashgate 2007) 252.

¹¹³ Case C-370/90 *R v Immigration Appeal Tribunal and Singh, ex p Secretary of State for the Home Department* [1992] ECR I-4265 [23].

¹¹⁴ *Bellinger* (n 57) [28] (Lord Nicholls).

¹¹⁵ Tatchell (n 69).

¹¹⁶ Cornell (n 20) 85.

OUR 'AFTER SOVEREIGNTY' ARRANGEMENT

Matthew Paterson*

1 INTRODUCTION

Legal interpretation takes place in a field of pain and death.¹

The idea of legal orders being founded on 'disorder' and 'violence' has 'entered the *lingua franca* of our current political discussions'.² It is worrying given the number of regimes that have risen and fallen by this notion; National Socialism and the Khmer Rouge to name a few. Nonetheless, standing at the end of a rich timeline of conceptions of sovereignty, it seems impossible to completely wash away the 'practical and empirical resonance' of the decisionist stream of thought.³ It reverberates in modernity like a palimpsest slate that cannot be scraped clean. As such, this article will examine the decisionism of Schmitt to conclude that law can be an alibi for power, but in a world that is 'after' the traditional conceptions of sovereignty, liberalism operates as a façade and check to the fading prominence of decisionism. This will be evidenced by exploring decisionism's interplay with the rule of law. It will then consider the extent to which decisionism maps onto human nature and will identify the Government Communications Headquarters (GCHQ) spying as a puncture into reality revealing the palimpsest nature of United Kingdom (UK) power relations.

2 THE TRADITIONAL DICHOTOMY

The relationship between power and law is usually expressed through the 'convenient label' of

sovereignty.⁴ A reductionist definition would find sovereignty to be 'a declaration of political responsibility for governing, defending and promoting the welfare of a human community'.⁵ However, it appears that there are few concepts 'more controversial than ... sovereignty' because it is embedded in a constantly changing historical framework.

However, we can bring sovereignty into focus by looking to the schools of thought upon which it rests. Liberalism holds that power derives legitimacy from the rule of law. It ensures the exercise of power 'not to be Arbitrary and at Pleasure' whilst offering a legitimising basis for the sovereign to maintain authority.⁶ This may come in the guise of divine law, natural law or the popularly accepted notion of consent, i.e. a social contract.⁷ By this definition, we can identify liberalism as normative in outlook and as seeing power residing 'in the legal system itself', 'not in any personal authority'.⁸ However, liberalism and its founding principles of individual equality and freedom, fail to appreciate that all 'political actions' are a distinction 'between friends and enemies'.⁹

Instead, decisionism holds that there is no space for the rule of law because law is the cover for individual authority.¹⁰ Power itself rules and law serves that purpose.¹¹ 'Laws are ... commands' backed by sanctions and 'empty vessel[s] devoid of any

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¹ Robert M Cover, 'Violence and the Word' (1986) 95 Yale LJ 1601, 1601.

² Charles Barbour, 'Exception and Event: Schmitt, Arendt, and Badiou' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 84.

³ James Martel, 'Walter Benjamin, Sovereignty and the Eschatology of Power' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 180.

⁴ Edward Hallett Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Study of International Relations* (Macmillan 1964) 212.

⁵ Michael Ross Fowler and Julie Marie Bunc, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press 1995) 12.

⁶ John Locke, *The Two Treatises of Civil Government* (first published 1764, Thomas Hollis ed, Millar 1764) ix, 137.

⁷ Charles Barbour and George Pavlich, *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 6.

⁸ Renato Cristi, 'Carl Schmitt on Sovereignty and Constituent Power' (1997) 10 CJLJ 189, 190 (emphasis added).

⁹ Carl Schmitt, *The Concept of the Political* (first published 1927, George Schwab tr, University of Chicago Press 1996) 26.

¹⁰ Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (CUP 2006) 7.

¹¹ Joseph Raz, 'The Rule of Law and its Virtue' in Aileen Kavanagh and John Oberdiek (eds), *Arguing About Law* (Routledge 2009) 189.

inherent ... binding content'.¹² To the decisionist, like Schmitt or Thrasymachus, sovereignty comes down to 'who decides ... when there is no clear provision of competence'.¹³ Sovereignty as a 'sheer force' seems rather brash to our Western democratic tendencies.¹⁴ However, it is more digestible if we consider that the historical *Leviathan* – the embodiment of decisionist authority – may have now vanished leaving behind 'a well-organised executive, army, police ... juridical apparatuses and ... professionally trained bureaucracy',¹⁵ which remain faintly decisionist in orientation. A 'useful lens' to understand this development of sovereignty is the metaphor of palimpsest.¹⁶ This occurs when text on a parchment is scraped clean so it can be written over, but traces of the original text remain visible.¹⁷ Accordingly, decisionism was set down first, but it has been overwritten with liberalism. Thus, decisionism occupies a fading existence, historically etched into the notion of power, but, like the first indelible words on an ancient parchment, decisionism, 'never fully repressed, always finds channels for its manifestation'.¹⁸

Outside the 'covenant or conquest'¹⁹ dichotomy stands Foucault's idea of the position of power operating in a circular manner 'as one historically contingent expression of much more complex networks of power relations'.²⁰ Foucault provides a fruitful exposition of power and this article seeks to agree with him on the matter that we are 'after' sovereignty, but in a manner that stays within the traditional dichotomy.

3 CONCEPTUAL BLURRING 'AFTER SOVEREIGNTY'

Currently, we are living in a time 'after sovereignty' where we have reached beyond a crystalline conception of how power and law interrelate.²¹ For example, in our increasingly secular world, divinity based sovereignty like Dante's *De Monarchia*, proves alien.²²

Similarly, Hobbes' *Leviathan*, whilst potent during the 17th century, no longer seems to fit our 'blurry' world.²³ Foucault suggests that 'medieval sovereignty [has] become increasingly subservient to other forms of power like 'biopower' or 'discipline'.²⁴ However, it is proposed that modern society has not succumbed to other forms of power, but the decisionism-liberalism dichotomy has been blurred. In our politico-legal order where 'durable ... norms' are 'frequently compromised',²⁵ we have reached a state where an understanding of sovereignty, requires a more nuanced approach than in any preceding century.²⁶

We can identify two reasons for our era taking on a 'blurry' 'after sovereignty' appearance. Firstly, modern sovereignty is based on a fiction that 'all legal authority is organised into ... autonomous ... territorial packages called nation-states'.²⁷ The fictitious nature of this traditional Westphalian 'ordering principle' has been accentuated with the UK's entry into the European Union and the effects of

¹² Valerie Kerruish, *Jurisprudence as Ideology* (Routledge 1991) 35; Tamanaha (n 10).

¹³ Cristi (n 8) 190–191 (emphasis added).

¹⁴ Barbour and Pavlich (n 7) 6.

¹⁵ Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (first published 1938, George Schwab tr, University of Chicago Press 1996) 65.

¹⁶ Rolf Schwarz & Oliver Jütersonke, 'Divisible Sovereignty and the Reconstruction of Iraq' (2005) 26 TWQ 649, 661.

¹⁷ Christine Chinkin and Freya Baetens, *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 7.

¹⁸ Cristi (n 8) 194; Chinkin (n 17) 7.

¹⁹ George Pavlich, 'On the Subject of Sovereigns' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 26–27.

²⁰ Barbour and Pavlich (n 7) 6.

²¹ *ibid* 3–6.

²² Dante Alighieri, *The De Monarchia of Dante Alighieri* (first published 1559, Houghton 1904).

²³ Thomas Hobbes, *Leviathan, Parts I and II* (Aloysius Patrick Martinich ed, Broadview 2005); Pavlich (n 19) 25–26.

²⁴ Pavlich (n 19) 26–27.

²⁵ Stephen Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press 1999) ix.

²⁶ Shaun McVeigh and Sundhya Pahuja, 'Rival Jurisdictions: The Promise and Loss of Sovereignty' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 97.

²⁷ Richard Joyce, 'Sovereignty after Sovereignty' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 38.

globalisation.²⁸ Secondly, no 'unified' theory has emerged because 'sovereignty ... is not monolithic'.²⁹ It has an exceptionally high fidelity to 'flux'.³⁰ On this note, Martel goes as far as suggesting that Hobbesian sovereignty will change by eventually becoming 'superfluous'.³¹ It will have created order and given 'people their own space of self-creation' thus being able to 'fade away'.³² Being 'after sovereignty' means we are amidst Martel's recasting process, though far from its end state. Therefore, sovereignty should be approached as 'a multitude of positions ... without finality'.³³ The very notion of palimpsest proposed in this article is as much a process as it is a paradigm. Consequently, sovereignty's true nature will always 'escape us'³⁴ but for now, 'politics without sovereignty' is a 'dream'³⁵ and so we must demonstrate this palimpsest's operation.

4 THE RULE OF LAW

Schmitt proposed that behind norms like the rule of law, there always exists the 'concrete ... will of the sovereign'.³⁶ Accordingly, the rule of law endures but it is never independent of the 'voluntarist foundations that ground' it.³⁷ For Schmitt, the interrelation of power and law was not strictly authority stemming from one deific figure, but that a 'sovereign is recast as ... [a] purely secular ... and democratic ... will'.³⁸ Bringing this forward to our 'after sovereignty' age, it seems the rule of law acts as a liberalist veiling of the decisionist undergirding of power. The operation of

this veil serves to cover decisionism but simultaneously to soften its authority.

Holmes reminds us that 'a word is the skin of a living thought'.³⁹ This strikes to the heart of the issue with the rule of law; it lacks precision and can be twisted as a means to enable partisan ends. By virtue of linguistic deficiencies, the inability to articulate its meaning undercuts the essence of what the rule of law seeks to do. Despite this inherent problem, liberalism argues that the rule of law, without qualification, governs our lives.⁴⁰ However, the 'law-making process ... disavows any allegiance to ... particular conception[s] of justice'.⁴¹ This lack of agreement on the law's founding principles allows space for decisionism to manifest itself.⁴²

Nonetheless, liberalism exhibits an admirable 'capacity for humanity'.⁴³ There is no doubt Thompson was onto something when he found that '[t]he rule of law ... and the defence ... from power's all-intrusive claims, seems ... to be an unqualified human good'.⁴⁴ However, the liberal camp has 'abandon[ed] the firm foundation of reality'.⁴⁵ We cannot simply 'exorcise' the power of decisionist *force* at will.⁴⁶ The liberal position is caught in a hall of mirrors between linguistic deficiencies and a disregard for reality.

Nevertheless, in its 'core of plain meaning', the rule of law aspires to possess qualities that protect

²⁸ Schwarz (n 16) 649; Saskia Sassen, *Losing Control?: Sovereignty in an Age of Globalization* (Columbia University Press 1996) 4.

²⁹ Martel (n 3) 181.

³⁰ David Stern, *Wittgenstein on Mind and Language* (OUP 1995) 161.

³¹ James Martel, *Love is a Sweet Chain: Desire, Autonomy, and Friendship in Liberal Political Theory* (Routledge 2001) 206–207.

³² *ibid.*

³³ Barbour and Pavlich (n 7) 10.

³⁴ Stephen Humphreys, 'Polymorphous Sovereignty' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 147.

³⁵ Peter Fitzpatrick, 'Leveraging Leviathan' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 12.

³⁶ Renato Cristi, 'Hayek and Schmitt on the Rule of Law' (1984) 17 *Can J Political Sci* 521, 525.

³⁷ *ibid.*

³⁸ Martel (n 3) 180.

³⁹ *Towne v Eisner* (1918) 245 US 418 (Holmes J).

⁴⁰ Brian Tamanaha, 'A Concise Guide to the Rule of Law' (St John's Legal Studies Research Paper No 07/0082, 2007) <<http://ssrn.com/abstract=1012051>> accessed 14 April 2015, 4.

⁴¹ Arie Rosen, 'Two Logics of Authority in Modern Law' (2014) 64 *UTLJ* 669, 697.

⁴² *ibid.*

⁴³ Martha C Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon 1995) 121.

⁴⁴ Edward Palmer Thompson, *Whigs and Hunters* (Allen Lane 1975) 266.

⁴⁵ Eelco van Kleffens, 'Sovereignty in International Law, Five Lectures' in *Collected Courses of The Hague Academy of International Law: Volume 82* (Hague Academy of International Law 1953) 128.

⁴⁶ *ibid.*

against the arbitrary exercise of power.⁴⁷ This is frequently connected with Fuller's 'inner morality of law'. He claims that the adherence to eight 'desiderata' illustrates the law's intrinsic character.⁴⁸ But, his 'efforts come to nought'.⁴⁹ We can support this rejection on two grounds. Firstly, the 'desiderata' are best thought of as standards of efficacy. The 'inner morality' undoubtedly creates aspirational values for sovereigns. However, just as the 'desiderata' can be used in benevolent regimes, so too can they be used exclusively for 'prudential reasons' in ill-intending regimes.⁵⁰ Raz illustrates this by likening it to the characteristics of a knife; capable of saving life yet equally capable of taking life.⁵¹ Therefore, the Fullerian rule of law appears ineffective because despots could hijack it. Moreover, the idealism that law possesses somewhere within it the universal essence of morality is difficult to comprehend. Mackie's argument from queerness elaborates upon this.⁵² He suggests that talk of metaphysics and objective values present concepts 'utterly different from anything else in the universe' and to perceive of them, would require a 'special faculty'.⁵³ Therefore, the inability to perceive of the metaphysics in liberalism's optimistic view of law makes it difficult to accept that our 'after sovereignty' age rests on the extreme liberalism end of the spectrum.

This critique of liberalism can be expanded by reference to law's 'vacuity'.⁵⁴ Law has to 'accommodate the infinity of our being with ... the ceaseless changing circumstances and complexities of

life'.⁵⁵ To do so, it can have 'no enduring content of its own'.⁵⁶ Yet, law does retain some temporally 'determinate content' and a 'mode of enforcement'.⁵⁷ If law exists in this form, then it requires 'some power apart from itself'⁵⁸ 'to render binding decisions' and ensure life does not become an 'endless negotiation in ... every situation'.⁵⁹ The idea of 'something apart from law' having influence seems sensible because for law and 'not men' to rule, the law would have to be 'closed and complete'.⁶⁰ It would have to be a formalist application of rules to facts, creating concrete outcomes. Yet, law is seldom like this and frequently 'something else' has to be 'called on to resolve the contradiction' of rules and principles.⁶¹ Accordingly, judges, politicians and other public figures 'share in ruling *with* law ... or *instead* of law'.⁶² Thus, the 'creation, administration, and interpretation' of laws are 'invariably acts of human agency and are exposed to ... the mischief which human action can produce'.⁶³ This further demonstrates that law as *completely* the 'truth of power' is an untenable position. However, the rule of law definitely occupies a place in our 'blurry' 'after sovereignty' world. Law being vacuous also ensures that 'no sovereign, however powerful, can completely contain law'.⁶⁴ 'Consequently, law requires that the 'sovereign ... claim a right and ... capacity to hold its position to determine law absolutely'.⁶⁵ Perhaps to make it easier to 'claim a right' to retain their 'position' they ought to 'ground [their] sovereignty in the ideal of the rule of law'.⁶⁶ The sovereign can step back allowing the rule of law to operate but when necessary it exhibits its 'will to

⁴⁷ Jeremy Waldron, 'The Concept and the Rule of Law' (NYU School of Law, Public Law Research Paper No 08/50, 2008) <<http://ssrn.com/abstract=1273005>> accessed 12 April 2015, 10.

⁴⁸ Lon Fuller, *The Morality of Law* (Yale University Press 1977).

⁴⁹ Matthew Kramer, 'Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders' (1998) 18 OJLS 235.

⁵⁰ *ibid.*

⁵¹ Joseph Raz, *The Authority of Law* (Clarendon 1979) 225.

⁵² John Mackie, *Ethics: Inventing Right and Wrong* (Penguin 1990).

⁵³ *ibid.* 38.

⁵⁴ Joyce (n 27) 48.

⁵⁵ Peter Fitzpatrick, 'What are the Gods to us Now? Secular Theology and the Modernity of Law' (2007) 8 Theoretical Inq L 161, 183–187; Joyce (n 27) 48.

⁵⁶ *ibid.*

⁵⁷ Peter Fitzpatrick, *Modernism and the Grounds of Law* (CUP 2001) 73–74.

⁵⁸ Joyce (n 27) 48.

⁵⁹ *ibid.*

⁶⁰ Sinkwan Cheng, *Law, Justice and Power: Between Reason and Will* (Stanford University Press 2004) 209.

⁶¹ Joyce (n 27) 48.

⁶² Cheng (n 60) 209 (emphasis added).

⁶³ Ernest J Weinrib, 'The Intelligibility of the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 59.

⁶⁴ Joyce (n 27) 49.

⁶⁵ *ibid.*

⁶⁶ Oscar Guardiola-Rivera, 'What Comes After Sovereignty?' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 130.

power' and reconstitutes the order 'in a single indivisible stroke'.⁶⁷ Though, given the indelible words of decisionism on our palimpsest, whether it is *compulsory* to use the rule of law to ground legitimacy, is a moot point.

Nonetheless, a sovereign that uses the rule of law as a façade makes it easier to ossify their legitimacy and extend it for as long as possible.⁶⁸ Expressing a dedication to the rule of law can be attained through the 'egalitarian philosophy of Government'. Mullender suggests we stand at the end of a rich timeline which has sought to accommodate the interests of all the law's addressees based solely on their status as humans.⁶⁹ For example, Hegel suggested that one must treat others as having equal interests in order to maintain a just system of Government.⁷⁰ Weinrib relates this egalitarianism to our palimpsest by arguing that despite 'political authority [being] wholly decisionist, law is (and should be) regulated by a principle of justice and correctness',⁷¹ i.e. some form of 'morality' or rule of law. Thus liberalism and decisionism appear to co-exist. If so, 'law as an instrument' can be used both to 'serve the social good' and as 'a means ... with the ends up for grabs'.⁷² This ambiguity demonstrates that law *only* as an alibi for power is a similarly untenable position.

Our 'after sovereignty' era then exhibits power relations that have a faded decisionist underpinning with a prominent and humane rule of law façade. The two sides are not in 'antithetical' stasis, but produce conditions that make either side's existence possible.⁷³ Concrete examples of this façade are evident through various devices of the Western 'liberal project'.⁷⁴ The end of World War II ushered in humanitarian devices

like the Atlantic Charter and the European Convention on Human Rights.⁷⁵ More recently, Parliament declared that the Constitutional Reform Act 2005 'does not adversely affect ... the *existing constitutional principle* of the rule of law'.⁷⁶ These examples demonstrate a commitment to the rule of law but could also be read as making the fading decisionist truth more palatable. Likewise, they highlight one of the most striking aspects of modern liberalism; it is built upon humankind's perpetual struggles on the 'slaughter-bench of history'.⁷⁷ Liberalism has been 'achieved' by writing over and embedding itself within a violent decisionist history. Ferguson appears to be a proponent of such a view in stating: 'the hundred years after 1900 were ... the bloodiest century in modern history';⁷⁸ paradoxically one of 'unparalleled progresses yet exceptional violence'.⁷⁹ The more one learns about the West's past, the more it seems it is not just 'legal interpretation' that has taken place 'in a field of ... death' but technological advancements, increased knowledge and our *liberal* institutions, all ride on the back of violence and suffering. The liberal façade is highly visible but the scroll of power can, at times, still be read as a lingering decisionist tale.

