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Board of Editors

Foreword

Message from the Editor-in-Chief

This year's edition of the North East Law Review is testimony to the ongoing quality of the work produced by students at Newcastle University. It has been both an honour and a privilege to have played a small part in showcasing a selection of that work to a wider audience, and it is with great pride that I present this collection to you. At a time when the worth of a university education is coming under increasing scrutiny, no better example can be found of the strength and resilience of values of careful research and high quality scholarship than the papers collected in Volume 6. I hope, and trust, that you will obtain as much learning and pleasure from reading them as I have.

Creation of a journal such as this is, inevitably, a collaborative effort. I would like to express here my thanks for the care and dedication of our team of editors. Despite the pressures of academic study, they have given up their own time to help maintain the high editorial standards demanded by the Review. I must note, in particular, the invaluable support I have received from my Deputy Editor, Jennifer Lio. Her hard work and editorial experience have been indispensable in reaching what seemed, at times, an unlikely objective. I'm sure she won't miss e-mails from me including the words "can you just", each of which she has handled professionally, speedily and, amazingly, without complaint. Once again, Richard Hogg has provided strong support on the administrative side. And last, but emphatically not least, I owe a debt of gratitude to Dr Derek Whayman, without whose support, IT wizardry and eagle-eyed attention to detail this edition of the Review could never have existed. Thanks to you all.

Tim Sayer

Message from the Deputy Editor

It has been a real pleasure contributing to the North East Law Review this year, a journal which gives space to students to voice their own informed opinions. From managers, to authors and editors, there is a combined effort to contribute something to current legal debates. The pieces of work selected by the North East Law Review are truly engaging, and foster a high-quality reflection on controversial legal issues. From Brexit and sovereignty to mental health and discrimination, these articles are diverse and, more importantly, contemporary.

The production of this journal is inevitably demanding, and requires strong collaboration of an extensive team and commitment of every single member. I therefore feel obliged to thank Dr Derek Whayman for his guidance and technical support; our academic staff for their time and expertise; our authors for their contributions, and editors for their rigorous attention to detail and high level of grammar proficiency. Finally, my sincerest thanks go to Tim Sayer for his constant hard work, profound dedication and strong leadership. Without any of them, the realisation of this volume would not have been possible.

Jennifer Lio

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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ASSESSING THE REASONS AND OPTIONS FOR BREXIT: A DEFENCE OF THE UK'S DECISION TO LEAVE THE EU

David Whelan[*]

1 INTRODUCTION

The UK's decision to leave the European Union (EU) following the 'in/out' referendum in 2016 was the culmination of longstanding discontent with the increasing powers of the Union. The day after the EU referendum, a poll, published by Lord Ashcroft, cited two of the three primary reasons for Britain's leave vote as being that 'decisions about the UK should be taken in the UK', and that '[r]emaining [in the EU] meant little or no choice about how the EU expanded its membership or powers'.[1] This paper will assess the legitimacy of these concerns in light of the setup and functioning of the EU, as set out by the Lisbon Treaty.

These concerns suggest that over-extensive European integration has meant a loss of legislative control for the UK and a lack of influence over EU competences. As Dimitrakopoulos explains, 'National Parliaments have come to regard integration as a threat to their powers'.[2] This article will attempt to demonstrate that the operation and structure of the EU has been detrimental to the UK's parliamentary democracy. In section 2, the article will analyse and criticise the most significant perceived contributions to the loss of control and influence. This includes: the institutional setup of the EU in creating a dominant executive; the inefficient functioning of control mechanisms such as subsidiarity in regulating competences; and the effects of EU supremacy on UK sovereignty. Through such scrutiny, the degree to which membership of the EU poses a threat to the UK's interests can be assessed. In section 3, the extent to which the 'Norway option' addresses the leavers' primary concerns will be weighed. The article will conclude that, given the institutional setup and functioning of the EU, the reasons cited in Lord Ashcroft's poll represent legitimate concerns. At present, the EU facilitates extension of its powers, consequently weakening of Member State (MS) sovereignty, while the 'Norway' option fails to salvage important decision-making powers for the UK.