5 SOVEREIGNTY AND HUMAN NATURE

Human nature is a useful analytic tool to clarify how liberalism softens the decisionist traces on our palimpsest. The palimpsest framework is facilitated by the 'brutish' conditions of life that we inherit.⁸⁰ Sovereignty has to encapsulate our 'will to live' and our associated 'fear of death'.⁸¹ Likewise, sovereignty needs to tend to Hart's 'minimum content of law' in which humanity exhibits, *inter alia*, 'approximate

⁶⁷ Jacques Derrida, *Rogues: Two Essays on Reasons* (Pascale-Anne Brault and Michael Naas trs, Stanford University Press 2005) 10; Friedrich Nietzsche, *The Will to Power* (first published 1888, Vintage 2011).

⁶⁸ Joyce (n 27) 47.

⁶⁹ Richard Mullender, 'Human Rights, Responsibilities and the Pursuit of a Realistic Utopia' (2010) 61 NILQ 39.

⁷⁰ Georg Wilhelm Friedrich Hegel, *Hegel's System of Ethical Life and First Philosophy of Spirit* (Henry Siltan Harris and Sir Malcolm Knox eds, first published 1803, State University of New York Press 1979) 236.

⁷¹ Rosen (n 41).

⁷² Tamanaha (n 10) 4.

⁷³ Miguel Vatter, 'Strauss and Schmitt as Readers of Hobbes and Spinoza: On the Relation between Political Theology and Liberalism' (2004) 4 New Centennial Review 161, 161.

⁷⁴ Schwarz (n 16) 662.

⁷⁵ *ibid*; The Atlantic Charter 1941; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁷⁶ Section 1 (emphasis added).

⁷⁷ Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (first published 1899, Cosimo 2007) 21.

⁷⁸ Niall Ferguson, *War of the World: Twentieth-Century Conflict and the Descent of the West* (Penguin 2006) xxxiv.

⁷⁹ *ibid* xxxv.

⁸⁰ Hobbes (n 23) 96.

⁸¹ Pavlich (n 19) 26.

equality, limited altruism ... and limited resources'.⁸² This grim starting point for humanity promotes a tendency to grope towards humanly decent social arrangements 'because people desire predictability, stability, equal protection,' and they do so by 'instituting ... impartial procedures'.⁸³

However, human nature is more complex than merely requiring conditions necessary for survival; our moral needs require attention. This arises because 'being subject to morality is an inescapable ... part of being human'.⁸⁴ This window into human nature suggests pursuing moralistic liberalism, whilst appreciating the decisionist underpinnings is well aligned with our human needs. As Fuller suggests, we have a 'system of "positive law" that approaches to an indefinite degree "natural law"'.⁸⁵

Similarly, the proposed palimpsest appears more of a truism when we consider that 'we want to be the poets of our lives'.⁸⁶ Thus, humans often express lofty, even utopian normative ambitions about desired social arrangements. Hence, humans tend to gravitate towards a preferable narrative. This explains why liberalism is easily received by our intuitions and occupies such prominence in our institutions, yet is not always grounded by the reality that 'civilization ... is still a struggling and imperfect thing'.⁸⁷

6 BADIOU AND GCHQ

Decisionism recently made its faded existence known through the 'water-shed' event of GCHQ spying.⁸⁸ The scandal involved the revelation that GCHQ undertook unprecedented levels of surveillance and 'played a leading role in advising ... how to work around

national laws intended to restrict the ... power of intelligence agencies'.⁸⁹ It called into question whether GCHQ were using law merely as a label to justify an arbitrary executive decision. Contextually, this event is just a small aspect of the 'state of exception' that has emerged since 9/11 and the 'war on terror'.⁹⁰

Sovereignty in our 'after sovereignty age' only 'attains visibility ... during exceptional situations'.⁹¹ As such, Badiou's concept of a 'truth-event' offers a lens to bring the 'exceptional' into focus. His 'Events' are 'paradigmatic markers of ontological fullness/emptiness'.⁹² They are not meaningless coincidences because 'they reveal something about humankind's subjectivity in its being'.⁹³ Like a literary *deus ex machina*, GCHQ spying sweeps in to reconstitute how we perceive the operation of the 'existing order' of reality.⁹⁴ In terms of our palimpsest metaphor, it is akin to shining a light on the parchment from a different angle which has revealed the faded words of decisionism more clearly than previously. The scandal has striking parallels with *Malone v Metropolitan Police Commissioner* (concerning the legality of police phone-tapping).⁹⁵ In both instances, the Government exercised discretion by virtue of the 'vacuity' of law or worse, pointed to no legal authority to undermine the civil liberties of the populace. The 'vacuity' of the legislation such as the Regulation of Investigatory Powers Act, facilitated the will of GCHQ to undertake surveillance with little restraint on their power.⁹⁶

⁸² H LA Hart, *The Concept Of Law* (Clarendon 1961) 190–200.

⁸³ Richard Mullender, 'Law, Morality and the Egalitarian Philosophy of Government' (2009) 29 OJLS 389, 389; Stanley Fish, *There's no Such Thing as Free Speech: and It's a Good Thing Too* (OUP 1994) 213.

⁸⁴ John Gardner, 'Nearly Natural Law' (2007) 52 Am J Juris 23, 25.

⁸⁵ Lon Fuller, 'Reason and Fiat in Case Law' (1946) 59 Harv L Rev 376, 379.

⁸⁶ Friedrich Nietzsche, *The Gay Science* (Bernard Williams ed, Josefine Nauckhoff tr, first published 1882, CUP 2001) 299.

⁸⁷ Library of Congress, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (Library of Congress 1971) 2(99) (Justice Jackson).

⁸⁸ Tamanaha (n 10) 8.

⁸⁹ Julian Borger, 'GCHQ and European Spy Agencies Worked Together on Mass Surveillance' *The Guardian* (London, 1 November 2013) <<http://www.theguardian.com/uk-news/2013/nov/01/gchq-europe-spy-agencies-mass-surveillance-snowden>> accessed 15 April 2015.

⁹⁰ Claudia Aradau, 'Law Transformer: Guantanamo and the 'Other' Exception' (2007) 28 TWQ 489.

⁹¹ Cristi (n 8) 190.

⁹² Antonio Calcagno, *Badiou and Derrida: Politics, Events and their Times* (Continuum 2007) 6.

⁹³ *ibid.*

⁹⁴ Andrew Robinson, 'An A to Z of Theory | Alain Badiou: The Event' *Ceasefire Magazine* (15 December 2014) <<https://ceasefiremagazine.co.uk/alain-badiou-event/>> accessed 30 March 2015.

⁹⁵ [1979] Ch 344 (Ch).

⁹⁶ Regulation of Investigatory Powers Act 2000.

Crucially, this 'Event' distorts the 'friend/enemy' distinction.⁹⁷ Under liberal egalitarian principles, everyone within the UK is a 'friend' by virtue of their 'status as humans', but with surveillance everyone is made a potential 'enemy'. Moreover, the scale of surveillance undertaken made it clear how easily the Government can have a 'monopoly on decision' and 'lift ... [themselves] above the legally constituted order'.⁹⁸ Ultimately, GCHQ contributes to how the palimpsest of power is interpreted. It has shown that law can, at times, be an alibi for power but that law is much more than that. Law is a 'practice' that needs to be both inherited in light of its decisionist roots and then continuously worked in search of giving voice, where prudent, to the liberal 'egalitarian philosophy of Government'.⁹⁹

7 CONCLUSION

In our 'after sovereignty' arrangement, 'law is not the truth of power nor its alibi'; it is a subtle position sitting in-between the traditional dichotomy.¹⁰⁰ Liberalism operates as a façade and check to fading decisionism. On the palimpsest of power, decisionism still makes itself known at the interstices of 'normal constitutional life' as in the event of GCHQ spying.¹⁰¹ The 21st century has made itself known as a time of great vicissitude; therefore, if we can appreciate law's darker decisionist traces, then we can allow jurists to transition from being 'jaded' to possessing strong 'reasons to action'.¹⁰² This ensures we strive to make 'law the best it can be'.¹⁰³ Ultimately, sovereignty's high fidelity to 'flux' ensures the relationship between power and law, is as much a historical palimpsest, continuously being reinterpreted as it is still being inscribed into.

⁹⁷ Schmitt (n 9).

⁹⁸ Cristi (n 8) 189.

⁹⁹ Richard Mullender, 'Law as a Practice' (Professorial Inaugural Lecture, Newcastle, October 2014).

¹⁰⁰ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon and others trs, eds, Harvester 1980) 141.

¹⁰¹ Cristi (n 8) 194.

¹⁰² Tamanaha (n 10) 4–5.

¹⁰³ Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 196; *Judgment at Nuremberg* (Stanley Kramer dir, 1961).

UNTANGLING THE RULE IN *RYLANDS V FLETCHER* FROM NUISANCE

Liam Rose*

1 INTRODUCTION

Since its inception into the common law in 1868, the rule in *Rylands v Fletcher* has been wrought with ambiguities.¹ Undoubtedly, the most controversial and difficult element of this rule for the judiciary and academics alike has been the requirement of non-natural use, which was established by Lord Cairns in the House of Lords.² Subsequent case law has sought to define exactly what Lord Cairns meant when he added this requirement to Blackburn J's original ruling in the Court of Exchequer Chamber, but this has been unsatisfactory.³ Furthermore, the rule has been described most recently in the United Kingdom as a 'sub species' of nuisance but this article will seek to establish that the rule in *Rylands* is distinct from both nuisance and negligence, particularly due to its strict liability nature and dispel arguments that it should be absorbed into either of these areas of tort law.⁴ Despite opinions to the contrary, this rule can still serve a distinct and important role in the common law and thus needs to be retained and refined, as it is certainly 'premature to conclude that the principle is for practical purposes obsolete.'⁵

2 NON-NATURAL USE

The non-natural use requirement originated in the House of Lords in the *Rylands* case, when Lord Cairns coined the term. However he failed to provide a clear definition of this term, with his only further expansion being that the object must not 'in its natural condition [be] in or upon [the land]'.⁶ This created a linguistic ambiguity in the law which judges have continuously struggled to effectively define; synonymous terms such as 'extraordinary' and 'special' have been used in

Canada,⁷ whilst the USA has a general rule of strict liability for all ultra-hazardous activities as seen in the *Restatement of Torts*, which has since been diluted to all abnormally dangerous activities.⁸

Clearly, this phrase is extremely malleable and open to a wide range of judicial discretion. The case of *Transco plc v Stockport MBC* is now the leading authority, in which Lord Bingham stated that the new test to be applied is whether the defendant's use was 'extraordinary and unusual,' and this test will be applied flexibly based upon all relevant circumstances.⁹

Stallybrass supports a rule for evaluating whether a use was non-natural in accordance with the circumstances, which he describes as *sub modo* dangerousness as very few things can be said to be intrinsically dangerous without context.¹⁰ This threshold, however, appears to be quite difficult to surmount with no clear guidance as to what constitutes an extraordinary use. Therefore, similar problems will still arise as they previously did with 'non-natural use', as many of the terms forwarded as an alternative appear to be synonymous. It appears that the definition of non-natural use is inadequate and clarification is still required if the rule is to realise its potential.

3 STRICT LIABILITY

Whilst it was not so at its inception, the rule in *Rylands* has become anomalous in the common law as it is a strict liability principle, based upon a longstanding theory which Blackburn J refers to in his judgment; a defendant 'acts at his peril' by harbouring potentially

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¹ *Rylands v Fletcher* (1868) 3 LR 330 (HL).

² *ibid* 339.

³ *Rylands v Fletcher* (1866) LR 1 Exch 265.

⁴ *Transco plc v Stockport MBC* [2003] UKHL 61, [2004] 2 AC 1 [9] (Lord Bingham).

⁵ *ibid* [99] (Lord Walker).

⁶ *Rylands* (n 3) 339.

⁷ *Windsor v Canadian Pacific Railway Ltd* (2014) 371 DLR (4th) 339.

⁸ American Law Institute, *Restatement of Torts* (2d) (1977) para 519(1).

⁹ (n 4) [11].

¹⁰ William TS Stallybrass, 'Dangerous Things and the Non-Natural User of Land' (1929) 3 CLJ 376, 377.

dangerous materials.¹¹ Presently, the law of tort centres upon a fault based system, but *Rylands* can find a defendant 'liabl[e] without fault',¹² highlighted in the judgment of Blackburn J, who states that a man 'is prima facie answerable for all the damage which is the natural consequence of its escape.'¹³

Several justifications exist for imposing strict liability in this area of the law, with the Law Commission stating that 'certain things and certain activities which involve special danger' and heighten the risk of an accident or damage fit within this regime.¹⁴ In addition, Morris remarks that there is 'strong appeal' in making the creator of the perilous activity liable for all the ensuing damage, rather than imposing the costs upon the injured party or society.¹⁵ Furthermore, Fletcher's paradigm of reciprocity undoubtedly validates strict liability under *Rylands*; this is when a defendant 'create[s] a risk of harm to the claimant that was of an order different from the risks that the claimant imposed on the defendant'¹⁶ and thus the court is justified in finding the defendant liable as he has created a risk that 'exceeds those to which he is reciprocally subject' to by the claimant, who deserves recompense as the level of protection he received fell beneath the expected standard.¹⁷

4 DISTRIBUTIVE JUSTICE

Clearly, the strict liability principle shows a favouring for distributive justice under *Rylands* as opposed to the usual corrective justice in a fault based system. Nolan classifies this as a focuses on 'causa rather than culpa',¹⁸ as even though the defendant may not have acted wrongfully, his action of creating a non-reciprocal risk was the primary cause of the damage and therefore vindicates the imposition of liability in order to redress the imbalanced risk he has created.¹⁹

If this area became fault-based, innocent parties would be less likely to succeed in acquiring damages. Moreover, relying on Nolan's principle of 'causa rather than culpa,' it is possible to dispel criticisms of the defences under *Rylands*, which some commentators believe undermine strict liability as they are 'contrary' to the principle.²⁰ These defences include an 'act of God'²¹ (which is an extremely narrow defence, only successfully pleaded twice) and that of a stranger.²² These are certainly compatible with the *Rylands* rule of strict liability as they are *novus actus interveniens*, meaning that they break the chain of causation, hence the foundation upon which a defendant is found liable, *causa*, is not present.²³

This justification of strict liability has shown the potential of the *Rylands* rule, as it can certainly ensure an upholding of standards within society and will lead to extra precautions being taken to ensure risks placed upon another are proportional. The simple, key justification advanced by Nolan is that the person who conducts the dangerous activity and creates the risk, standing to benefit from it, should also bear the burdens of any resulting harm from his disproportionate conduct.²⁴ However, the strict liability regime has been threatened by the decisions in *Cambridge Water Company v Eastern Counties Leather*²⁵ and *Transco*²⁶ to implement a requirement of foreseeability.

5 ALTERNATIVE APPROACHES

5.1 Private Nuisance

Cambridge Water sought to classify the rule in *Rylands* as an extension of private nuisance.²⁷ Lord Goff gave the leading speech, deciding the case upon a requirement of nuisance; that 'foreseeability of damage of the relevant type should be regarded as a

¹¹ *Rylands* (n 3) 279.

¹² Clarence Morris, 'Hazardous Enterprises and Risk-Bearing Capacity' (1952) 61 Yale LJ 1172, 1172.

¹³ *Rylands* (n 3).

¹⁴ Law Commission, *Civil Liability for Dangerous Things and Activities* (Law Com No 32, 1970) 4.

¹⁵ Clarence Morris, 'Hazardous Enterprises and Risk-Bearing Capacity' (1952) 61 Yale LJ 1172, 1173–4.

¹⁶ George Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harv L Rev 537, 546.

¹⁷ *ibid* 548.

¹⁸ Donal Nolan, 'The Distinctiveness of *Rylands v Fletcher*' (2005) 121 LQR 421, 430.

¹⁹ George Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 Harv L Rev 537.

²⁰ Law Commission (n 14) 11.

²¹ *Rylands* (n 3) 280.

²² *Carstairs v Taylor* (1871) LR 6 Ex 217; *Nichols v Marsland* (1875) LR 10 Ex 255.

²³ Nolan, 'The Distinctiveness of *Rylands v Fletcher*' (n 18) 445.

²⁴ *ibid* 448.

²⁵ [1994] 2 WLR 53 (HL).

²⁶ *Transco* (n 4).

²⁷ *Cambridge Water* (n 25) 304 (Lord Goff).

prerequisite of liability under the rule.’²⁸ Whilst this did seem to fuse the two torts, it was not a completely novel principle. Blackburn J in *Rylands* had already spoken of liability arising for ‘the natural and anticipated consequences’ of the escape, which certainly seems akin to a concept of reasonable foreseeability.²⁹

However, ‘a foreseeability requirement is not inconsistent with a strict liability regime’ as there can still be foreseeability without any fault of the defendant.³⁰ Further support for this belief is found through Wilkinson, who believes there are three different levels in which foreseeability and strict liability could operate: full foreseeability, where foreseeing the escape is ‘integral’ for the damages the defendant is liable for; semi-foreseeability, where the escape is assumed and the defendant is liable for all damages reasonably anticipated as a result; and totally strict liability, in which foreseeability is irrelevant, and liability arises for all damage caused.³¹ If a semi-foreseeability approach was to be adopted, the key features of strict liability would be retained in the *Rylands* rule, whilst allowing the rule to co-exist with a definitive requirement of foreseeability, which could be seen as a fairer, albeit pro-defendant slant upon the rule. However, ‘considerable uncertainty remains concerning the interpretation of foreseeability in the context of *Rylands*,’ so further clarification is required from the judiciary.³²

The imposition of this requirement was affirmed by the House of Lords in *Transco*, as well as confirmation that the rule is now integrated as a ‘sub species’ of nuisance.³³ This means that only those with a proprietary interest can sue under *Rylands*,³⁴ and claims can only be based upon damage to land or to an interest in land,³⁵ as the House definitively stated that

‘damages for personal injuries are not recoverable under the rule.’³⁶ These cases now stand as the current authority for the *Rylands* rule.

However, the merging of the rule within nuisance appears unsound as the two doctrines serve distinct roles. A succinct distinction was put forward by Murphy: ‘the rule in *Rylands v Fletcher* should properly be confined to physical harm caused by one-off escapes while nuisance should be confined to ongoing interferences with amenities.’³⁷ Further distance could also be placed if recovering for personal injury was interpreted to be possible under *Rylands*; indeed, in Blackburn J’s judgment, he states that a defendant is ‘answerable for all the damage’ of an escape,³⁸ and whilst this does not specify that personal injuries are included, nor does it specify that they are not,³⁹ which led to some cases in the twentieth century imposing liability for personal injury.⁴⁰

There is a final key distinction between *Rylands* and nuisance in respect of how they each treat the acts of third parties; generally the latter does not find a defendant liable for the acts of independent parties, whereas *Rylands* does for independent contractors and lawful visitors, but not for the acts of God and strangers.⁴¹ Again this reinforces the distributive justice goal of the rule, as even though a defendant may not have actually had any fault for the third parties’ activities, the rule ensures that an innocent victim is compensated.

Therefore, through this analysis it has been shown that nuisance and the rule in *Rylands* are different beings, and hence should not be fused together; Nolan believes that merging the two could ‘wreak havoc’ in the area of nuisance.⁴² In addition, the potential of the rule could perhaps be even greater than just strict

²⁸ *ibid* 306.

²⁹ *Rylands* (n 3) 280.

³⁰ Nolan (n 18) 444.

³¹ David Wilkinson, ‘*Cambridge Water Company v Eastern Counties Leather plc*: Diluting Liability for Continuing Escapes’ (1994) 57 MLR 799, 803–4.

³² *ibid* 807.

³³ *Transco* (n 4).

³⁴ *ibid* 47.

³⁵ *ibid* 39.

³⁶ *ibid* 9, 35, 52.

³⁷ John Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24 OJLS 643, 651.

³⁸ *Rylands* (n 3) 279.

³⁹ Murphy (n 37) 653.

⁴⁰ *Shiffman v St John of Jerusalem* [1936] 1 All ER 557 (KB); *Hale v Jennings Bros* [1938] 1 All ER 579 (CA).

⁴¹ David W Williams ‘Non-Natural Use of Land’ (1973) 32 CLJ 310, 317.

⁴² Nolan (n 18) 437.

liability for property damage, it could also incorporate personal injury, which would widen its scope and thus increase its relevance.

5.2 Negligence

Another alternative approach to the *Rylands* rule has been to absorb it within negligence, which has been the case in Australia. Indeed, there has been significant commentary which suggests that these two torts are now ‘virtually indistinguishable’,⁴³ whilst the judiciary in the UK have stated that the line differentiating them is now a faint one.⁴⁴ For these reasons, the Australian High Court saw fit to absorb *Rylands* into negligence law in the case of *Burnie*.⁴⁵ The court held that future cases will now be dealt with under the usual negligence rules, with two added provisos: that there shall be a non-delegable duty of care imposed in cases within the scope of *Rylands*, and secondly that when the activity is dangerous, the standard of care will be particularly high.⁴⁶

However just as with nuisance, it is inappropriate to merge the two areas as they serve different purposes. Firstly, there are significantly contrasting thresholds that need to be attained; as *Rylands* is a strict liability principle, there is no need to prove fault, whereas negligence requires extensive proof that a duty of care has been breached. Murphy describes the proof of this breach as being an ‘insurmountable evidential burden’ which many claimants cannot hope to meet, thus undermining the rule.⁴⁷ Also, negligence is a fault-based area focused upon corrective justice which aims to punish the party who has fallen below the expected standard of care. Contrastingly, *Rylands* is a pro-claimant rule which focuses upon distributive justice and rectifying the imbalances within society.

Indeed in *Transco* the House of Lords declined to follow the Australian model, but its fusing of the rule within nuisance will serve little better. Ultimately, the main purpose and potential of the rule can be identified in Blackburn J’s judgment, which was wholly policy based. Industrialism had begun in the UK bringing

with it increased risks in society; the imposition of strict liability in this area is more beneficial to protect society than a fault-based principle as companies are more likely to face redress. This leads to a raising of standards within society and a protection of the environment as more precautions will be taken. Whilst there have been very few *Rylands* cases recently, perhaps this is because these standards are generally being upheld, and to remove the current strict liability rule would cause more harm than good.⁴⁸

5.3 Other Possibilities

Aside from merging the rule in *Rylands* with nuisance or negligence, there are several other options to determine its future. In the USA, a general rule of strict liability has been imposed to encompass all abnormally dangerous activities, whilst removing the requirement of escape, and allowing recovery for personal injuries.⁴⁹ However, this concept gives rise to the same issues prevalent with non-natural use; the controlling mechanism of ‘abnormally dangerous activities’ is an extremely indeterminate phrase in an ever-changing society, and thus appears incapable of definitive definition, so this would not be a suitable course for *Rylands* to take in the UK. Alternatively, the judiciary could distance itself from this area and allow Parliament to provide clarification. Certainly this was the opinion of Lord Goff, who believes that it would be more appropriate for Parliament to legislate on this strict liability area, perhaps to provide coherent statutory definitions.⁵⁰ Unfortunately, similar problems would exist with this method as with the American restatement; Parliament would struggle to provide definitive, exhaustive definitions and this could lead to more confusion in this area.

Nolan advocates abolition in his article, as the *Rylands* rule is ‘complex, uncertain and inconsistent’⁵¹ and despite all the effort exhausted into clarifying this area, the practical effect is seen as minimal, it is ‘a mouse’⁵² in the wider field of tort. A final alternative would be to return to a pre-*Transco* position, removing it from the field of nuisance.⁵³ Retaining strict liability

⁴³ *ibid* 441.

⁴⁴ *Attorney General v Cory Brothers* [1921] 1 AC 521 (HL) 536 (Viscount Haldane).

⁴⁵ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

⁴⁶ Nolan (n 18) 44.

⁴⁷ Murphy (n 37) 660.

⁴⁸ *ibid* 665–666.

⁴⁹ *Restatement of Torts (2d)* (n 8) para 519(1).

⁵⁰ *Cambridge Water* (n 25) 305.

⁵¹ Law Commission (n 14) 12.

⁵² *Transco* (n 4) [39] (Lord Hoffman).

⁵³ Murphy (n 37) 668.

would ensure it can still serve a distinct, albeit narrow, purpose, and this could still be justified with the incorporation of a semi-foreseeability level. Furthermore, the rule could realise an even greater potential with the inclusion of personal injury. By expanding the scope of the rule, it would enhance its relevance and provide claimants with an alternative course of action for personal injury.

6 CONCLUSION

This article has established that the current law on *Rylands* is unsatisfactory. Despite numerous attempts in several countries, the requirement of non-natural use as used in England and Wales is still inadequately defined and requires further deliberation. The analysis

of strict liability and foreseeability has shown that these two concepts can work in tandem without undermining the rule and will ensure the upholding of standards in society whilst also being fairer for defendants. However, the current positions in the UK and Australia where *Rylands* has been fused with nuisance and negligence respectively are not desirable. It has been shown that the rule serves a distinct purpose from these two areas of tort, despite its narrow scope, and the best course of action appears to be to return a pre-*Transco* state for the rule. In addition, incorporating a principle of semi-foreseeability and allowing liability for personal injury could ensure that the rule in *Rylands* not only survives, but thrives.

THE EU AND THE ECHR PROTOCOLS – A CRITIQUE OF ‘SELECTIVE’ ACCESSION

*Ross Howells**

1 INTRODUCTION

The need for accession by the European Union (‘EU’) to the European Convention on Human Rights (‘ECHR’)¹ stems from the fact European integration has been based upon two distinct legal orders.² The first is that European integration is contingent upon the human rights protection grounded upon the Convention, drafted by the Council of Europe, and applied by the European Court of Human Rights (‘ECtHR’ or ‘Strasbourg Court’) residing in Strasbourg. Article 1 of the Convention gives the Strasbourg Court the power to enforce the rights therein upon Contracting States who will be obliged by international law to remedy a breach of the Convention.

The second is that European integration depends upon the EU and its predecessors. Here, the Court of Justice of the European Union (‘CJEU’ or ‘Luxembourg Court’), pursuant to Article 19 TEU, holds Member States accountable.³ Although initially established to pursue purely economic integration of Member States, the EU’s jurisdiction now expands far beyond this and includes, *inter alia*, the protection of fundamental rights. Originally fundamental rights were ‘enshrined in the general principles of Community law’.⁴ However, the subsequent pressure from Member States provided the impetus for the EU to adopt the Charter of Fundamental Rights:⁵ a codified catalogue of rights awarded legally equivalent status to the Treaties following the Lisbon Treaty.⁶

In the absence of accession there remain an abundance of problems between the two legal systems.

Firstly, accession proves necessary given that the EU system of fundamental rights has been increasingly based upon the freedoms established within the Convention. As a result, both legal orders interpret the same Convention document, but in the absence of a coordinating instrument, the possibility of a diverging interpretation proves a continuing risk.

Secondly, the continuing conferral of Member State powers to the EU, in the absence of accession, has clearly resulted in an expanding lacuna present within the Convention system, specifically where Member States are obliged to implement Union law which incidentally breaches the Convention. Then, the Strasbourg Court’s lack of jurisdiction *ratione personae* over the Union means ECtHR rulings can only be addressed to Member States and not Union organs themselves. Moreover, Member States implementing Union law enjoy a privileged position whereby applicants must prove ‘manifest deficiencies’⁷ in the protection of human rights before claims are considered by the Strasbourg Court – a requirement not present for other Contracting States.

Ultimately, it must be noted, that while the EU is not a Contracting Party to the Convention, there exists an idiosyncrasy whereby the EU, pursuant to the *acquis communautaire*, requires all Member States to accede to the Convention, when it itself fails to do so.⁸ This will remain the case so long as the EU does not satisfy Article 6(2) TEU.

Accession would be the last step in establishing a harmonious enforcement of human rights protection

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¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

² Sionaidh Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Rights *Acquis*’ (2006) 43 CMLR 629.

³ Consolidated Version of the Treaty of the European Union [2012] OJ C326/13 (TEU).

⁴ Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR I-419, para 7.

⁵ *Solange I-Beschluß* BVerfGE 37, 271 BvL 52/71, 2.

⁶ TEU (n 3) art 6.

⁷ *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v Ireland* ECHR 2005-VI.

⁸ Catherine Barnard and Steve Peers, *European Union Law* (OUP 2014) 246.

within Europe. Firstly, accession would ensure that, in addition to the Charter's internal protection, an external judicial review by the Strasbourg Court of human rights protection is assured.⁹ Secondly, with the Convention becoming legally binding upon the Union, any potential divergences between fundamental rights and rights protected by the Convention can be prevented. Thirdly, EU citizens would finally be able to bring cases against the organs of the EU directly to the Strasbourg Court.

In Opinion 2/94, the Luxembourg Court declared that the Union had a lack of competence to accede to the Convention.¹⁰ Since then, the Lisbon Treaty and Protocol No 8 have reformed the Treaties so as to ensure the EU has competence to accede to the Convention.¹¹ In fact, pursuant to Article 6(2) TEU, this is now an obligation for the EU. Accordingly, in 2010 negotiations initiated by the Council of Europe attempted to address the complexity of accession. Their focus ultimately lay with two sensitive issues: firstly, ensuring that the Strasbourg Court would not interpret EU law in a binding manner (especially regarding the division of competence between the EU organs and the Member States);¹² and secondly, respecting Article 344 TFEU which secures exclusive jurisdiction for the Luxembourg Court over Union law.¹³ Three years of negotiations have resulted in the Draft Accession Agreement and its accompanying Draft Explanatory Report – a document subject to critical analysis throughout the remainder of this article.¹⁴

At time of press, the most recent development regarding accession has been the release of, in accordance with Article 218(11) TFEU, Opinion 2/13 (or 'the Opinion') in December 2014.¹⁵ In the Opinion the Luxembourg Court overwhelmingly rejected the

Accession Agreement. It justifies its rejection upon a plethora of grounds which, as Douglas-Scott opines, will make accession very difficult if not impossible.¹⁶ However, the Opinion does have a 'silver lining'. The subsequent redrafting of the Accession Agreement provides the opportunity for critical analysis, such as that submitted within this article, to influence the future Accession Agreement and ensure a more coherent protection of human rights within Europe than would otherwise be provided for.

This article critically analyses the issues of accession specifically arising from the material scope of the Accession Agreement, that being, the Convention, Protocol No 1 to the Convention ('The Protocol') and Protocol No 6 to the Convention (the remaining protocols to the Convention will hereinafter be called the 'unaccessed protocols'). In doing so it attempts to suggest reform that ensures a more coherent protection of human rights while accommodating for the specificity of the Union legal order. It bears mentioning that the issues arising from the unaccessed protocols have largely been unaddressed in academic analysis.

This article begins by arguing that the legal justifications provided by the Member States to defend the current material scope of the Accession Agreement are indefensible. This, in conjunction with the fact the Charter protects all rights within the unaccessed protocols, leads to the argument that all protocols should be incorporated within the redrafted Accession Agreement. Furthermore, in the alternative, the future Accession Agreement should at least incorporate Protocol No 13 due to reasons which will become evident later. Subsequently, two arguments are

⁹ Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart 2013) 5.

¹⁰ ECJ Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-01759.

¹¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1; Protocol (No 8) Relating to Article 6(2) of the Treaty on the European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2012] OJ C326/1, 273.

¹² Opinion 1/91 [1991] ECR I-06079, Opinion of the Court.

¹³ Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

¹⁴ Council of Europe, 'The Council of Europe Final Report: The Accession of the European Union to the European Convention on Human Rights' (2013)

<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/5thmeeting_finalrep_/5thmeeting_finalrep_en.pdf> accessed 1 September 2014 (Draft Accession Agreement).

¹⁵ Opinion 2/13 [2014] OJ C260/32, Opinion of the Full Court.

¹⁶ Sionaidh Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' *UK Constitutional Society* (24 December 2014) <<http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>> accessed 25 December 2014.

submitted regarding the unacceded protocols and their impact upon the Luxembourg Court.

Firstly it is argued that the CJEU erred in Opinion 2/13 when it rejected the Accession Agreement on the basis of Protocol No 16 of the Convention.

Secondly, the scope of accession creates an uncertainty as to how the Luxembourg Court should interpret rights within the unacceded protocols, when the CJEU has previously incorporated such rights within Union Law. In other words, should the CJEU only consider Convention rights it has acceded to notwithstanding that in the past it has held to incorporate rights which would not be covered by the Accession Agreement? In assuring a more coherent system of protection, it is argued that the Luxembourg Court should continue such interpretation and to do so would not breach principles of Union law.

Thirdly and finally, this article concludes by critically analysing the relationship between the Union and Convention legal orders. In doing so, it argues that the privileged position which has previously benefited the EU should cease to exist in so far as the material scope of the Accession Agreement is concerned. However, the judicial *realpolitik* evidenced by Opinion 2/13 suggests such radical reform would not be feasible. Accordingly, reform to the jurisprudence affording the EU a privileged position in a narrower range of situations is advanced.

2 MEMBER STATE MINIMALISM

2.1 Introduction

Article 1 of the Accession Agreement states that the EU will accede to ‘the Convention, the Protocol to the Convention and to Protocol No 6 to the Convention only.’¹⁷ The rationale behind the selective accession vis-à-vis the Convention protocols is grounded upon the approach of least common denominator or ‘minimalism’.¹⁸ In other words, during negotiations the Protocol and Protocol No 6 were the only protocols to have been signed and ratified by all Member States of the EU. In this way the EU preserves the principle of neutrality by avoiding ‘any risk of challenging any

Member State action within the scope of EU law in relation to a Protocol which the Member State in question has not ratified’.¹⁹

In section 2.2 it is demonstrated that since the completion of the Draft Accession Agreement new developments within the Member States provides justification for the incorporation of Protocol No 13 within the redrafted Accession Agreement. This would conform to Member State minimalism. Then, in section 2.3, it is argued that the minimalist approach of Member States within the negotiations is ultimately indefensible. Union accession to unacceded protocols would not breach accession safeguards found in Article 6(2) TEU or Protocol No 8 to the Treaties.

2.2 Extending Accession to Protocol No 13

On the 23rd of May 2014 Poland was the final Member State to ratify Protocol No 13 abolishing the death penalty absolutely. Accordingly it is argued that, notwithstanding subsequent criticism of the minimalist approach, it should be incorporated in the material scope of the Accession Agreement upon redrafting in any case.²⁰ Since Poland has ratified Protocol No 13 one can draw a clear analogy between the unacceded Protocol No 13 and the acceded Protocol and Protocol No 6. Protocol No 13, considering all Member States have now ratified it, would no longer risk infringement upon the principle of neutrality. Therefore its incorporation within the Accession Agreement would not contravene the guarded minimalist Member State stance. Accordingly, reflecting Poland’s ratification, the redrafted Accession Agreement should incorporate Protocol No 13 as well as the Protocol and Protocol No 6.

2.3 Rebutting Minimalism

In supporting a minimalist argument, Member States have argued that accession to protocols of the Convention which are not ratified by all Member States (the unacceded protocols) would prove *ultra vires*. For example, the United Kingdom has argued that EU accession to such protocols would amount to

¹⁷ Draft Accession Agreement (n 14) art 1.

¹⁸ Xavier Groussot, Tobias Lock and Laurent Pech, ‘EU Accession to the European Convention on Human Rights: a Legal Assessment’ *Robert Schuman Foundation Policy Paper No 218* (2011) <<http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-218-en.pdf>> accessed 3 February 2015, 9.

¹⁹ Paul Gragl, ‘A Giant Leap for European Human Rights? The Final Agreement on the European Union’s Accession to the European Convention on Human Rights’ (2014) 51 CMLR 13, 16.

²⁰ Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances.

an extension of EU competences.²¹ Accordingly, such Member States allege that Article 2 of Protocol No 8 of the Treaties, stating accession ‘shall not affect the competences of the Union or the powers of its institutions’, by application of Article 6(2) TEU in conjunction, would be breached.²² Such submissions echo arguments of obligations entering through the ‘backdoor’ witnessed in the past vis-à-vis the Human Rights Act 1998. In response, fearing the blocking of negotiations, the Commission conceded to a material scope of accession incorporating only the Protocol and Protocol No 6. As a result, a minimalist approach to accession prevailed.²³

Such minimalist stance, it is argued, proves indefensible. As the Commission rightly submits in Opinion 2/13, Article 6(2) TEU ‘confers a competence on the EU to accede to all the existing protocols, irrespective of whether or not all the Member States are parties to them’.²⁴ In concurrence with the Commission, the rebuttal of the minimalist approach is clearly grounded upon Union jurisprudence, the Charter and the Treaties themselves.

Firstly, Union case law demonstrates that Member States would only comply with acceded protocols when implementing Union law.²⁵ In elaborating on the *Eridania* case,²⁶ the Luxembourg Court in *Klensch* held that Member States implementing Union regulation must comply with the general principle of equal treatment.²⁷ The principle was extended to incorporate fundamental rights as demonstrated by the *Wachauf* case, in which a Member State was found to be breach fundamental rights when implementing a Union measure.²⁸ The case of *Booker Aquaculture* demonstrate that Member States’ obligation to respect

fundamental rights also applies to the implementation of Union directives.²⁹ By implication, and in concurrence with the commentary of Tridimas on the scope of general principles of EU law,³⁰ general principles are only applicable to Member States when acting within the scope of Union law. Therefore, to argue that the incorporation of the unacceded protocols within the Accession Agreement would extend the scope of Union law in the first place proves indefensible.

Secondly, the Charter itself reaffirms the argument that the minimalist approach proves indefensible. In concurrence with the above analysis, Article 51 of the Charter delineates its scope of application to ‘Member States only when they are implementing Union Law’.³¹ As stated in the Explanatory Notes, this provision results from the codification of case law concerning the scope of application of fundamental rights.³² In fact, although the Luxembourg Court did not expressly rebut the minimalist approach, it did reaffirm, pursuant to *Åklagaren v Hans Åkerberg Fransson*,³³ that Member States are bound by the Charter only when implementing EU law.³⁴ In agreement with the drafters of the Charter, this unambiguously demonstrates that ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law.’³⁵

Thirdly and finally, as the commission shrewdly points out, to conclude that minimalism was justified would render Article 2 of Protocol No 8 meaningless given its primary purpose is to ensure that the *domestic* significance of the protocols within Member States remains as it would have done prior to Union

²¹ Groussot, Lock and Pech (n 18) 4.

²² (n 11).

²³ Groussot, Lock and Pech (n 18) 4.