2 ASSESSING THE REASONS FOR BREXIT

2.1 'Decisions about the UK should be taken in the UK'[3]

The 'community method' – whereby article 17(2) of the Treaty on the European Union (TEU) gives the European Commission legislative initiative and articles 14(1) and 16(1) TEU grant legislative functions to the Council of Ministers and European Parliament (EP) – has been regarded as central to the functioning of the Union.[4] However, this tripartite legislative arm of the EU has been the main contributor to the UK's loss of control over the EU legislative process. The problem is two-fold: firstly, an analysis of the co-legislative setup of the Council and the EP reveals that National Parliaments (NPs) are marginalised; additionally, the 'secondary' implementing powers of the Commission combined with the ineffective comitology system means that MS lose control over important, domestically-affected legislative areas.

The first problem reflects a process Cygan calls 'deparliamentarisation'.[5] To analyse this, it is necessary to explain the flawed setup of the co-legislative institutions. The current institutional balance of the EU favours an overly powerful Council

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[1] Lord Ashcroft, 'How the United Kingdom Voted on Thursday… and Why' (24 June 2016) <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why> accessed 15 December 2017.

[2] Dionyssis G Dimitrakopoulos, 'Incrementalism and Path Dependence: European Integration and Institutional Change in National Parliaments' [2001] J Com Mar St 405, 406.

[3] Lord Ashcroft (n 1).

[4] Ben Smulders and Katharina Eisele, 'Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon' (2012) 31 YEL 112, 113.

[5] Adam Cygan, 'The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments' (2011) 36 ELR 478, 481.

in legislative creation, causing loss of domestic parliamentary control. As Hayes-Renshaw asserts, the Council is the 'fulcrum' of the EU legislative process.[6] Indeed, even after the Lisbon Treaty's formal creation of a co-decision procedure – in article 294 of the Treaty on the Functioning of the European Union (TFEU) – between the Council and the EP, there still remain several areas, such as tax-harmonisation, where the EP has limited legislative powers compared to the Council.[7] Although Craig maintains that the Council represents MSs, he ignores the extent to which the Council represents executive interests, since the Council is made up of an executive minister from each MS.[8] Combining this with the technocratic nature of the Commission, the legislative arena is thus dominated by executives, whose actions are widely outside the control of NPs at Union level. Even at the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC), which encourages involvement of NPs in the EU legislative process, there is a trend toward government-related functions over citizen-focused issues.[9] This means that decisions are taken further from the democratic will of the UK electorate, in favour of EU-level executive interests. As the House of Lords made clear, the EU must improve the involvement of NPs in the legislative process to check executive powers.[10] Since Parliament is an invaluable mechanism by which 'public preferences are converted into political decisions',[11] their lack of influence over EU legislation, coupled with the dominance of the executive, equates to the loss of UK citizens' control over EU decision making.

The second problem with the EU's legislative arm regards the Commission's powers to create delegated and implementing acts under articles 290 and 291 TFEU respectively and the ineffective scrutiny mechanism known as 'comitology'. According to Cini, the Commission is the closest thing to an executive in the EU.[12] It is made up of MS representatives who are to remain independent of national influence and is responsible for proposing legislation and implementing decisions.[13] The Commission is given 'secondary' implementing powers to deal with more detailed aspects of EU laws. Cases such as *Biocides* reveal tensions among the legislative institutions on the delineation between use of delegated and implementing acts.[14] Post-Lisbon it is important in determining whether the Commission is subject to *ex post* control by the Council and EP, or *ex ante* supervision by the MSs. Comitology is the *ex ante* control mechanism by which MSs supervise (in the form of committees) the implementing powers of the Commission under article 291 TFEU. According to Kritikos, the comitology system is a crucial mechanism for ensuring accountability and institutional balance.[15] Yet the new comitology regime fails to achieve this paradigm. This is because the Lisbon Treaty removed the Regulatory Procedure with Scrutiny, which gave powers to the Council and EP to block a proposed implementing measure. Instead there are examination and appeal committees whereby flagged Commission proposals must be supported by a qualified majority of the committee. However, support of this committee is not always an absolute requirement for implementation measures.[16] The Commission can force certain measures through, for reasons such as avoiding risk to the Union's financial interests.[17] Furthermore, the Commission is not bound by the opinions of Advisory Committees. This lack of MS power to control the Commission's implementing powers shows that the comitology system fails to properly hold the Commission to account and further