²⁴ Opinion 2/13 (n 15) para 86.

²⁵ Jean-Paul Jacqué, ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’ (2011) 48 CMLR 995, 1003.

²⁶ Case C-230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l’Industria degli Zuccheri v Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades* [1979] ECR 1979–02749.

²⁷ Joined Cases 201 and 202/85 *Marthe Klensch and others v Secrétaire d’État à l’Agriculture et à la Viticulture* [1986] ECR 1986–03477.

²⁸ Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 1989–02609.

²⁹ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] ECR I-07411.

³⁰ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 323.

³¹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 51(1).

³² Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/02, art 51.

³³ Case C-617/10 [2013] OJ C114/7.

³⁴ Opinion 2/13 (n 15) para 171.

³⁵ Explanations Relating to the Charter (n 32) art 51.

accession.³⁶ Furthermore, as the Union has competence to accede to the Convention and the protocols in question are merely accessory to the Convention, the Union will also have the competence to accede to the protocols. Therefore on the basis of these grounds the rebuttal of the minimalist stance is further strengthened.

It is worth considering whether the minimalist approach is justified on the basis that, pursuant to Protocol No 30 of the Treaties, the Charter’s jurisdiction *ratione materiae* is restricted vis-à-vis the United Kingdom and Poland.³⁷ Article 1(1) of Protocol No 30 provides that the Charter does not extend the ability of the CJEU, or any court or tribunal of Poland or the UK, to find that the laws, practices or action of Poland or the UK are inconsistent with the fundamental rights, freedoms and principles that the Charter reaffirms. Strictly interpreting the protocol suggests that it serves as an opt-out for both Poland and the UK. Accordingly, the Charter’s legally binding features are truncated with respect to these territories. This interpretation would suggest that the rights conferred in the Charter should not be applied by bypassing said protocol through other legal methods.³⁸ As a result, for the Union to accede to protocols not acceded to by the United Kingdom or Poland, and therefore requiring those countries to respect such protocols within the field of Union law, would amount to a breach of Protocol No 8.

Contrary to the above justification, Union jurisprudence thus far suggests that Protocol No 30 cannot be assumed to provide an opt-out for the UK or Poland.³⁹ The case of *NS v Secretary of State for the Home Department* clarified Luxembourg’s position specifically in respect of Article 1(1) of the protocol.⁴⁰ There it was held that in accordance with recital 3 of the protocol, Article 6 of the TEU requires the Charter to be applied to Poland and the UK irrespective of the protocol. This interpretation seems correct in light of recital 6 of the protocol which confirms that the Charter merely ‘reaffirms rights, freedoms and principles recognized in the Union ... but does not

create new ones’.⁴¹ Therefore since both countries were bound by these rights prior to the Charter coming into effect, they will be bound after. It must be conceded that the Luxembourg court is yet to rule on Article 1(2) of the protocol which prevents justiciable rights being created on any rights under Title IV of the Charter, except in so far as each country recognises them under their own national laws. Importantly, because by large Protocol No 30 does not exclude the Charter’s application to the United Kingdom or Poland, accession to unacceded protocols would not amount to a breach of Protocol No 8 of the Treaties or Article 6(2) TEU.

Ultimately, following the rebuttal of the minimalist approach, one may wonder whether there exists an argument which justifies the incorporation of the remaining unacceded protocols within the new Accession Agreement. This would assure a greater coherence of human rights protection and immediately resolve the issue highlighted later in sections 3.3 and 3.4. As correctly alluded to by Jacqu , given that all rights within the unacceded protocols are guaranteed by the Charter in the first place, there seems little justification in excluding these from the Accession Agreement.⁴² Accordingly, so long as judicial *realpolitik* allows, the redrafted Accession Agreement should adopt such approach.

2.4 Interim Conclusions

Evidently, accession negotiation regarding the material scope was governed by judicial *realpolitik*. Fearing a risk to their sovereignty, Member States adopted the prevailing minimalist stance and blocked Union accession to protocols not universally ratified. Since these negotiations, all Member States have ratified Protocol No 13 and therefore it should be incorporated in the redrafted Accession Agreement in any case.

However, such minimalism is not justified and should not dictate accession in the first place. Member States are bound by the Accession Agreement only when they are implementing Union law. Accordingly, it cannot be argued that minimalism is necessary to

³⁶ Opinion 2/13 (n 15) para 86.

³⁷ Protocol No 30 On the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [2012] OJ C326/1, 313.

³⁸ Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, not Hearts’ (2008) 45 CMLR 617, 667.

³⁹ Case C-489/10 *Bonda* [2012] OJ C217/2, Opinion of AG Kokott.

⁴⁰ Case C-411/10 [2011] ECR I-13905.

⁴¹ *ibid* paras 119–122.

⁴² Jacqu  (n 25) 1004.

respect Article 6(2) TEU or Protocol No 8 of the Treaties. Moreover, to conclude otherwise would defeat the purpose of Protocol No 8. Ultimately, given that universal ratification is not a prerequisite for incorporation within the Accession Agreement, and the Charter guarantees the rights within all protocols of the Convention, there exists a strong argument that the redrafted Accession Agreement should incorporate all protocols to the Convention.

3 THE VIEW FROM LUXEMBOURG

3.1 Introduction

The Luxembourg Court has historically been incredibly selfish regarding its power within the Union. This is overwhelmingly demonstrated within Opinion 2/13.⁴³ In line with the focus of this article on the protocols of the Convention it is necessary to critically analyse Luxembourg's rejection in Opinion 2/13 of the Accession Agreement on the basis of Protocol No 16 of the Convention. Protocol No 16 allows for Contracting Parties to request advisory opinions from the Strasbourg Court. Accordingly, section 3.2 of this article, contrary to Opinion 2/13, argues that Protocol No 16 does not prove a risk to Union autonomy. Consequently it is concluded that the Luxembourg Court erred in rejecting the Accession Agreement on this basis.

Next, concerning the substantive implications of accession, this article attempts to answer a question largely unanswered by academic commentary: how will 'the Luxembourg Court decide cases where individuals rely on such rights set forth in the Charter which, in turn, refers back to the Convention in Article 52(3) of the [Charter] when the Charter contains "rights which correspond to rights guaranteed by the Convention"?'⁴⁴ Section 3.3 will argue that the Luxembourg Court has interpreted corresponding rights irrespective of universal ratification of Member States; accordingly, it should continue to interpret these following accession (hereinafter 'Judicial Activism').⁴⁵ Thus the material scope of the Accession Agreement should not restrict correspondence post-accession. This, as is argued in section 3.4, should be

facilitated through the Charter rather than through general principles of EU law because to utilise the latter would prove contradictory to the intentions of the drafters of the Charter.

3.2 Protocol No 16 and Luxembourg's Defensive Stance

The Luxembourg Court in Opinion 2/13 held that Protocol No 16 of the Convention adversely affects the Union's autonomy and therefore provides grounds for the rejection of the Accession Agreement.⁴⁶ This position seems to be argued on three grounds. Firstly, the court seems to rely on established precedent to argue that Protocol No 16 amounts to a transferal of power to an international court which amounts to a deprivation of autonomy.⁴⁷ Secondly, an advisory opinion of the Strasbourg Court pursuant to Protocol No 16 could circumvent the preliminary reference mechanism (Article 267 TFEU) by triggering the prior involvement procedure within the Accession Agreement.⁴⁸ Thirdly, the CJEU contends that Protocol No 16 enables the opportunity for Member States to choose between the Strasbourg and the Luxembourg Court in any given case thus facilitating forum shopping.⁴⁹ The subsequent analysis will demonstrate that none of these grounds withhold scrutiny and accordingly the finding of the court regarding Protocol No 16 is unjustified.

As for the first ground, in justifying its position the Luxembourg Court seems to allude to the notion of supremacy as established by Opinion 1/09. In Opinion 1/09 it was held an international court may not be conferred exclusive jurisdiction over Union law at the cost of the 'essential character' of the powers which the Treaties confer upon the Luxembourg Court.⁵⁰ In this vein, the court argues, that Protocol No 16 confers the power of interpretation of Union law to the Strasbourg Court.

However the fear of the Luxembourg Court does not warrant the rejection of the Accession Agreement. It is argued the procedural conflict of Protocol No 16 could easily be remedied internally by the Union. As Steinz rightly contends, the court's fear of Protocol No

⁴³ Opinion 2/13 (n 15).

⁴⁴ Gragl (n 9) 95.

⁴⁵ *ibid.*

⁴⁶ Opinion 2/13 (n 15) paras 196–200.

⁴⁷ *ibid* para 197.

⁴⁸ *ibid* para 196.

⁴⁹ *ibid* para 198.

⁵⁰ Opinion 1/09 [2011] OJ C211/03, Opinion of the Full Court.

16 resembles the prohibition established by Article 344 TFEU preventing Member States from submitting inter-state applications pursuant to Article 33 of the Convention on matters of Union law.⁵¹ Such precedent is underpinned by the duty of sincere cooperation established in Article 4(3) TEU.⁵² Importantly, in *Ireland v United Kingdom* (the *MOX Plant* case),⁵³ that principle was used to prevent a Member State from pursuing dispute-settlement proceedings under the United Nations Convention of the Law of the Sea where Union law was concerned.⁵⁴ By analogy, there is nothing to suggest that the duty of sincere cooperation could not be used to prevent Member States from applying for advisory opinions under Protocol No 16 where Union law was concerned.⁵⁵ Accordingly, supremacy as interpreted by the CJEU above, contrary to the findings of Opinion 2/13, would not be adversely affected.

As for the second ground, the Luxembourg Court fears that Protocol No 16 would undermine the preliminary reference procedure because, it argues, Protocol No 16 can trigger the prior involvement procedure established in the Accession Agreement.⁵⁶ The court alleged that such outcome would contravene the ‘uniform interpretation of EU law’ established in *Van Gend & Loos*.⁵⁷

By contrast, as correctly noted by Lock, the prior involvement procedure can never be triggered by such a mechanism provided for by Protocol No 16.⁵⁸ This is evidenced by Article 3 of the Accession Agreement, which states prior involvement can only occur when the EU is a co-respondent and has not had the

opportunity to assess the facts of the given case.⁵⁹ Such argument is further supplemented by paragraph 66 of the Accession Agreement explanatory report, which states prior involvement ‘only applies in cases in which the EU has the status of a co-respondent.’⁶⁰ Therefore, the Luxembourg Court’s concern in this respect seems unjustified.

As for the third ground, the Luxembourg Court holds that Protocol No 16, by enabling national courts to circumvent the Union’s preliminary reference procedure, facilitates forum shopping.⁶¹

However, as correctly rebutted by Johansen there is no evidence to suggest that Protocol No 16 absolves Member States of their obligations under Article 267.⁶² In fact, in accordance with *CILFIT* Member State courts are obliged to refer questions of interpretations of Union law to the Court of Justice.⁶³

In response, the CJEU would contend the risk of forum shopping is still possible if, for example, a court of first instance requests a preliminary reference under Article 267 thereby absolving the apex court of the obligation stemming from *CILFIT*.⁶⁴

Such argument is flawed on three accounts. Firstly, the preliminary reference obtained by the lower court would remain binding upon all those above it, therefore assuring Union supremacy.⁶⁵ Secondly, in any instance where, subsequent to the preliminary reference, the Luxembourg Court diverges from such holding or the Strasbourg Court develops jurisprudence corresponding to the Charter, the apex

⁵¹ T Streinz, ‘Forum Shopping between Luxembourg and Strasbourg?’ *Verfassungsblog* (Munich, 17 June 2015) <<http://www.verfassungsblog.de/en/forum-shopping-zwischen-Luxembourg-und-strassburg/#.VQmcukJhpUR>> accessed 18 March 2015.

⁵² TEU (n 3) art 6.

⁵³ (n 13).

⁵⁴ *ibid* para 182.

⁵⁵ *ibid*.

⁵⁶ Opinion 2/13 (n 15) para 196.

⁵⁷ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I-0001.

⁵⁸ Tobias Lock, ‘Oops! We Did it Again – the CJEU’s Opinion on EU Accession to the ECHR’ *Verfassungsblog* (Munich, 18 December 2014) <<http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#.VQmeAEJhpUQ>> accessed 18 March 2015.

⁵⁹ Draft Accession Agreement (n 14) art 3.

⁶⁰ Council of Europe, ‘Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’ (2013) para 66.

⁶¹ Opinion 2/13 (n 15) para 198.

⁶² Stian Øby Johansen, ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR Accession Agreement (Part 2 of 2)’ *Øbykanalen* (Oslo, May 2014) <<https://obykanalen.wordpress.com/2014/05/07/some-thoughts-on-the-ecj-hearing-on-the-draft-eu-echr-accession-agreement-part-2-of-2/>> accessed 18 March 2015.

⁶³ Case 77/83 *CILFIT* [1984] ECR I-01257.

⁶⁴ Johansen (n 62).

⁶⁵ Streinz (n 51).

court would again be bound by the *CILFIT* doctrine.⁶⁶ Thirdly, the indefensible position of the CJEU becomes evident when the case of *Foto-Frost* is considered. In *Foto-Frost* the Luxembourg Court held that Member States ‘may not themselves declare Community acts invalid.’⁶⁷ Therefore, an advisory opinion under Protocol No 16 declaring Union law as incompatible with the Charter could not be acted upon without the involvement of the Luxembourg Court. The harmlessness of Protocol No 16 upon Union supremacy becomes even more apparent given that Article 5 of Protocol No 16 states that such advisory opinions that would be given by the Strasbourg Court would not be binding upon the Contracting States.⁶⁸

Accordingly, in light of the above analysis it is argued that the Luxembourg Court erred in rejecting the Accession Agreement on the basis that Protocol No 16 would prejudice Union supremacy. The redrafted Accession Agreement should not be rejected on this basis.

3.3 Judicial Activism: Why?

Advocate General Cruz-Villalón argues that a lack of consensus between Member States on the status of an ECHR right necessitates a ‘partially autonomous interpretation’ of that right within the Charter.⁶⁹ In other words, where the status of ECHR rights differ between Member States, such as in the unaccessed protocols, the CJEU should find an ‘independent interpretation which is based exclusively on the wording and scope of [the Articles] of the Charter.’⁷⁰ Accordingly, the Advocate General would oppose the finding of correspondence where there is a lack of universal ratification by the Member States, and accordingly, judicial activism post-accession. With respect, the abundance of evidence within Union law, suggests that, contrary to the Advocate General’s position, judicial activism should be adopted by the Luxembourg Court.

A definition of ‘correspondence’ is provided. Article 52(3) of the Charter states that in so far as the rights contained within the Charter ‘correspond to the rights guaranteed by the [Convention], the meaning and scope of those rights shall be the same as those laid down by the Convention’.⁷¹ Correspondence however does not prohibit the Union from providing more extensive protection.⁷² In *DEB*, the Luxembourg Court clarified that corresponding rights should be ‘determined not only by reference to the text of the ECHR, but also, *inter alia*, by reference to the case-law of [the ECtHR]’.⁷³

The Explanatory Report regarding the use of Article 52(3) states that ‘The reference to the ECHR covers both the Convention and the Protocols to it’⁷⁴ with a clear lack of differentiation between protocols acceded by all Member States and protocols acceded to by only some Member States.⁷⁵ Furthermore, as correctly noted by Peers, such approach is not isolated to protocols of the Convention but also other international treaties. This is clearly evidenced by the Charter’s Explanatory Notes to Articles 3, 23, 25, 27, 30, 31 and 33 of the Charter which explicitly mention multiple instruments such as the Convention on Bioscience and the Revised Social Charter of the Council of Europe, which have not been signed or ratified by all Member States and yet influence the interpretation of the Charter. This demonstrates, contrary to the Advocate General’s position, that universal ratification of Member States of international instruments such as the Convention’s protocols is not a prerequisite for establishing correspondence.⁷⁶

Moreover the indefensible stance of the Advocate General becomes apparent when one considers that the Luxembourg Court has in fact found correspondence with protocols not universally ratified by Member States on three occasions.

⁶⁶ *ibid.*

⁶⁷ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR I-04199, para 20.

⁶⁸ Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶⁹ *Åklagaren* (n 33) Opinion of AG Cruz-Villalón, para 86.

⁷⁰ *ibid* para 87.

⁷¹ Charter of Fundamental Rights (n 31) art 52.

⁷² *ibid.*

⁷³ Case C-279/09 *DEB* [2010] ECR I-13849, para 35.

⁷⁴ Explanations Relating to the Charter (n 32).

⁷⁵ Steve Peers and Sacha Prechal, ‘Article 52’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).

⁷⁶ Paul Gragl, ‘EU Accession to the ECHR’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).

Firstly, in interpreting Article 19 of the Charter, the Luxembourg Court has found Article 4 of Protocol No 4 to correspond. This is clearly evidenced by the Explanatory Note of the Charter which states Article 19 has the ‘same meaning and scope’ as Article 4 of Protocol No 4.⁷⁷ Furthermore the Luxembourg Court has ‘incorporated’ all relevant ECtHR jurisprudence when adjudicating upon relevant Union law.⁷⁸ As Guild correctly implies, this amounts to correspondence notwithstanding Greece and the United Kingdom have not ratified the protocol.⁷⁹

Secondly, in *Bonda*, when examining the administrative nature of the punishment enforced by a Member State, the Luxembourg Court assessed such nature against ECtHR’s ‘Engel Criteria’,⁸⁰ establishing a clear correspondence with Article 4 of Protocol No 7 of the Convention.⁸¹ Furthermore, this argument is confirmed by the Explanatory Notes of the Charter explicitly stating that Protocol No 7 Article 4 concerning the *ne bis in idem* principle corresponds to Article 50 of the Charter.⁸² However, such correspondence only extends as far as the scope of the Convention right, that being, the right not to be punished twice within the *same* state.⁸³ Once again we see correspondence established notwithstanding, in this instance, Germany, Belgium and Poland have not ratified this protocol.

Thirdly, as correctly argued by Peers and Prechal, correspondence can exist even if the Charter itself or the Explanatory Notes thereto do not mention any notion of correspondence.⁸⁴ This is clear following the aforementioned *DEB* case which established correspondence could result from situations in which the Luxembourg Court has proceeded to interpret the case law of the ECtHR vis-à-vis Charter rights.⁸⁵ Accordingly, it can be argued that Protocol No 4 Article 2 corresponds to the free movement rights protected by the Charter. This is because within the

case of *Byankov*,⁸⁶ the Luxembourg Court explicitly considered the ECtHR cases of *Ignatov*⁸⁷ and *Gochev*⁸⁸ when ruling on a question of free movement rights. As mentioned above, Greece and the United Kingdom are yet to ratify Protocol No 4 of the Convention.

It is worth noting that the analysis based on the Charter’s Explanatory Report proves overwhelmingly persuasive in light of Article 6(1) of the TEU and Article 52(7) of the Charter which establishes that the Explanatory Notes must be taken into account when the court interprets Charter provisions. This was expressly followed in the *Inuit* Case.⁸⁹

In addition to the above arguing there is insufficient basis to conclude that the abovementioned correspondence should cease following accession, a principled and teleological interpretation of the Charter in fact demonstrates support for maintaining such judicial activism.