[6] Fiona Hayes-Renshaw and Helen Wallace, *The Council of Ministers* (Palgrave Macmillan 2006) 321.
[7] Achim Hurrelmann and Joan Debardeleben, 'Democratic Dilemmas in the EU Multi-level Governance: Untangling the Gordian Knot' (2009) 1 EPSR 229, 231.
[8] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) 45.
[9] Tapio Raunio, 'The Gatekeepers of European Integration? The Functions of National Parliaments in the EU Political System' (2011) 33 JEI 303, 314.
[10] House of Lords European Union Committee, 'The Role of National Parliament's in the European Union' (9th Report, 24th March 2014) para 40.
[11] Dimitris N Chryssochoou, Stelios Stavridis and Michael J Tsinisizelis, 'European Democracy, Parliamentary Decline and the "Democratic Deficit" of the European Union' (1998) 4 JLS 109, 125.
[12] Michelle Cini, 'The European Commission: An Unelected Legislator?' (2002) 8 JLS 14, 14.
[13] Consolidated Version of the Treaty of the European Union [2008] OJ C115/13 (TEU), art 17.
[14] Case C-427/12 *Commission v Parliament and Council* [2014] ECR 1.
[15] Mihalis Kritikos, 'Looking for Accountability in Institutionally Unchartered Waters: Comitology Committees in Operation and EU Decision Making Structures' (2015) 37 J Europ Integration 409, 413.
[16] Vihar Georgiev, 'Too Much Executive Power? Delegated Law-Making and Comitology in Perspective' (2013) 20 JEPP 535, 546.
[17] Catherine Barnard and Steve Peers, *European Union Law* (OUP 2014) 129.

weakens MS influence over the EU legislative process. Whilst it is widely accepted in modern democracies that most legislatures entrust some delegated legislative function to the executive, the Commission commands a significant expanse of power in article 291 TFEU. The implementing power may not be a formal legislative power in the same way as the co-legislators enjoy, but it does amount to a substantive power which governs implementation of vast areas of EU law. Without effective control over these powers via the comitology system, MS lose influence over decisions which affect them directly. This means that the degree to which the UK can control implementation of EU legislation is intolerably weakened post-Lisbon, legitimising public sentiment for regaining control over decision-making that affects the UK.

2.2 'Remaining in the EU meant little or no choice about how the EU expanded its membership or powers'

Another primary concern highlighted by Lord Ashcroft's poll regarding advanced integration with the EU is that the UK lacks influence over expansion of the EU's competences and membership. The latter issue (that of membership) should not be of concern since article 49 TEU states that MS must ratify any accession treaty for it to become valid. However, the issue of competences is more troubling. The way in which the competences are fashioned favours the EU and the principle mechanism for regulating EU competence – subsidiarity – is ineffective. Article 2 TFEU notes the specific competence categories, namely exclusive, shared and supporting action. The loss of MS competence in certain areas can perhaps be explained by Haas's theory of neofunctionalism.[18] Placing certain policy areas under supranational control develops a desire to encompass adjacent areas under the same control, creating a 'spill-over' of competences. Today, this is seen partly by operation of article 2(2) TFEU; a MS can only exercise competence in shared areas to the extent that the Union has not already done so. This means the Union is effectively expanding its exclusive competence each time it legislates in an area of shared competence. Cygan agrees, identifying a 'gradual, but consistent expansion of EU competences at the expense of National Parliaments'.[19] This issue is compounded by the ineffectual functioning of subsidiarity. Subsidiarity is the mechanism by which EU-level action is controlled. Article 5(3) TEU states that the Union shall only act in a shared area of competence if the MS cannot sufficiently achieve the objective of an action and that the action can be better achieved at Union level. The Lisbon Treaty introduced the Early Warning System (EWS), whereby MS can deliver reasoned opinions to the Commission on its compliance with subsidiarity.[20] If enough MS do so, the 'yellow' or 'orange' card procedure is triggered, where proposed legislation must be reviewed. However, in practice the procedure is inadequate. In 2013, fourteen NPs, including that of the UK, sent reasoned opinions regarding the European Public Prosecutor's Office proposal, triggering a review by the Commission. Despite clear disapproval from half the Union MS, the Commission declared the proposal had not breached subsidiarity and withdrawal or amendment was not required.[21] Similarly in *Monti II*, the Commission reasoned that the proposal complied with subsidiarity, a review having been triggered by the EWS.[22] Although this proposal was eventually withdrawn, this was due to political pressure rather than the application of the principle of subsidiarity and recognition of MS competence. This has led to suggestions of a 'red' card to block proposals altogether.[23] Obliging the Commission to scrap proposals if over half of MS protested would certainly give more control to MS, but such a reform has not yet been realised. As a report from the UK Foreign Office concludes, 'the Commission has undermined faith in the yellow card procedure'.[24] Certainly, the Commission's disregard for reasoned opinions has proven that the procedure is merely a political gimmick with no real regulatory power granted to MS. Therefore, the UK has no