Firstly, it is submitted that there is no rationale for abandoning the correspondence which has thus far been established. As noted above correspondence has been found within specific articles of Protocol No 4 and Protocol No 7. Accordingly, with respect to these, all Member States of the Union are bound by the relevant ECtHR jurisprudence and interpretations *as if* they have already signed and ratified those specific provisions. In such cases it seems the discontinuance of correspondence would be a regressive development for Union fundamental rights protection. Accordingly it can be argued that judicial activism would not offend Member States fearing the Union’s ever expanding competence.

Secondly, as correctly asserted by Jacqu  , a teleological interpretation of Article 52(3) suggests the

⁷⁷ Explanations Relating to the Charter (n 32).

⁷⁸ *ibid.*

⁷⁹ Elspeth Guild, ‘Article 19’, in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).

⁸⁰ *Engel v The Netherlands* App no 5370/72 (ECtHR, 8 June 1976).

⁸¹ *Bonda* (n 39).

⁸² Explanations Relating to the Charter (n 32).

⁸³ *ibid.*

⁸⁴ Peers and Prechal (n 75).

⁸⁵ Above, text to n 73.

⁸⁶ Case C–249/11 *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti* [2012] OJ C366/12.

⁸⁷ *Ignatov v Bulgaria* App no 50/02 (ECtHR, 2 July 2009).

⁸⁸ *Gochev v Bulgaria* App no 34383/03 (ECtHR, 26 November 2009).

⁸⁹ Case C–583/11 *Inuit Tapiriit Kanatami v European Parliament and Council of the European Union* [2013] OJ C344/14.

CJEU's judicial activism should prevail.⁹⁰ This is demonstrated when one considers the drafters of the Charter intended Article 52(3) to 'ensure the necessary consistency between the Charter and the ECHR.'⁹¹ Therefore, the *purpose* of Article 52(3) prevails so long as two distinct interpretations of rights enshrined in both the Charter and Convention are possible, which is clearly the case post-accession vis-à-vis the unaccessed protocols. There is no reason to suggest that the purpose of Article 52(3) is rendered moot post-accession. Accordingly, the CJEU should continue to maintain the 'necessary consistency' where it has previously been established, irrespective of the accession agreement.

These developments clearly show, contrary to the Advocate General's submissions, the CJEU is willing to find correspondence pursuant to the Charter, notwithstanding an absence of universal ratification by Member States. Not only is there a lack of rationale for abandoning correspondence, a teleological interpretation of Article 52(3) of the Charter suggests that post-accession the court should continue interpret the accession agreement in a wide manner. Accordingly, the Strasbourg Court should continue to utilise corresponding Convention jurisprudence notwithstanding this may fall outside the material scope of the Accession Agreement.

3.4 Judicial Activism: How?

Article 6 of the TEU ensures that fundamental rights within the Charter and those within general principles continue to exist concurrently. Furthermore, they are equal in legal status.⁹² This raises the question, in light of their possible 'concurrent' applicability, which approach the Luxembourg Court should adopt if it adopts judicial activism in accordance with the previous section.

Gragl briefly considers that using Article 6(3) TEU to incorporate the provisions of the unaccessed protocols as general principles of law could preserve

the coherence between the Charter and the ECHR post-accession.⁹³ There is merit to such a stance. General principles consisting of 'fundamental provisions of unwritten primary EU law'⁹⁴ would prove useful in this instance given their 'gap-filling function'.⁹⁵ The flexibility of the general principles approach is clearly revered by the Luxembourg Court who has omitted to undertake a precise classification of general principles in order to maintain the ability to solve issues arising from semantic discrepancies.⁹⁶ Therefore in issues such as how best to pursue judicial activism, the general principles route seem a valid choice.

Although a valid option, it is argued that to utilise it risks contravening the intention of the drafters of the Charter. Subsequent analysis will argue that judicial activism risks circumventing the Charter's limited application, firstly vis-à-vis horizontal situations, and secondly in instances where Member States derogate from Union law. Therefore, in order to ensure judicial activism is not opposed by Member States, it should be facilitated by the Charter.

Consider first the horizontal situations point. Although the Charter reaffirms general principles which have been known to apply in horizontal situations, there is a persuasive argument to suggest the Charter itself does not apply in horizontal situations. This is evidenced by Article 51 of the Charter. A strict reading of Article 51 suggests the Charter applies only to 'institutions, bodies' offices and agencies of the union [and] to the Member States only.⁹⁷ Accordingly, one can surmise that individuals lack *locus standi* before the court vis-à-vis rights found within the Charter. Furthermore, the Charter implies that defendants to proceedings brought under the Charter cannot be private individuals. Pursuant to Article 52 of the Charter, it seems impossible that a private individual may justify a breach the Charter because such breach requires a justification provided by the law.⁹⁸ Rosas has previously contended that the Charter does in fact apply to horizontal situations.⁹⁹

⁹⁰ Jacqué (n 25) 1004.

⁹¹ Explanations Relating to the Charter (n 32).

⁹² Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique* [2012] OJ C73/2, Opinion of AG Trstenjak, para 127.

⁹³ Gragl (n 9) 95.

⁹⁴ *Maribel Dominguez* (n 92) Opinion of AG Trstenjak, para 93.

⁹⁵ Tridimas (n 30) 17.

⁹⁶ *Maribel Dominguez* (n 92) Opinion of AG Trstenjak, para 93.

⁹⁷ Charter of Fundamental Rights (n 31) art 51.

⁹⁸ *ibid* art 52.

⁹⁹ Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart 2012) 178.

These are demonstrated by the *Schmidberger*,¹⁰⁰ *Mangold*¹⁰¹ and *Viking*¹⁰² cases respectively. However, in rebuttal, as Rosas himself concedes, the application of the Charter in these situations is contingent upon the involvement of the State in some capacity. In other words, rather than purely horizontal situations, Rosas only demonstrates that the Charter applies to ‘triangular relationships’ always involving the State. Accordingly it can be argued that, contrary to general principles, the Charter does not apply in horizontal situations. Therefore, to facilitate judicial activism via the general principles approach would contravene the intention of the drafters of the Charter who arguably wanted to restrict fundamental rights within horizontal situations.

Consider next the derogation point. It is argued that, contrary to general principles, the Charter does not apply in situations where Member States derogate from Union law. The robust nature of such argument is evidenced within the Charter; as Article 51 states the Charter applies to ‘Member States *only when they are implementing* Union law.’¹⁰³ Therefore, as Lord Goldsmith rightly contends, the Charter cannot be seen as ‘extending the Union’s competences’ in such cases.¹⁰⁴ In such instances ‘the protection of fundamental rights for the citizen will be the existing structure of national law and constitutions and important international obligations like [the ECHR]’.¹⁰⁵ This view is shared by Advocate General Jacobs who argues that fundamental rights protections at the time would not be triggered if it was found that a particular derogation was legally justified under EU law.¹⁰⁶ It is worth noting that this conclusion is still disputed and yet to be clarified by the Luxembourg Court.¹⁰⁷ While it is arguable that the Charter does not apply in situations of Union law derogation, it can further be argued that the use of general principles for judicial activism would circumvent the safeguards of the Charter as highlighted by this analysis.

To pursue judicial activism facilitated by the general principles approach may allow the rights of unaccessed protocols to be applicable in both

horizontal situations and derogations situations. Such use can be argued to ‘circumvent the restriction on the addressees of fundamental provided by the EU legislature in the Charter.’¹⁰⁸ Accordingly it is argued that judicial activism post-accession should be maintained through the Charter.

3.5 *Interim Conclusions*

The defensive and increasingly unjustifiable stance of the Luxembourg Court regarding accession is clearly demonstrated with its holding in Opinion 2/13, rejecting the Accession Agreement on the basis of Protocol No 16 of the Charter. As has been shown with the critical analysis of section 3.2, such stance is indefensible. Therefore, the redrafted Accession Agreement should not be rejected on this basis.

Moreover, as section 3.3 demonstrated, there is a strong argument to suggest the Luxembourg Court should continue to interpret the case law of the ECtHR where it has previously found correspondence irrespective of the material scope of the Accession Agreement. However in order to avoid a risk of circumventing the Charter’s scope of application – thereby contravening the intention of the drafters of the Treaties – this should occur through the provisions of the Charter rather than through the general principles route.

4 SCOPE OF ACCESSION AND THE STRASBOURG-LUXEMBOURG RELATIONSHIP

4.1 *Introduction*

The Strasbourg Court has faced a dichotomy between ensuring the Convention is interpreted in light of extending and strengthening international cooperation on the one hand,¹⁰⁹ while on the other ensuring that Contracting Parties do not evade their obligations behind a veil of other international obligations. While the EU is not a Contracting Party to the Convention, there remains an absence of hierarchy between the two courts. Accordingly, although not in the interest of either court, the possibility of contradictory interpretations of rights guaranteed within the

¹⁰⁰ Case C-112/00 *Schmidberger* [2003] ECR I-5659.

¹⁰¹ Case C-144/04 *Mangold* [2005] ECR I-9981.

¹⁰² Case C-438/05 *Viking* [2007] ECR I-10779.

¹⁰³ Charter of Fundamental Rights (n 31) art 51 (emphasis added).

¹⁰⁴ Lord Goldsmith, ‘A Charter of Rights, Freedoms and Principles’ (2001) 38 CMLR 1201, 1206.

¹⁰⁵ *ibid* 1205.

¹⁰⁶ Francis G Jacobs, ‘Human Rights in the European Union: the Role of the Court of Justice’ (2001) 26 EL Rev 331.

¹⁰⁷ Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2013) 8 EuConst 375.

¹⁰⁸ *Maribel Dominguez* (n 92) Opinion of AG Trstenjak, para 129.

¹⁰⁹ *Bosphorus* (n 7) para 108.

Convention is a real possibility. To resolve the issue the Strasbourg Court established a rebuttable presumption of equivalent protection (the ‘*Bosphorus* presumption’) which has been found to apply to the Union legal order in certain instances. The question remains, given the Accession Agreement remains silent on this matter, will the presumption be overturned on accession? More importantly for our purposes, will such solution differ between situations covered by the Agreement and those covered by unaccessed protocols?

Initially, section 4.2 will briefly outline the *Bosphorus* doctrine. Thereafter, section 4.3 will argue that the *Bosphorus* presumption should be reformed so as to continue to apply to situations falling within the unaccessed protocols but contrastingly cease to apply to situation covered by the material scope of accession. However, as section 4.4 will argue, Opinion 2/13 demonstrates an animated reluctance of the Luxembourg Court to abandon the *Bosphorus* presumption. Accordingly, the manifesting political pressure is unlikely to permit the reform suggested in section 4.3. Therefore, by considering the judicial *realpolitik* implications of Opinion 2/13, section 4.5 argues that the *Bosphorus* presumption should be reformed so as to apply to a narrower range of situations.

4.2 The *Bosphorus* Doctrine

The Strasbourg Court has held that contracting parties to the Convention are not prohibited from transferring their sovereign power to international organisations such as the EU.¹¹⁰ Furthermore, so long as that international organisation is not a contracting party to the Convention, the ECtHR cannot hold it accountable for any obligations arising from the Convention.¹¹¹ However, in contrast, Article 1 of the Convention does not distinguish between a breach occurring as a consequence of domestic law or as consequences of international obligations.¹¹² This rightly ensures that

Contracting Parties cannot absolve themselves of the guarantees of the Convention simply because they are implementing international law – an outcome ‘depriving [the Convention] of its peremptory character and undermining the practical and effective nature of its safeguards’.¹¹³ In resolving this contrast, the Strasbourg Court has implemented the *Bosphorus* doctrine. Developing the early case law of *M & Co*,¹¹⁴ the Strasbourg Court in *Bosphorus* confirmed that:

state action taken in compliance with such [international] legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights ... in a manner which can be considered at least equivalent to that for which the Convention Provides.¹¹⁵

However such a presumption is not absolute and would be rebutted where the protection of Convention rights is ‘manifestly deficient’.¹¹⁶ The precise conditions of finding protection ‘manifestly deficient’ remains unknown, however some have speculated that this is satisfied when the EU has not conducted an ‘adequate review’.¹¹⁷ The presumption will arise either where the state had no discretion in carrying out the act, such as in *Bosphorus*,¹¹⁸ or where acts of the EU organs did not involve the Member States, such as in *Connolly*.¹¹⁹

The *Bosphorus* presumption affords Member States and EU organs a privileged position of immunity from the jurisdiction of the ECtHR. For the Strasbourg Court to even consider a claim, an applicant must not only prove that an equivalent protection is lacking, but that it is ‘manifestly deficient’ – an arguably nebulous condition.¹²⁰ Ultimately, as alluded to in section 1 of this article, the *Bosphorus* presumption protects the hypocrisy whereby the EU requires all Member States to accede to the Convention when it itself fails to do so.¹²¹ Such

¹¹⁰ *Matthews v United Kingdom* ECHR 1999–I.

¹¹¹ *Confédération Française Démocratique du Travail v European Communities* (1978) 13 DR 321.

¹¹² *United Communist Party of Turkey v Turkey* ECHR 1998–I, para 29.

¹¹³ *Bosphorus* (n 7) para 154.

¹¹⁴ *M & Co v Federal Republic of Germany* (1990) 64 DR 138.

¹¹⁵ *Bosphorus* (n 7) para 155.

¹¹⁶ *ibid* para 156.

¹¹⁷ *Bosphorus* (n 7) concurring Opinion of Judge Ress.

¹¹⁸ Council Regulation (EEC) 990/93 of 26 April 1993 Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14.

¹¹⁹ Case C–274/99 *Bernard Connolly v Commission of European Communities* [2001] ECR I–01611.

¹²⁰ Barnard and Peers (n 8) 247.

¹²¹ *ibid* 246.

factors are instrumental in suggesting that the *Bosphorus* presumption should largely be abandoned.

4.3 Reforming *Bosphorus*: Prior to Opinion 2/13

In arguing for a reformed *Bosphorus* presumption which applies only to situations encompassed by the unaccessed protocols it must first be established that the *Bosphorus* presumption can in fact apply to protocols that were not universally ratified by the Member States in the first place.

Considering, as Jacqu   asserts, that all rights present within the Convention protocols are covered within the Charter,¹²² it seems arguable that the *Bosphorus* presumption applies to all protocols of the Convention irrespective of universal ratification. Furthermore, it is argued that the difference in jurisdiction *ratione personae* between the Charter and the respective protocols does not ultimately justify the refusal to apply the *Bosphorus* presumption to unaccessed protocols. In fact, as the Strasbourg Court held, the equivalent protection does not need to be ‘identical’ for a presumption to be established.¹²³ In the alternative, even if initially the *Bosphorus* presumption did not apply to protocols not universally ratified, there is a strong argument to suggest such development could occur given that, since the *Bosphorus ratio*, the Charter has been made legally binding.

The subsequent analysis argues for a reformed *Bosphorus* presumption in which it applies to unaccessed protocols and contrastingly does not apply in situations covered by the Accession Agreement. Importantly, the Strasbourg Court would only have jurisdiction to apply such reformed *Bosphorus* presumption to Member States that have signed the unaccessed protocol. In other words, the ECtHR can only apply the reformed *Bosphorus* presumption in so far as its jurisdiction *ratione personae* allows. This proves unproblematic for our purposes given that conflicting interpretation of the Convention could only occur with respect to these Member States.

Beno  t-Rohmer alleges that Strasbourg’s respect for ‘international cooperation’, the inspiration for the

Bosphorus presumption will persevere following accession. Therefore, she argues, the premise for the *Bosphorus* presumption will still stand, post-accession.¹²⁴ Such analysis proves robust regarding unaccessed protocols; while the Union is not required to follow Strasbourg’s interpretation of the Convention *verbatim* vis-  -vis the unaccessed protocols, Member States who have ratified such protocols face the possibility they are required to follow conflicting obligations (albeit this is less likely where rights correspond).

However, to the extent that the Union has acceded to the Convention and its protocols, Beno  t-Rohmer’s assertion cannot be upheld. In such cases, her position fails to consider that the Accession Agreement augments the respect for international cooperation to the extent that the *Bosphorus* presumption is no longer needed. This is supported considering the facts of *Bosphorus*; the Strasbourg Court felt the need to establish the *Bosphorus* presumption *because* the Irish State faced conflicting obligations stemming from the Convention and ‘Community law’.¹²⁵ Post-accession, the possibility of diverging interpretations of rights encompassed by the Accession Agreement becomes greatly reduced. Therefore, while the *Bosphorus* presumption is justified by the principle of international cooperation so far as the unaccessed protocols are concerned, this is not the case where the Union submits itself to the jurisdiction of the Strasbourg Court pursuant to the Accession Agreement.

The reformed *Bosphorus* presumption, it is argued, strikes a balance between the principle of equal treatment governing contracting states and the paradox argument of abandoning the *Bosphorus* presumption completely. In agreement with Christiaan Timmermans, a paradox arises when suggesting the abandonment of the *Bosphorus* presumption post-accession.¹²⁶ After all, Luxembourg’s approach has been to continually adopt Strasbourg’s jurisprudence, most evident with the promotion of the Charter to legally binding status. Such argument was used above

¹²² Jacqu   (n 25) 1004.

¹²³ *Bosphorus* (n 7) para 155.

¹²⁴ Florence Beno  t-Rohmer, ‘Beinvenue aux Enfants de Bosphorus’ (2010) 81 *Revue Trimestrielle des Droit de l’Homme* 19.

¹²⁵ *Bosphorus* (n 7) para 148.

¹²⁶ Christiaan Timmermans, ‘Some Personal Comments on the Accession of the EU to the ECHR’ in Vasiliki Kosta and others (eds), *The EU Accession to the ECHR* (Hart 2014).

to argue unacceded protocols could benefit from the *Bosphorus* presumption.

On the other hand, this stance must be balanced with the principle of equal treatment which governs the Contracting States. Since 1995, the Strasbourg Court has held that inequality between Contracting States would run counter the achievement of establishing greater unity in the realisation of human rights.¹²⁷ This is reiterated in the Convention's Preamble. The expectation that the principle of equal treatment will govern accession is clear when analysing the parties' submissions within negotiations. For example, Russia submitted that 'All member states *are equal parties* to the Convention after [the] accession of the EU, and *all parties will remain in [an] equal situation* with respect to all aspects of the functioning of the Convention.'¹²⁸ This expectation has translated into the Accession Agreement as evidenced by the Draft Explanatory Report which states 'the Accession Agreement aims to preserve the equal rights of all individuals under the Convention ... and *the equality of all High Contracting Parties*.'¹²⁹ If the abovementioned principle of equal treatment has been interpreted correctly, it is unlikely that the *Bosphorus* presumption as it exists currently would be accepted.

Reflecting the above dichotomy, the reformed *Bosphorus* presumption would see that it is not applied within cases covered by the Accession Agreement (the majority of the Convention system). However, it is conceded that reforming the presumption to apply to the unacceded protocols would contravene the principle of equal treatment. Justification of this aspect of the reformed *Bosphorus* presumption is grounded upon the Accession Agreement which provides for 'adaptations' considering the EU is not a State.¹³⁰ In other words, because the reformed *Bosphorus* presumption is justified through the rationale of 'international cooperation' – and such rationale is only possible because the EU is not a State – such reform is permitted by the Accession Agreement itself.