[18] Andrei Constantin, 'Is the European Commission Too Powerful? Neofunctionalism and Intergovernmentalism Considered' (2013) 5 Inquiries Journal 1, 2.
[19] Cygan (n 5) 482.
[20] Lisbon Treaty, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, art 6.
[21] Commission 'Communication on the Review of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity' COM(2013) 851.
[22] Commission, 'Proposed Council Regulation 2012/0064 (APP) of 21 March 2012 on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services' COM(2012) 130.
[23] Charles Grant, *How to Build a Modern European Union* (Centre for European Reform 2013).
[24] Foreign and Commonwealth Office, *Review of the Balance of Competences Between the United Kingdom and the European Union: Subsidiarity and Proportionality* (HM Government 2014) 30.

effective means to monitor subsidiarity compliance, losing influence over the expansion of the EU's competence, resulting in fears of 'competence creep' by the Union.

Conversely, Schiemann makes a compelling argument against the concerns of losing control and influence over EU decision making and powers: namely, that the UK has accepted a loss of sovereignty as an 'autonomous voluntary act' by virtue of the European Communities Act 1972 and has further acknowledged EU supremacy.[25] However, this view ignores the extent to which mechanisms of the supremacy doctrine, such as indirect effect, ask too much of national courts, sometimes leading to the contrivance of inconsistent interpretations of domestic legislation to accommodate EU law. Indirect effect was introduced by the ECJ in *Von Colson* as corollary to direct effect.[26] It requires national courts to (in so far as is possible) interpret national legislation to give effect to either an unimplemented or poorly implemented directive.[27] It differs from direct effect because it is designed so that private parties can enforce unimplemented directives where they previously had no power to do so. The EU has put significant pressure on national courts to interpret statutes in conformity with Union laws, even if this means introducing wording not intended by Parliament. Notably in *Coleman*,[28] the Employment Appeals Tribunal inserted a whole new section into a statute to give effect to a directive on equal treatment in employment.[29] This extreme judicial drafting means that the UK Parliament loses substantial control of its sovereign ability to legislate and make decisions. This is because any legislation it enacts may be subject to contortion by courts to comply with EU laws, negating the democratic legitimacy of such legislation. In this way, legislative interpretation is 'strained so much that … [it] becomes judicial legislation'. Therefore, the functioning of indirect effect legitimises concerns about the UK losing control over its own decisions.[30]

3 ASSESSING THE OPTIONS FOR BREXIT: A CASE STUDY

Amongst the UK's various post-referendum options, it is suggested that membership to the European Free Trade Association (EFTA) to become part of the European Economic Area (EEA) agreement would be the logical step. Key to note is that although Switzerland is an EFTA state, it is not part of the EEA as it holds separate bilateral agreements with the EU and since the Council expressed disdain for the 'Swiss' model, it is not a realistic option for the UK.[31] Nonetheless, joining three of the four EFTA states (Norway, Iceland and Lichtenstein) in the EEA would, according to Burke, preserve 'many of the most valuable aspects of the UK-EU trade relationship'.[32] Indeed EEA membership entails EFTA states' participation in the European single market and access to the four economic freedoms,[33] supposedly without surrendering legislative or judicial sovereignty.[34] However, the reality is that EFTA states are bound by EU rules, yet 'lack access to its decision-making processes'.[35] A Norwegian report calculated that to be in the EEA it has had to incorporate almost three-quarters of all EU laws into domestic legislation.[36] This means that the UK Parliament would lose even more sovereign control on its decision-making abilities than the inadequate power it had in the EU, because the EEA gives 'virtually no role to directly elected institutions' of EFTA states.[37] Also, the EEA Joint Committee must adopt relevant EU laws and EFTA states must transpose these into national law. Under article 102(5), failure or refusal to annex any

[25] Konrad Schiemann, 'Europe and the Loss of Sovereignty' (2007) 56 ICLQ 475, 487.
[26] Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.
[27] C-106/89 *Marleasing SA v Comercial Internacional de Alimentacion SA* [1991] ECR-I 4135.
[28] *EBR Attridge Law LLP v Coleman* [2010] ICR 24 [15].
[29] Council Directive 2000/78/EC Establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[30] James Hand, 'Discrimination Law and the Ebb and Flow of Indirect Effect in Britain' (2016) 37 Liverpool LR 119, 126.
[31] Council of the European Union, *Council Conclusions on EU relations with EFTA countries* (14 December 2010) 2.
[32] Ciaran Burke, Ölafur Ísberg Hannesson and Kristin Bangsund, 'Life on the Edge: EFTA and the EEA as a Future for the UK in Europe' (2016) 22 European Public Law 69, 78.
[33] Agreement on the European Economic Area [1994] OJ L1/3 (AEEA), 6.
[34] Arild O Eidesen, 'The Norwegian Experience of the EEA Judiciary' in The EFTA Court (ed), *The EEA and the EFTA Court Decentred Integration* (Hart 2014) 136.
[35] Foreign Affairs Committee, *The Future of the European Union: UK Government Policy* (HC 2012-13, 87-I) para 20.
[36] The EEA Review Committee, 'Outside and Inside: Norway's Agreements with the European Union' (2012) Official Norwegian Reports 6.
[37] Thomas Burri and Benedikt Pirker, 'Constitutionalisation by Association? The Doubtful Case of the European Economic Area' (2013) 32 YEL 207, 211.

new legislation to the EEA can result in a suspension of that part of the agreement.[38] Whilst presently there have been no suspensions, the latent powers to restrict parts of the agreement further exemplify that the UK could be under stringent obligations to comply with EU laws, without having control over their formation. Moreover, the EFTA Court deploys doctrines which will likely 'affect the UK legal order'.[39] For example, in cases of conflicting legislation, Protocol 35 requires EFTA states to introduce a statutory provision to the effect that EEA rules prevail over domestic ones.[40] This, combined with the principle of state liability for failure to implement EEA rules,[41] could force the UK into legislating against their domestic will to accommodate EU rules, meaning a loss of legislative sovereignty in EEA-governed areas. Although EFTA membership gives access to the EU internal market, this comes at a high price, namely the loss of decision-making power in key economic and social areas for the UK, handing power to the EEA as an auxiliary to the EU, without influence over EU decision-making.

4 CONCLUSION

As this response has recognised, it is legitimate to assert that, as a member of the EU, the UK Parliament has lost vital control over decisions which affect citizens directly. It has also lost influence in how the EU expands its powers. In its institutional setup, significant legislative powers reside in supranational institutions such as the Council and Commission (which are, it should be remembered, executive bodies), marginalising MS involvement in the legislative process. Meanwhile, regarding the functioning of the EU, accountability mechanisms such as subsidiarity have been conceded to be (by the President of the Commission no less), 'not sufficient'.[42] The result is consistent, ill-constrained expansion of Union powers at the expense of UK sovereignty. Attempts to regain UK control on decision-making by following the 'Norway' model of EFTA membership and signing the EEA agreement would prove futile. The EEA is merely a subsidiary of the EU, adopting Union legislation with no formal input into its creation. Given the fundamental deficiencies evident in both the EU and the EEA, if the UK is to regain essential legislative and policy control, a hard Brexit would appear to be looming.