In addition to the above, it is argued that the principle of equal treatment would preclude the Strasbourg Court from removing the *Bosphorus* presumption vis-à-vis cases falling within the unacceded protocols. The Strasbourg Court clearly respects the material scope of accession as evidenced by Article 2 of the Accession Agreement.¹³¹ Article 2 enables the EU to make a reservation to any right within the scope of accession and amends Article 57 of the Convention accordingly. In this way the Strasbourg Court ensures 'the conditions applicable to other High Contracting Parties with regard to reservations, declarations and derogations under the Convention should also apply to the EU.'¹³² Theoretically, the EU could have expressed a reservation regarding a right within the Convention, the Protocol or Protocol No 6. In such circumstances the Strasbourg Court would have been obliged to maintain the status quo and rule any such matters as it would have done prior to accession – inadmissible. By implication, it follows such respect should also translate to the material limits of scope of accession i.e. the unacceded protocols. The fact that the Union has not acceded to several protocols should be sufficient to delineate a clear boundary for Strasbourg's jurisdiction. As the Strasbourg Court would never oblige a Contracting State to abide by a protocol it has not ratified, e.g. Poland and Protocol No 13 prior to 2014, so too should such respect be afforded to the Union. To remove the *Bosphorus* presumption in cases of unacceded protocols would essentially amount to *de facto* accession by the Union to protocols outside of the Accession Agreement. This would in turn risk offending Member States who so fervently argued for the principle of neutrality which governs the selective accession to the protocols seen today in the Accession Agreement. Therefore the principle of equal treatment not only supports the abandonment of the *Bosphorus* presumption – notwithstanding Timmermans' position – but also supports reform that it should be abandoned *only* in situations corresponding to the material scope of accession.

¹²⁷ *Loizidou v Turkey* ECHR 1996–VI.

¹²⁸ Council of Europe, 'Second Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights' (4 July 2012) <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working_documents/47_1\(2012\)02_Extracts_CDDH_Report_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working_documents/47_1(2012)02_Extracts_CDDH_Report_EN.pdf)> accessed 18 February 2015, Appendix VI (emphasis added).

¹²⁹ Draft Explanatory Report to the Accession Agreement (n 60) para 7 (emphasis added).

¹³⁰ *ibid.*

¹³¹ Draft Accession Agreement (n 14) art 2.

¹³² Draft Explanatory Report to the Accession Agreement (n 60) para 33.

Although impossible to predict, Protocol No 8 of the Treaties could be argued to support such reformed *Bosphorus* presumption. Protocol No 8 Article 1 specifies that the Accession Agreement should ‘make provisions for the specifics of the characteristics’ of the Union ‘in particular with regard to’ the Union’s possible participation in the Convention’s control bodies and the need for applications to be correctly addressed to the Member States and Union as necessary.¹³³ Proponents submit that a wide interpretation of such provision ‘has major implications for the way in which the [ECtHR’s] supervision operates’.¹³⁴ This argument seems justified especially if the words ‘in particular’ are read non-exhaustively.¹³⁵ Accordingly, such a provision could be argued to support the survival of the *Bosphorus* presumption for situations falling within the unaccessed protocols. However, opponents would argue such interpretation fails to consider the specific design of Article 1. It seems more likely, as De Schutter argues, that the intention of the drafters was such that the preservation of the ‘specific characteristics’ was limited to the procedural, rather than the substantive, matters of accession.¹³⁶ This is clearly evidenced by both examples listed in the provision. Both demonstrate merely ‘procedural, administrative and technical aspects’¹³⁷ of EU integration and fail to legitimately support the notion that Protocol No 8 will have substantive implications for EU integration, not least of all the survival of the *Bosphorus* presumption. Therefore, although difficult to predict, it seems at least arguable that Protocol No 8 will not have any impact on the substantive judicial scrutiny process, let alone begin to distinguish between the material scope of accession and the unaccessed protocols.

Finally, in advocating the survival of the *Bosphorus* presumption in general, it has been argued that the *sui generis* characteristic of the Union justifies

its special treatment vis-à-vis other contracting parties to the Convention. As Mahoney asserts, even after accession, the Union ‘will not lose its specificity in relation to the ECHR Contracting States and so will never be in a position where it can be assimilated purely and simply, to a Contracting State.’¹³⁸ Such statement is *prima facie* justified especially in light of the Draft Explanatory Report on accession. For example, in supplementing Article 7 of the Accession Agreement, the Explanatory Report explains that the ‘co-ordinated manner’ governing Member States’ action must be taken into account when, post-accession, all Contracting Parties vote in the Committee of Ministers’ Supervision under Articles 39 and 46 of the Convention.¹³⁹ However, there seems to be a lack of evidence that the Mahoney’s ‘specificity’ should encompass the procedural *and* substantive accommodations of the Union, namely the defence of the *Bosphorus* presumption. Secondly, in agreement with De Schutter, Mahoney’s assertion proves circular; ‘it states that the EU deserves a specific treatment due to it being a specific international organisation, rather than a state’.¹⁴⁰ Accordingly, to justify the *Bosphorus* presumption by either the scope of the Accession Agreement or the unaccessed protocols post-accession due to the *sui generis* elements of the Union, would most likely be unsuccessful.

Accordingly, in light of the arguments above, the *Bosphorus* presumption should be removed following accession only insofar as the Union has acceded to the Convention. Situations involving the rights of unaccessed protocols should continue to benefit from the *Bosphorus* presumption due to the continuing need to protect ‘international cooperation’. Such a development, it is argued, would fall within the ‘adaptions’ provided for by the Accession Agreement. It bears reiterating that the Strasbourg Court would only have jurisdiction to apply such reformed

¹³³ Paul Mahoney, ‘From Strasbourg to Luxembourg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon’ (2011) 31 HRLJ 73, 78.

¹³⁴ Marie-Louise Bemelmans-Videc, ‘The Accession of the European Union/European Community to the European Convention on Human Rights’ (Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 18 March 2008) <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11835&lang=EN>> accessed 18 February 2015, para C IV.

¹³⁵ Mahoney (n 133).

¹³⁶ Bemelmans-Videc (n 134) para ciii.

¹³⁷ Mahoney (n 133) 78.

¹³⁸ *ibid* 79.

¹³⁹ Draft Explanatory Report to the Accession Agreement (n 60) para 82.

¹⁴⁰ Olivier De Schutter, ‘Bosphorus Post-Accession: Redefining the Relationship between the European Court of Human Rights and the Parties to the Convention’ in Vasiliki Kosta and others (eds), *The EU Accession to the ECHR* (Hart 2014) 183.

Bosphorus presumption to Member States that have signed the unaccessed protocol in question i.e. they would be limited by their jurisdiction *ratione personae*.

4.4 Judicial Political Reality: Opinion 2/13

The subsequent analysis will demonstrate that three grounds expressed within Opinion 2/13: firstly, the EU's *sui generis* nature; secondly, the principle of mutual trust; and thirdly, the Common Foreign and Security Policy ('CFSP') suggest that the Luxembourg Court anticipates *at least* the retention of the *Bosphorus* presumption. To this author's regret, by adopting such defensive position and providing that 'judicial realpolitik [would] trump arguments of principle', as De Schutter concludes,¹⁴¹ one can conclude that the initial reform suggested in section 4.3 of this article is unlikely to be adopted.

Firstly, as correctly highlighted by Peers, the Opinion expressly endorses the theory that the Union is *sui generis*.¹⁴² This is evidenced by the Luxembourg Court's preliminary considerations which, *inter alia*, supports the amendment to Article 59 of the Convention because the Union 'is precluded by its very nature from being considered a State'.¹⁴³ Furthermore, in expanding on its jurisprudence of supremacy,¹⁴⁴ the court held the EU has a:

new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of rules to ensure its operation.¹⁴⁵

If this demonstrates the Luxembourg Court's disparagement of the approach taken within the Accession Agreement as Douglas-Scott suggests, then

it must be conceded that the analysis in section 3.2 underestimates the importance of EU's *sui generis* nature.¹⁴⁶ By confirming that this *sui generis* character 'has consequences as regards the procedure for and conditions of accession to the ECHR',¹⁴⁷ Mahoney's aforementioned position¹⁴⁸ proves more probable. Such a position suggests an expectation of the Luxembourg Court that the *Bosphorus* presumption is expected to survive, irrespective of the breadth of the material scope of accession.

Secondly, in demanding a provision acknowledging the EU obligation of mutual trust,¹⁴⁹ the Luxembourg Court seems to argue for a higher threshold for rebutting the *Bosphorus* presumption. Most relevant to the area of freedom, security and justice ('AFSJ'), the principle of mutual trust 'requires [Member] States, save in exceptional circumstances, to consider all other Member States to be complying with EU law and particularly with fundamental rights recognised by EU law'.¹⁵⁰ The Luxembourg Court held that because the ECHR system may require Member States to reciprocally scrutinise their compliance with Convention rights, the Accession Agreement 'specifically disregards'¹⁵¹ the EU principle of mutual trust.¹⁵² Accordingly, the court held, accession 'is liable to upset the underlying balance of the EU and undermine the autonomy of EU law'.¹⁵³

This position not only contradicts the ECtHR's principle of equal treatment, but also amounts to 'consenting tacitly to substitution, in the field of Community law, of Convention standards by a Community standard', which the judges in *Bosphorus* feared so much.¹⁵⁴ Such a holding seems justified on similar grounds as Timmermans' argument regarding an arising paradox. In fact, the Luxembourg Court

¹⁴¹ *ibid* 184.

¹⁴² Steve Peers, 'The CJEU and the EU's Accession to the ECHR: a Clear and Present Danger to Human Rights Protection' *EU Law Analysis* (18 December 2014) <<http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html>> accessed 18 February 2015.

¹⁴³ Opinion 2/13 (n 15) para 156.

¹⁴⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585; *Van Gend en Loos* (n 57).

¹⁴⁵ Opinion 2/13 (n 15) para 158.

¹⁴⁶ Douglas-Scott (n 16).

¹⁴⁷ Opinion 2/13 (n 15) para 158.

¹⁴⁸ Above, text to n 140.

¹⁴⁹ Case C-411/10 *NS v Secretary of State for the Home Department* ECR I-13905.

¹⁵⁰ Opinion 2/13 (n 15) para 191.

¹⁵¹ *ibid* para 193.

¹⁵² *ibid* para 194.

¹⁵³ *ibid*.

¹⁵⁴ *Bosphorus* (n 7) Joint Concurring Opinion of Judges Rozakis and others, para 3.

goes beyond Timmermans’ submission because, by requesting ‘a provision to prevent such a development’, the court is essentially demanding a stricter *Bosphorus* threshold before the Strasbourg Court can intervene. In other words, by demanding that within AFSJ, the threshold for Strasbourg’s intervention is substituted from ‘manifestly deficient’ to the Union’s threshold of ‘exceptional circumstances’,¹⁵⁵ the CJEU is insisting the EU AFSJ system triumphs over the existing protection of human rights within the Convention system.¹⁵⁶

Thirdly, the Luxembourg Court has held that a condition for accession would be the complete immunity for the Common Foreign and Security Policy area (‘CFSP’) from any scrutiny from the Strasbourg Court post-accession. The Luxembourg Court argued, pursuant to Article 24(1) TEU, because certain aspects of the CFSP ‘fall outside the ambit of judicial review’,¹⁵⁷ of the CJEU, then no other international court, including the ECtHR, can have jurisdiction.¹⁵⁸ This condition for accession calls for a complete insulation of CFSP from Strasbourg’s jurisdiction. In effect this is an unconditional *Bosphorus* presumption. Therefore, contrary to the analysis in section 3.2 above, this position seems to suggest that not only is the *Bosphorus* presumption likely to survive beyond accession, it is to some degree, an irrebuttable presumption within CFSP is a condition of accession.

It bears repeating that the most desirable reform with respect to the *Bosphorus* presumption is that submitted in section 4.3. However, it is clear from the recent Opinion that the Luxembourg Court expects that at the very least the *Bosphorus* presumption will prevail and in some cases be reinforced. The future of the *Bosphorus* presumption is ultimately the decision of the Strasbourg Court; however, if, as De Schutter claims, *realpolitik* prevails over principled argument,

then it is unlikely the *Bosphorus* presumption will be abandoned. Accordingly section 4.5 suggests alternative reform taking into account this judicial *realpolitik*.

4.5 Reforming *Bosphorus* considering Opinion 2/13

In light of this judicial *realpolitik*, De Schutter argues the future of *Bosphorus* in fact lies with its ‘generalisation’ to all Contracting Parties of the Convention.¹⁵⁹ The subsequent analysis demonstrates that although there is merit to the generalisation of the *Bosphorus* presumption in this way, ultimately this would act to the detriment of the current system of human rights protection. Accordingly, it is argued that the application of *Bosphorus* should be restricted, thereby increasing the judicial scrutiny of the EU by the Strasbourg Court.

De Schutter proposes an extension of the *Bosphorus* presumption ‘in any situation where, at the national level, a protection ‘equivalent’ to that provided by the ECHR system is ensured.’¹⁶⁰ Such reform certainly proves robust in light of the Convention system’s emphasis on subsidiarity. Not only has the principle of subsidiarity been emphasised in the Interlaken¹⁶¹ and İzmir Declarations,¹⁶² but also reaffirming established case law,¹⁶³ the Strasbourg Court in *Greens and MT* held:

the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions and, as a result ... the role of the domestic policy-maker should be given special weight.¹⁶⁴

As evidenced by the Brighton Conference, Contracting Parties would likely welcome the generalisation of the *Bosphorus* presumption, which in effect strengthens the ECtHR’s margin of appreciation.¹⁶⁵ Furthermore,

¹⁵⁵ Opinion 2/13 (n 15) para 191.

¹⁵⁶ Peers (n 142).

¹⁵⁷ Opinion 2/13 (n 15) para 252.

¹⁵⁸ *ibid* para 257.

¹⁵⁹ De Schutter (n 140).

¹⁶⁰ *ibid* 188.

¹⁶¹ Council of Europe ‘High Level Conference the Future of the European Court of Human Rights: Interlaken Declaration’ (2010) <http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 3 April 2015.

¹⁶² Council of Europe, ‘High Level Conference on the Future of the European Court of Human Rights: İzmir Declaration’ (2011) <http://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf> accessed 3 April 2015.

¹⁶³ *Hatton v United Kingdom* ECHR 2003-VIII, para 93; *Sukhovetsky v Ukraine* ECHR 2006-VI, paras 68–69.

¹⁶⁴ *Green and MT v United Kingdom* (2010) ECHR 1826, para 113.

¹⁶⁵ Council of Europe, ‘High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration’ (19 February 2010) <http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 19 January 2016.

such reform would decrease the backlog of cases the Strasbourg Court faces (99,900 cases in December 2013).¹⁶⁶ Moreover, such extension would be contingent upon the convergence of Member State modality in which they protect Convention rights.¹⁶⁷ For example, the UK, being a dualist state, would have to reform the Human Rights Act 1998 to provide for a stronger protection of Convention rights beyond the current declaration of incompatibility mechanism. This, De Schutter argues, would facilitate an elevation of status for the Convention in domestic legal systems.¹⁶⁸ Lastly, the resulting convergence on the 'human rights proofing' methods adopted by parliamentary committees or the Executive would further assure the protection of Convention rights.¹⁶⁹

A closer analysis of the aforementioned advantages arising from generalising *Bosphorus* demonstrates these are ultimately limited, politically improbable or detrimental to the system of human rights protections.

Firstly, generalising the *Bosphorus* presumption is not necessary to reduce ECtHR's case backlog given recent developments addressing these already. For example, by reorganising the system of presiding judges, Protocol No 14 has already reduced the ECtHR's caseload by 60,100 within two years since its enforcement.¹⁷⁰ This should further fall following the entry into force of Protocol No 16.

Secondly, the change in modalities facilitating an entrenchment of the Convention on the national level is unrealistic and improbable. Notwithstanding the views of the Brighton Conference delegation, such reform is highly unlikely to be accepted at the cost of a reduction in Contracting State sovereignty. For example, it is hard to conceive that the UK would be

withdrawing its system of declaration of incompatibility. As UK Lord Chief Justice stated:

Strasbourg shouldn't win and doesn't need to win ... it is at least arguable that having taken into account of the decision of the court in Strasbourg our courts are not bound by them.¹⁷¹

This argument is further strengthened considering that the UK Supreme Court in 2009 upheld domestic law notwithstanding the ECtHR had ruled it was in violation of Article 6(1) of the Convention.¹⁷² Accordingly, if the redrafted Accession Agreement incorporated a generalised *Bosphorus* presumption it would likely be a strong point of contention among Member States and could ultimately lead to the obstruction of Union accession. It is after all De Schutter who alludes to the influence of judicial *realpolitik*.

Lastly, in concurrence with Harmsen, the generalisation of the *Bosphorus* presumption risks a breach of the principle of equal treatment.¹⁷³ If *Bosphorus* is generalised, Strasbourg's analysis may adopt a:

[c]ategorical logic, in which different categories of Member States ... are identified through either their judicial or political processes, with the [Strasbourg] Court then differentially treating cases according to the category of member from which they originate.¹⁷⁴

By presuming some states are likely to respect the Convention while others are not, inequalities may arise when the contrary in fact occurs in each respected category. In other words States may abuse their 'certificate of good conduct' or *vice versa*, the Strasbourg Court may assume a breach when there is

¹⁶⁶ European Court of Human Rights, 'President Spielmann highlights the Court's very good results in 2012' (24 January 2013) <<http://hudoc.echr.coe.int/web/services/content/pdf/003-4234795-5035179>> accessed 18 February 2015.

¹⁶⁷ De Schutter (n 140) 188.

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid* 189.

¹⁷⁰ (n 166).

¹⁷¹ David Batty, 'Senior Judge Raises Doubts over Power of European Court' *The Guardian* (London, 20 October 2011) <<http://www.theguardian.com/law/2011/oct/20/senior-judge-doubts-european-court>> accessed 18 February 2015.

¹⁷² *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373 not applying *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1; cf *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127 where the Grand Chamber modified their approach slightly.

¹⁷³ Robert Harmsen, 'The (Geo-)Politics of the EU Accession to the ECHR: Democracy and Distrust in the Wider Europe' in Vasiliki Kosta and others (eds), *The EU Accession to the ECHR* (Hart 2014).

¹⁷⁴ *ibid* 207.

not one.¹⁷⁵ Such development could question the legitimacy of the Convention, catalyse support for opponents of the Convention and demobilise perspective claimants.¹⁷⁶

The early response of the Strasbourg Court to Opinion 2/13 seems to support the proposition that generalising the *Bosphorus* presumption would not be a viable option. Denouncing Opinion 2/13 as a ‘great disappointment’, the President of the Strasbourg Court, Dean Spielmann, expressed in the Annual Report:

that the principal victims will be those citizens whom this opinion (no 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each Member State. More than ever therefore, the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation.¹⁷⁷

The strength of this evidence must be treated with caution – this is a non-legally binding document signed by only one of 47 Judges and Spielmann’s role as President in no way entitles him to dictate future relations with the Union.¹⁷⁸ Nevertheless, such exceptionally strong language should not be overlooked and in line with such position, the subsequent argument suggests that the Strasbourg Court should restrict the conditions that the *Bosphorus* presumption applies.

This position attempts to augment the preliminary observations put forward by Lock following Opinion 2/13.¹⁷⁹ As already considered, it seems unlikely that a reformed *Bosphorus* presumption which differentiates between cases falling within unaccessed protocols and the Accession Agreement will be adopted.

Firstly, however, the Strasbourg Court could cease to apply the presumption in situations akin to the *Connolly* case.¹⁸⁰ Accordingly, the Strasbourg Court would adjudicate on actions of the Union organs without the need for Member State involvement. Hence areas such as EU competition law, which is enforced at the Union level by the Commission pursuant to Article 105 TFEU, would now be susceptible to review by the Strasbourg Court. This would remedy the protection gap established by *Connolly*, which previously would have been resolved by accession but for the defensive stance of the Luxembourg Court in Opinion 2/13.

Secondly, it is argued that increased judicial scrutiny of the EU’s principle of mutual trust is both legally defensible and justifiable. The *Bosphorus* presumption is only possible because the Union has been ‘considered to protect fundamental rights’.¹⁸¹ However, in cases involving the principle of mutual trust it is arguable there is ‘no adequate review’¹⁸² and therefore protection is ‘manifestly deficient’. In fact, Opinion 2/13 explicitly states that the lack of protection of the principle of mutual trust within the Accession Agreement was a basis for the incompatibility.¹⁸³ Accordingly, the Strasbourg Court would enjoy a newfound mandate to adjudicate upon AFSJ matters.

This reform, contrary to the analysis in section 3.2, would not consider the distinction between the material scope of accession and unaccessed protocols but instead would apply generally. In some ways such development could be seen as a retaliation to the overly-protective stance of the Luxembourg Court, so care must be taken not to risk a judicial standoff where the victims would not only be those individuals highlighted by Spielmann but also Member States and ultimately the Union and the Convention systems.

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ Dean Spielmann, ‘European Court of Human Rights Annual Report 2014 (Provisional Version)’ (European Court of Human Rights, 2014) <http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf> accessed 18 February 2015.

¹⁷⁸ Tobias Lock, “‘Will the empire strike back?’ Strasbourg’s Reaction to the CJEU’s Accession Opinion’ *Verfassungsblog* (Munich, 30 January 2015) <<http://www.verfassungsblog.de/en/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/>> accessed 18 February 2015 (emphasis added).

¹⁷⁹ *ibid.*

¹⁸⁰ (n 119).

¹⁸¹ *Bosphorus* (n 7) para 155.

¹⁸² The Concurring Opinion of Judge Ress in *Bosphorus* (n 7).

¹⁸³ Lock (n 178).

4.6 *Interim Conclusions*

It has been argued that there is evidence to suggest that the *Bosphorus* presumption applies equally to all protocols of the Convention irrespective of universal ratification. Furthermore, the subsequent critical analysis attempted to justify a reformed *Bosphorus* presumption which does not apply to situations encompassed by the Accession Agreement, but contrastingly does apply to cases falling within the unaccessed protocols. Such a reformed presumption would only be applied by the ECtHR in so far as its jurisdiction *ratione personae* allowed. However with the benefit of hindsight, Opinion 2/13 clearly demonstrates the Luxembourg's reluctance to lose its privileged position. If judicial *realpolitik* becomes instrumental in the redrafting of the Accession Agreement then the aforementioned reform will unlikely come to fruition. Accordingly, complying with the restrictions established in Opinion 2/13, it has been argued that the Strasbourg Court should restrict the finding of a *Bosphorus* presumption in certain circumstances, namely decisions made purely by organs of the Union and those falling within AFSJ shielded by mutual cooperation.

5 CONCLUSION

The conclusion of the Accession Agreement was hailed as a monumental event for Europe. Accession would mean that the Union would become the 48th High Contracting Party and the first to be a non-State entity.¹⁸⁴ The detrimental impact of the existence of two concurrent but contrasting legal orders would be overcome by accession establishing a hierarchy in which any previous danger of diverging human rights standards becomes an impossibility. Furthermore, the European Union organs would be accountable to the external judicial supervision of the Strasbourg Court. Importantly, accession would allow applicants to directly seek redress against a Union institutions through the Convention legal system.

The recent rejection of the draft Accession Agreement by the Luxembourg Court in Opinion 2/13 clearly demonstrates that accession cannot continue on current terms. As Peers argues, Opinion 2/13 provides a checklist of amendments that the redrafted Accession Agreement must incorporate.¹⁸⁵ As already alluded to, the Union is obliged under Article 6(2) TEU to accede

to the Convention. However such obligation cannot bind third parties and the blockage of accession by the ECtHR or non-EU Member States of the Convention is a very real possibility.¹⁸⁶

This article has assumed that an Accession Agreement will be concluded, albeit in redrafted form. In doing so, the critical analysis has not concerned itself with the benefits of accession. Instead, the focus has been on suggesting reform to a new Accession Agreement which would remedy the jurisprudential issues arising from the limited material scope of the Accession Agreement vis-à-vis the Convention protocols. In doing so, it is hoped the approach advanced here will be adopted in order to establish a more coherent system of human rights protection than would otherwise have been afforded by the previous Accession Agreement.

To recapitulate: firstly, it has been argued that the rationale justifying that the Accession Agreement should incorporate only protocols that have been universally ratified by Member States is indefensible. Contrary to the submission of the Member States during negotiations, to incorporate the unaccessed protocols within an Accession Agreement would not contravene either Protocol No 8 of the Treaties or Article 6(2) TEU. This is predominantly because any obligation falling under the Accession Agreement would only bind Member States when they implement Union law. This was clearly evidenced by the case law of the CJEU and the Charter. Therefore, to argue that protocols must be universally ratified in order to comply with the accession safeguards of Article 6(2) TEU or Protocol No 8, as some Member States have, is erroneous. Accordingly, in conjunction with Jacqué's evidence demonstrating that the Charter already guarantees the rights present within all protocols of the Convention, it has been ultimately suggested that the reformed Accession Agreement should cover all Convention protocols. To do so would avoid the issues raised in sections 3 and 4. In any event, the recent ratification of Protocol No 13 by Poland means there are now three protocols universally ratified by the Member States. Therefore, if minimalism was to prevail, Protocol No 13 should be incorporated within the redrafted Accession Agreement.

¹⁸⁴ Noreen O'Meara, "A More Secure Europe of Rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 German LJ 1813, 1813.

¹⁸⁵ Peers (n 142).

¹⁸⁶ *ibid.*

Secondly, two issues at the level of the Luxembourg Court were critically analysed. As regards the first, this article demonstrated that the Luxembourg Court erred in its rejection of the current Accession Agreement on the basis of Protocol No 16 of the Convention which allows Member States to request non-binding opinions from the Strasbourg Court. The concerns raised by the Luxembourg Court concerning autonomy could easily be remedied through internal Union jurisprudence. More specifically, analogous to the *MOX Plant* case,¹⁸⁷ the principle of sincere cooperation could resolve the issues highlighted by the court. Moreover, it has been shown that Protocol No 16 cannot be used to trigger the prior involvement procedure of the Accession Agreement. Furthermore, as evidenced by the jurisprudence of *CILFIT* and *Foto-Frost*,¹⁸⁸ the fear that Protocol No 16 facilitates forum shopping proved unfounded.

The second issue examined in section 3 concerned the question of how the Luxembourg Court should approach cases in which individuals relied on a corresponding right within a protocol which was not included in the Accession Agreement. Here it was argued that the Luxembourg Court should engage in judicial activism and continue to interpret such rights in light of the Convention notwithstanding the limited material scope of accession. This was supported by evidence demonstrating that the Luxembourg Court in the past has not been concerned with the need for universal ratification before correspondence was established. Furthermore, a teleological interpretation of the correspondence mechanism within the Charter notwithstanding the existence of an Accession Agreement support this submission. Therefore, it was concluded that judicial activism should take place in the sense outlined above. A caveat was, however, raised by arguing that judicial activism, in order to respect the wishes of the drafters of the Charter, should

occur through the Charter and not through the application of general principles of EU law.

Thirdly and finally, a critical approach was adopted in examining the relationship between the two European legal orders. After demonstrating that the *Bosphorus* presumption could be concluded to apply to all protocols of the Convention,¹⁸⁹ this article suggested reform of the *Bosphorus* presumption. The reform advanced was that post-accession, the *Bosphorus* presumption should continue to apply to protocols which remained unaccessed to by the Union, but should cease to apply to situations which would be incorporated within the Accession Agreement. Importantly, the ECtHR would apply this reformed presumption only to Member States who are signatories to the relevant protocols. This was clearly supported by a close analysis of *Bosphorus* which established the presumption to preserve international cooperation in the first place.

However to this author's regret it was also shown that Opinion 2/13 demonstrates not only an expectation, but also an insistence by the Luxembourg Court that its privileged stance be maintained and even strengthened. Therefore, considering the judicial *realpolitik* of Opinion 2/13, alternative reform was suggested. Rebutting academic arguments that *Bosphorus* could be generalised to apply to Member States, this article suggested a narrowing of the situations in which *Bosphorus* should be applied. More specifically, the Strasbourg Court should not apply the presumption in cases where only the Union organs have acted, i.e. the *Connolly* line of jurisprudence should be abandoned.¹⁹⁰ Furthermore, the Luxembourg Court should restrict the application of *Bosphorus* in situations concerning Union 'mutual trust'. This, after all, was conceded by the Luxembourg Court to be an area for which no internal judicial scrutiny takes place in the first place.

¹⁸⁷ (n 13).

¹⁸⁸ *CILFIT* (n 63); *Foto-Frost* (n 67).

¹⁸⁹ *Bosphorus* (n 7).

¹⁹⁰ (n 119).

PROBLEMS IN THE LAW RELATING TO DRUG SUPPLIERS AND MANSLAUGHTER

Christopher Grayson*

The law regarding drug suppliers whose client dies after voluntarily self-injecting has been shrouded in controversy.¹ Past cases have been confused and contradictory in regards to how suppliers are dealt with.² However, in recent years there have been a number of cases looking to clarify this situation. In this article I argue the decision in *Kennedy (No 2)*³ does allow suppliers to be treated in a principled manner in regards to a charge of unlawful act manslaughter (hereafter UAM) and does treat them consistently, although this could go further. I then argue that *Kennedy (No 2)* is undermined by *R v Evans*,⁴ which established the supplier can be convicted of gross negligence manslaughter (hereafter GNM). This conviction does not follow legal principles and is not a solid ground for a consistent treatment of drug suppliers. Finally I argue that a conviction of manslaughter does not cohere to legal principles of fair labelling and proportionality.

The case of *Kennedy (No 2)* established that when a drug dealer supplies to a user, and the user subsequently dies, the dealer will not be found guilty of UAM.⁵ The reasoning behind this is that the 'free, deliberate and informed intervention' of a second person⁶ will act as a *novus actus interveniens* and thus will break the chain of causation.⁷ Lord Bingham recognises that to make out UAM there needs to be

three elements. First, the defendant needs to have committed an unlawful act; second, the unlawful act must be a crime; and third, the defendant's act was a significant cause of death.⁸ Lord Bingham took the case of *R v Dalby* as authority that the supply of a dangerous drug is not harmful in itself and therefore cannot be the cause of death.⁹ He concluded that the defendant had committed no unlawful act which was the cause of death. Instead it was the deceased's free and voluntary decision to inject in a form and quantity which caused the death.¹⁰ Finding the defendant guilty of would have been 'palpably inconsistent over issues of causation and voluntariness',¹¹ as the second act has overtaken the first as the cause of death.¹²

The finding that the deceased freely and voluntarily administered the drug is fatal to the contention that the defendant caused the injection¹³ on Professor Williams' argument that even though someone may urge or suggest reasons for you to do something, they 'do not cause you to do it'.¹⁴ So when the deceased has voluntarily injected themselves they become the 'final wielder of human autonomy', bearing responsibility for their actions.¹⁵ Then, on the usual principles of causation, the causal chain has been broken and the supplier is relieved of liability.

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¹ Paul Duke, 'Drug Dealers and Fatal Self-In Australia: A Cause for Concern' (2008) 1 Queensland Law Student Rev 13, 14.

² Russell Heaton, 'Dealing in Death' (2003) Crim LR 497, 497.

³ [2007] UKHL 38, [2008] 1 AC 269.

⁴ [2009] EWCA Crim 650, [2009] 1 WLR 1999.

⁵ *Kennedy* (n 3).

⁶ *R v Latif* [1996] 1 WLR 104 (HL) 115 (Lord Steyn).

⁷ Catherine Elliott and Claire De Than, 'Prosecuting the Drug Dealer when a Drug User Dies: *R v Kennedy (No 2)*' (2006) 69 MLR 986, 993.

⁸ *Kennedy* (n 3) [7] (Lord Bingham).

⁹ [1982] 1 WLR 425 (CA).

¹⁰ *ibid* 429.

¹¹ Alan Reed, 'Causation and Assisting Drug-Abuse Injection' (2005) 69 JCL 384, 389.

¹² Lisa Cherkassky, 'Kennedy and Unlawful Act Manslaughter: An Unorthodox Application of the Doctrine of Causation' (2008) 72 JCL 387, 388.

¹³ *Kennedy* (n 3) [18] (Lord Bingham).

¹⁴ Glanville Williams, 'Finis for Novus Actus?' (1989) 48 CLJ 391, 392.

¹⁵ *ibid* 391.

The criminal law generally assumes the existence of free will.¹⁶ It could, however, be argued the drug addict is not really making a free choice¹⁷ by virtue of them being an addict. This would take us down the line of reasoning used in *R v Finlay*¹⁸ which applied *Empress Car Co (Abertillery) Ltd v National Rivers Authority*,¹⁹ where the defendant was found liable because the self-injection of the deceased was ‘entirely foreseeable’.²⁰ This approach may be more logical, but it is inconsistent with the doctrine of free will to describe these actions in terms of cause and effect.²¹ Although we can study human behaviour as the subject of causal influences²² and pander to a form of ‘paternalistic determinism’,²³ it is crucial when liability is at stake that we take a firm view on the autonomy of will in order to accord to principles of just punishment.²⁴ Although the test in *Finlay* is desirable from a moralist approach²⁵ – as drug suppliers would be criminally liable for a user’s death – it would be unjust for the user to transfer responsibility by claiming they could not stop themselves.²⁶ The rejection of *Finlay* shows how *Kennedy (No 2)* is a return to general principles of autonomy and causation in the criminal law,²⁷ and treats drug suppliers in a principled manner.

In the earlier case of *R v Kennedy*, the defendant was guilty of UAM as his preparation of the syringe allowed the court to find joint responsibility for the administration of the drug.²⁸ This decision meant drug suppliers were treated inconsistently as while suppliers who prepared the needle could be liable for

manslaughter, the dealer who simply handed over a bag would not be.²⁹ There is no difference in moral culpability between these two circumstances³⁰ and it is beneficial that *Kennedy (No 2)* removed this irrational distinction meaning that drug suppliers were to be treated more consistently.

Lord Bingham did however hold that suppliers who administered the injection would still be guilty,³¹ a principle applied in *R v Rogers*.³² It is difficult to see the moral difference between suppliers who prepare the drug and suppliers who inject the drug. This inconsistent approach leads to ‘rough justice’,³³ where the law only catches instances of first time users who are unsure how to inject.³⁴ This shows that the law is not yet treating suppliers in a fully consistent manner. This could, however, easily be changed. Rogers proposes that as it should not matter if the supplier administered the drug or simply prepared the syringe; it should be consent from the user in both the situations which precludes liability.³⁵ This would be a more consistent approach still as the difference between these types of supply does not go to a difference in culpability.³⁶

Due to the decision in *Kennedy (No 2)*, it is clear to prosecutors that a charge of UAM will not be successful. This means prosecutors will turn to GNM,³⁷ another form of involuntary manslaughter. Making out this offence precludes the need to find an unlawful act,³⁸ which is what *Kennedy (No 2)* failed on. Instead what is needed is: first, the defendant must

¹⁶ *Kennedy* (n 3) [14] (Lord Bingham).

¹⁷ Heaton, ‘Dealing in Death’ (n 2) 507.

¹⁸ [2003] EWCA Crim 3868, [2003] All ER (D) 142 (Dec).

¹⁹ [1998] 2 WLR 350 (HL).

²⁰ *Finlay* (n 18) [15].

²¹ Tony Honoré, *Responsibility and Fault* (Hart 1999).

²² Glanville Williams (n 14) 392.

²³ Duke (n 1) 20.

²⁴ Glanville Williams (n 14) 392.

²⁵ Duke (n 1) 24.

²⁶ Heaton, (n 2) 508.

²⁷ Duke (n 1) 14.

²⁸ [2005] EWCA Crim 685, [2005] 1 WLR 2159; Offences Against the Person Act 1861, s 23.

²⁹ Elliott and De Than (n 7) 989.

³⁰ *ibid.*

³¹ *Kennedy* (n 3) [20].

³² [2003] EWCA Crim 945, [2003] 1 WLR 1374.

³³ Heaton (n 2) 509.

³⁴ *ibid.*

³⁵ Jonathan Rogers, ‘Death, Drugs and Duties’ [2009] Pitts LJ 6, 9.

³⁶ *ibid.*

³⁷ David Ormerod, ‘*R. v Evans (Gemma): Manslaughter – Gross Negligence – Deceased Supplied by Defendant with Heroin which Proved Fatal*’ (2009) 9 Crim LR 661, 663.

³⁸ Heaton (n 2) 501.

owe the victim a duty of care; second, that the duty is breached; third, that the breach caused the death; and fourth, that the breach was gross enough to justify criminal sanctions.³⁹ In the case of *R v Evans* the jury found the defendant guilty of GNM after she supplied heroin to the deceased and subsequently failed to call for help when the victim showed symptoms of an overdose. The duty arose from the fact she contributed to a state of affairs which she knew had become life threatening;⁴⁰ the defendant then breached her duty of care when she did not take 'reasonable steps' to save the deceased.⁴¹

This decision in *Evans* is fundamentally inconsistent with the reasoning in *Kennedy (No 2)* and runs counter to established legal principles of autonomy and causation.⁴² The reason for this inconsistency with *Kennedy (No 2)* is that the same principle applies, in that it is impossible to prove a causal link between her breach of duty and the user's death when the deceased has freely and voluntarily self-injected.⁴³ *Evans'* actions were not a direct cause, but an indirect causative contribution⁴⁴ meaning she cannot be liable for the cause of death. The reliance on *R v Miller*⁴⁵ was misguided; the two cases can be distinguished in that in *Miller* there was no other party to break the chain of causation,⁴⁶ whereas in cases of the supply of drugs there is another party whose actions break the chain of causation and relieve the defendant's liability. Therefore, as the law stands, drug suppliers are not treated in a principled manner as regards causation when being tried for GNM.

Although Lord Judge stated that the defendant was under a 'plain and obvious duty to take reasonable

steps to assist',⁴⁷ the parameters of duty requirements in these circumstances are not clear,⁴⁸ meaning the law requires some clarifying and amending. The lack of clear statutory or common law guidance on where a duty arises⁴⁹ makes the standard of care a drug supplier is subject to conceptually difficult⁵⁰ and will lead to drug suppliers being treated inconsistently. Smith discusses the idea of a 'universal positive duty' where there is an immediate need to act which only requires minimal action and inconvenience.⁵¹ This does place some guidance on when a duty arises. However, if the law is to continue convicting drug suppliers under a manslaughter offence, then Rogers' proposal of legislating on when a duty arises is necessary to provide more consistency in regards to when a duty arises.⁵²

A further question is whether a conviction of GNM can be justified on the basis of policy. The treatment suppliers receive under *Kennedy (No 2)* can be justified as a matter of policy because relieving suppliers from liability means they are not discouraged from calling for help if their clients overdose.⁵³ *Prima facie*, the applicability of GNM can be justified as it provides a positive incentive for drug suppliers to call for help⁵⁴ as they are required to take reasonable steps to care for their client.⁵⁵ However, the most likely effect of *Evans* is that it will not impose a positive duty, but that suppliers will not associate with their clients after the supply so they do not become aware of a danger, and thus no duty arises.⁵⁶ This is problematic as the advisory council for the misuse of drugs has found that injecting in the company of others is

³⁹ *R v Adomako* [1994] 3 WLR 288 (HL).

⁴⁰ *Evans* (n 4) [36].

⁴¹ *ibid.*

⁴² Elliott and De Than (n 7) 993.

⁴³ Glenys Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: *R. v. Evans*' (2009) 9 Crim LR 631, 633.

⁴⁴ Dennis Baker, 'Omissions Liability for Homicide Offences: Reconciling *R. v Kennedy* with *R. v Evans*' (2010) 74 JCL 310, 312.

⁴⁵ [1983] 2 WLR 539 (HL).

⁴⁶ Glenys Williams (n 43) 638.

⁴⁷ *Evans* (n 4) [49].

⁴⁸ Glenys Williams (n 43) 632.

⁴⁹ *ibid* 631.

⁵⁰ Elliott and De Than (n 7) 991.

⁵¹ Glenys Williams (n 43) 643.

⁵² Rogers (n 35) 9.

⁵³ *ibid* 7.

⁵⁴ Rebecca Williams, 'Policy and Principle in Drugs Manslaughter Cases' (2005) 64 CLJ 66, 76.

⁵⁵ *Evans* (n 4) [31].

⁵⁶ Rogers (n 35) 7.

inherently safer,⁵⁷ meaning the availability of a manslaughter charge would actually increase the number of drug users dying. Also, imposing this charge will often impose the burden on family and friends as opposed to professional dealers who are removed from the actual supply.⁵⁸ This is unjust as family culpability is often more pale than that of the professional dealer who cares nothing for the 'miserable consequences' of their trade.⁵⁹ It is thus evident that convicting drug suppliers of manslaughter in these circumstances is contrary to a good legal policy of reducing deaths from overdose.

Although it does seem fair to criminalise Evans, it is disproportionate and unfair to label her conviction as manslaughter.⁶⁰ As we have seen, Evans' culpability lay only in negligence and indirectly contributing to the dangerous situation.⁶¹ This makes the harsher sentence that manslaughter attracts disproportionate on the basis of the principle that the sentence should reflect the seriousness of the offence.⁶² Moreover, the principle of fair labelling provides that the description of the charge should match the offence.⁶³ This is important, as the sentence should not create a false or misleading impression of the offender's wrongdoing⁶⁴ in order for the suppliers to not be 'unfairly stigmatised'.⁶⁵ Convicting a drug supplier of manslaughter is unfairly stigmatising.

In order for the law to cohere more closely to these principles, adopting Professor Tadros' proposal would be beneficial. He argues that the omission of not helping the client should be punished, not its consequences.⁶⁶ This principle can be seen in action in the Canadian case of *R v Finlay* where the defendant was convicted for his failure to act rather than for homicide.⁶⁷ Not only would this treat drug suppliers in a more principled way on the basis of fair labelling and proportionality (because it is more linked to the defendant's culpability), it also imposes a positive duty on the supplier to call for help without giving as strong an incentive for them to leave the client.

In conclusion, English law does fail to deal with the drug supplier whose client dies after voluntarily self-injecting or ingesting in a consistent and principled manner. If the law were to follow the decision in *Kennedy (No 2)*, suppliers would be treated in a principled and consistent way, although adopting Rogers' proposals their treatment would be more consistent still. However, the case of *Evans* now allows for drug suppliers to be treated in a manner which is inconsistent with good policy and the principles of causation, proportionality and fair labelling. In addition to this, there is the potential for suppliers to be inconsistently treated due to a lack of clarity in the law as providing assistance.

⁵⁷ Russell Heaton, 'Principals? No Principles!' (2004) Crim LR 463, 467.

⁵⁸ Rogers (n 35) 7.

⁵⁹ *ibid.*

⁶⁰ Baker (n 44) 316.

⁶¹ *ibid.*

⁶² Jonathan Herring, *Criminal Law: Text, Cases and Materials* (6th edn, OUP 2014) 12.

⁶³ *ibid.* 14.

⁶⁴ James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 228.

⁶⁵ *ibid.* 226.

⁶⁶ Victor Tadros, *Criminal Responsibility* (OUP 2005) 207–211.

⁶⁷ (1993) 105 DLR (4th) 699.

INTEGRATED PRODUCT POLICY: AN ALTERNATIVE TO DIRECT AND ECONOMIC REGULATION OF WASTE

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1 INTRODUCTION

As waste is one of the biggest environmental concerns for England & Wales it is important to have effective regulation. Direct regulation in the form of command and control is the traditional approach and has sometimes achieved quite dramatic improvements in environmental performance.¹ However, direct regulation is only as effective as its 'penalties or incentives that act as deterrents to non-compliance.'² It will thus be argued that although it is the traditional approach, direct regulation seems to have shortcomings, particularly in relation to the lack of enforcement of sanctions. This may be because it fails to 'encourage polluters to go beyond the minimum that is legally required',³ and thus there is no incentive for polluters to change their behaviour and so further incentives will be needed. These incentives arguably may come from economic regulation, particularly through imposing taxes. Economic regulation is sometimes presented as a 'straightforwardly' superior form of regulation'.⁴ However, 'economic instruments raise as many questions as they do answers'⁵ because of their attempts to balance rights between parties.⁶ Thus it will be argued that as neither of these two categories of regulation are completely independent, the alternative of an Integrated Product Policy (IPP) will embrace 'flexible environmental standards rather than uniform ones',⁷ which will allow for greater regulation of a wide variety of individuals. It will be seen that mixing the regulatory methods is the most

effective way of dealing with the range of individuals and activities by providing a variety of incentives.

2 EVALUATION OF DIRECT REGULATION

Waste law is directly regulated by setting standards, which are enforced and backed up with sanctions. Permits and licences are the 'favoured instrument through which such standards were to be achieved.'⁸ Offenders operating under a permit can have their licence revoked or suspended which should occur 'where other instruments fail to generate the desired deterrent effect.'⁹ These are strong deterrents as they ensure monetary loss for the offender if operations cease, although the regulations do exclude some waste operations and apply mainly to large concerns, thus limiting their deterrent effect. Additionally, the Environmental Protection Act 1990 sets a duty of care,¹⁰ which applies to any person involved in a range of listed activities throughout the waste process, a breach of which is a criminal offence.

Breaching the permitting regulations can result in a variety of largely strict liability criminal offences.¹¹ Strict liability offences are "efficient" in the sense that they alleviate the burden of the prosecution from having to prove negligence or fault on the part of the operator',¹² though it has been noted that 'there is no objective evidence to suggest that imposing strict liability makes any difference to compliance rates.'¹³ However, strict liability follows principle that the polluter pays 'in the sense that the punishments

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¹ Neil Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) 21 JEL 179, 183.

² Sir John Harman, 'Opinion: Environmental Regulation in the 21st Century' (2004) 6 Env L Rev 141, 156.

³ Stuart Bell, Donald McGillivray and Ole Pedersen, *Environmental Law* (8th edn, OUP 2013) 246.

⁴ Timothy Swanson, 'Economic Instruments and Environmental Regulation: A Critical Introduction' (1995) 4 RECIEL 287, 287.

⁵ *ibid* 294.

⁶ *ibid*.

⁷ Bell, McGillivray and Pedersen (n 3) 234.

⁸ Gunningham (n 1) 183.

⁹ Anthony Ogus and Caroline Abbot, 'Sanctions for Pollution: Do We Have the Right Regime?' (2002) 14 JEL 283, 298.

¹⁰ Environmental Protection Act 1990, s 34.

¹¹ The Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675, r 38.

¹² Paula de Prez, 'Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions' (2000) 12 JEL 65, 70.

¹³ Bell, McGillivray and Pedersen (n 3) 280.

imposed by criminal courts for environmental crime represent a 'payment';¹⁴ and as no fault must be proved, it is thus easier to make any suspected polluters pay for their contribution to environmental harm within a range of activities.

The potential profit from non-compliance is an obstacle for effective direct regulation, as is reflected in the sentencing guidelines which explicitly state that there should be removal of any 'economic benefit derived from the offending'.¹⁵ As Fortney notes, 'criminal penalties are essential to a coherent and effective scheme of environmental regulation'¹⁶ and are the only way to effectively deter people from making money through, for example, fly-tipping. However, it is arguable that the 'enforcement policy of the Environment Agency ... reveals a cautious approach',¹⁷ which creates a situation where, for example, low levels of fines are 'hampering the use of the criminal justice process in preventing environmental harm'.¹⁸ This is because often 'prosecution is seen as a last resort and fines are of little commercial significance to large- and medium-sized companies'.¹⁹ So direct regulation only has a real impact on those who cannot afford to pay the fines, whereas for larger companies the profits made from non-compliance will far outweigh the level of fines. However, since the Proceeds of Crime Act 2002 allows for the confiscation of any assets gained as a result of waste crime, there is a deterrent for larger scale criminal waste activity, which fully reflects the harm caused.

Sections 33 and 34 of the Environmental Protection Act 1990 contain the sanctioning framework for many

of the non-permitted waste offences. However, critics question 'the extent to which the sanctions imposed are sufficient'.²⁰ On the one hand, having the polluter pay the clean-up costs may affect large scale offenders as well as smaller offenders and may tip the balance towards deterrence when the costs are very high. However, prosecutions are low, perhaps as they are expensive and time consuming, especially when they require scientific evidence and expert witnesses. Studies have shown that almost two-thirds of respondents believe the courts understanding of environmental issues is unsatisfactory.²¹ The 'low levels of fines ... suggest that these offences are being trivialized' and not enforced to their full advantage.²² However there is evidence that, there are convictions 'in over 95% of the prosecutions brought under waste, water and integrated pollution control'.²³

Therefore, direct regulation has created a situation 'where agency capacity to punish non-cooperation is lacking'²⁴ and so 'a regulatory approach that emphasizes cooperation and accommodation' would be more effective,²⁵ thus other forms of additional regulation are needed to address the range of offenders and activities in a way that will encourage better waste management.

3 EVALUATION OF ECONOMIC REGULATION

Economic instruments are arguably 'far more efficient than command and control regulation'²⁶ where 'the dominance of the profit motive [is] a significant, if not insurmountable, barrier'.²⁷ Economic regulation can limit the potential profit of non-compliance using mechanisms such as taxes that will address a range of

¹⁴ *ibid* 280.

¹⁵ Sentencing Council, 'Environmental Offences: Definitive Guideline' (Sentencing Council 1 July 2014) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf> accessed 18 January 2016.

¹⁶ David C Fortney, 'Thinking Outside the "Black Box": Tailored Enforcement in Environmental Criminal Law' (2003) 81 *Tex L Rev* 1609, 1631.

¹⁷ Ogus and Abbot (n 9) 286.

¹⁸ *ibid* 286.

¹⁹ Anthony Emery and Michael Watson, 'Organizations and Environmental Crime: Legal and Economic Perspectives' (2004) 19 *Managerial Journal* 741, 756.

²⁰ Bell, McGillivray and Pedersen (n 3) 301.

²¹ Carol Hatton, Pamela Castle, and Martyn Day, 'The Environment and the Law – Does our Legal System Deliver Access to Justice? A Review' (2004) 6 *Env L Rev* 240, 244.

²² de Prez (n 12) 75.

²³ Ogus and Abbot (n 9) 287.

²⁴ Lesley K McAllister, Benjamin Van Rooij, and Robert A Kagan, 'Reorienting Regulation: Pollution Enforcement in Industrializing Countries' (2010) 32 *Law and Policy* 1, 5.

²⁵ *ibid*.

²⁶ Gunningham (n 1) 185.

²⁷ Sanford E Gaines and Cliona Kimber, 'Redirecting Self-Regulation' (2001) 13 *JEL* 157, 170.

offenders and activities. It is clear that economic instruments 'do not provide complete solutions, but they do indicate the directions in which real and effective regulation needs to develop'.²⁸ Sustainable development is arguably the focus of economic regulation, where the aim is to anticipate and offset impacts, rather than wait until the disposal stage of the waste process.²⁹ Therefore the benefit of economic regulation is that they are 'starting points, but not the last word'.³⁰ By using taxes 'it is possible to equilibrate between the impacts of many different types of use of the resource' to regulate throughout the process.³¹ This is evidenced in England where the key economic mechanism in waste regulation is the landfill tax which 'appl[ies] the "polluter pays" principle'³² by making the polluter pay the relevant level of tax that corresponds with the class of waste they are disposing of in landfill, which creates an economic incentive.

The landfill tax allowed regulation to target larger offenders, where levels of tax for landfill waste would be very high and thus would arguably be a 'catalyst that creates significant cost savings' by adopting better waste management systems.³³ However this is likely to require 'long term strategic planning and large scale reorganisation' with initial costs³⁴ so the effects may not be immediate. Economic regulation may also extend beyond corporations to society in general, as both the USA and Europe have shown that 'direct household waste charges or mandatory recycling schemes could be successful alternatives for correcting the failures of the municipal waste sector'.³⁵ For example, the introduction of the plastic bag tax in England shows a gradual societal move towards improving waste management as it is expected to reduce the number of plastic bags being sent to landfill. As these economic mechanisms are able to target individuals as well as corporations, these regulations

can incentivise and deter the widest range of individuals and activities.

However, there are negative consequences related to the landfill tax as evidence suggests that whilst landfill levels are decreasing, fly-tipping and exporting waste is increasing. As there is a "race to the bottom" in search of low taxes and favourable rules',³⁶ there has been increasing regulation to deal with transboundary waste movement.³⁷ It must therefore be asked whether taxes can outweigh these negative consequences, especially as this is occurring largely in a commercial context, and this is where direct regulation is needed in conjunction to provide criminal sanctions. For the landfill tax and other economic regulations to be effective in regulating waste, the 'attractiveness of recycling and waste to energy schemes must be enhanced'³⁸ in order to incentivise people to alter their waste output so instead of merely paying the tax, they eventually save that money by finding such schemes a more efficient way of operating.

Recent years have shown 'interest in the use that can be made of civil law mechanisms' as they may offer further deterrents and incentives.³⁹ New legislation has introduced civil sanctions,⁴⁰ although these are criticised as studies have shown that 97% of 'leading practitioners ... believe the civil law system fails to provide environmental justice'.⁴¹ Additionally, the Environmental Protection Act 1990, section 73 allows for the payment of damages for causing personal injury or property damage and thus creates a strong incentive to obey regulations to avoid paying these sums. These provide an alternative to common law causes of action, and can also be brought in addition to other claims in tort, such as negligence and trespass. As section 73 is linked to offences under sections 33 or 63(2),⁴² the offence is strict liability thus

²⁸ Swanson (n 4) 294.

²⁹ World Bank, *Greening Industry: New Roles for Communities, Markets, and Governments* (OUP 1999) 3.

³⁰ Swanson (n 4) 294.

³¹ *ibid* 291.

³² Jack Rostron, 'The Law and Regulation of Waste in the United Kingdom: A Review' (2008) *Env Qual Mgmt* 47, 55.

³³ Adam D Read, Paul S Phillips and Guy Robinson, 'Landfill as a Future Waste Management Option in England: The View of the Landfill Operators' (1997) 20 *Resources, Conservation and Recycling* 183, 190.

³⁴ *ibid*.

³⁵ *ibid* 187.

³⁶ Michael J Gilbert and Steve Russell, 'Globalization of Criminal Justice in the Corporate Context' (2002) 38 *CL & SC* 211, 222.

³⁷ *Transfrontier Shipment of Waste Regulations* 2007, SI 2007/1711.

³⁸ Read, Phillips and Robinson (n 33) 204.

³⁹ Bell, McGillivray and Pedersen (n 3) 265.

⁴⁰ *Regulatory Enforcement and Sanctions Act* 2008.

⁴¹ Hatton, Castle and Day (n 23) 250.

⁴² *Environmental Protection Act* 1990.

making this cause of action preferable to other tort claims. Therefore ensuring a ‘sensible, fair and practicable civil liability regime’,⁴³ which is ‘geared towards the charging of resource users in accordance with the harms that their uses are causing’ would ensure compliance with the most harmful activities,⁴⁴ particularly where the harms and thus the costs would be greater, and only large corporate offenders could afford such payments.

4 INTEGRATED PRODUCT POLICY AS AN ALTERNATIVE

An alternative approach is to use Integrated Product Policy. As a European Commission initiative, this approach utilises all these different mechanisms whilst regulating throughout a product’s entire life cycle. One example is producer responsibility legislation where for example, the packaging of the product is also regulated.⁴⁵ The effectiveness of these regulations is questionable as, for example, eco-label schemes have been argued to need adequate environmental awareness within society in order to be effective.⁴⁶ Creating sector-based regulation allows for tailored regulation and enforcement which increases effectiveness, rather than ‘forc[ing] distinct types of actors to conform to a ‘one-size-fits-all’ paradigm’ as direct regulation may be seen to do, which does not ensure effective regulation.⁴⁷ This maps onto the EU’s waste hierarchy,⁴⁸ which ultimately helps create harmonization in regulation and enforcement. Landfill tax is a clear example of IPP in one sector. This is evidently largely an economic mechanism to control levels of waste going to landfill. However, as this can heighten the level of fly-tipping, criminal sanctions are

required to tackle these consequences. This clearly shows how different mechanisms can be integrated into one policy for the sector to ‘produce better regulation than single instrument ... approaches’ by addressing different individuals and activities throughout the process with different mechanisms.⁴⁹

5 CONCLUSION

It can be seen that while direct regulation has worked well in dealing with large point sources, it is also clear that the complexity of the problems demands a more diverse array of legal responses than setting uniform standards and striving to enforce universal compliance with them. The aim for regulation is ultimately to achieve optimal enforcement. As different offenders will respond to different penalties, prosecutions and sanctions and are only a small element of a varied approach to the enforcement mechanisms that are needed to achieve an effective regulation of waste. Command-and-control and economic instruments, therefore, supplement and complement each other and the boundaries between the styles are much more imprecise. In addressing the environmental impacts of waste each approach has weaknesses as well as strengths, and none can be applied as an effective stand-alone approach. Thus the conclusion is that direct regulation cannot be the only way to effectively manage waste regulation as it would not address all offenders and, in terms of sanctions, has its own downfalls. Therefore the most desirable approach would be to use an integrated product policy to utilise different mechanisms to regulate waste most effectively and efficiently.

⁴³ John Thomas Smith II, ‘The Challenges of Environmentally Sound and Efficient Regulation of Waste – The Need for Enhanced International Understanding’ (1993) 5 JEL 91, 106.

⁴⁴ Swanson (n 4) 291.

⁴⁵ Producer Responsibility Obligations (Packaging Waste) Regulations 2007, SI 2007/871.

⁴⁶ Andrew Jordan, Rudiger KW Wurzel, and Anthony R Zito, ‘“New” Instruments of Environmental Governance: Patterns and Pathways of Change’ (2003) 12 Environmental Politics 1, 11.

⁴⁷ Fortney (n 16) 1631.

⁴⁸ Directive 2008/98/EC on Waste and Repealing Certain Directive [2008] OJ L312/3 art 4.

⁴⁹ Gunningham (n 1) 200.