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[38] AEEA, art 102(5).
[39] Burke and others (n 32) 79.
[40] AEEA, Protocol 35 on the Implementation of EEA Rules.
[41] Case E-9/97 *Sveinsbjörnsdóttir* [1998] EFTA Court Reports 95 (advisory opinion of 10 December 1998).
[42] Jean-Claude Juncker, 'European Commission and European Parliament, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (15 July 2014) <https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf> accessed 15 December 2017, 17.

STATE SOVEREIGNTY AND TRANSNATIONAL COOPERATION – REASSESSING MEMBERSHIP OF THE EUROPEAN UNION

Ben Leach[*]

> People have accused me of being in favour of globalisation. This is equivalent to accusing me of being in favour of the sun rising in the morning.[1]

1 INTRODUCTION

Globalisation, seemingly, is a fact of life. Although there are inherent difficulties in the constructing and functioning of supranational bodies such as the EU, the economic (among other) gains they bring are generally considered to outweigh the inevitable loss of sovereignty they entail. This theme will inform an analysis of the two concerns raised in Lord Ashcroft's poll of why voters voted to leave the EU (that 'decisions about the UK should be taken in the UK', and that '[r]emaining [in the EU] meant little or no choice about how the EU expanded its membership or powers').[2] It will be argued that, although EU membership necessarily limits sovereignty, this is normatively justifiable. An analysis of the Norway model will reveal the difficulties of regaining sovereignty in the areas where it is perhaps most desired. In any event, the economic and political costs involved are unlikely to be worth minimal gains in sovereignty.

2 ASSESSMENT OF THE CONCERNS CITED IN LORD ASHCROFT'S POLL

2.1 'The principle that decisions about the UK should be taken in the UK'[3]

'The principle that decisions about the UK should be taken in the UK' ('statement #1') is central to the definition of an autonomous state. However, the principle is open to several interpretations, each having implications to an analysis of the UK-EU relationship. Firstly, the statement can be interpreted strictly: decisions about the UK should *always* be taken in the UK. Notwithstanding the potentially 'dangerous' theory of *demos* this engenders,[4] this interpretation denies the existence of 'international policy externalities' that incentivise 'policy co-ordination.'[5] Globalisation has (for better or worse) committed nations to surrendering sovereignty in return for benefits[6] that would be unilaterally unachievable.[7] Therefore, incentives for cooperation exist – and would exist absent the EU.[8] What is contestable is whether this cooperation directly benefits ordinary citizens. The EU referendum result may suggest that ordinary citizens think not. This political argument concerns domestic policy choices as much as international. As such, it is irrelevant for present purposes, although it helps to explain the disaffection that people feel with the EU. Therefore, strictly interpreted, statement #1 is irreconcilable with the concept of the EU and with globalisation generally.

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[*] Newcastle University, Undergraduate Law Student.

[1] Clare Short, cited in 'An A-Z of business quotations: Globalisation' *The Economist* (3 August 2012) <http://www.economist.com/blogs/schumpeter/2012/08/z-business-quotations> accessed 19 January 2017.

[2] Lord Ashcroft, 'How the United Kingdom voted on Thursday… and why' (24 June 2016) <http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why> accessed 24 January 2017.

[3] ibid.

[4] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd edn, CUP 2014) 151.

[5] Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473, 485.

[6] Anand Menon and Stephen Weatherill, 'Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union' (2007) 13/2007 LSE Law, Society and Economy Working Papers <http://ssrn.com/abstract=1021218> accessed 22 January 2017, 2–3.

[7] Chalmers, Davies and Monti (n 4) 151.

[8] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 154.

However, accepting (as this article will) the necessary importance of transnational policy-coordination, the statement can be interpreted more broadly. The principle that decisions about the UK should *insofar as is possible* be taken in the UK is not necessarily at odds with the EU: the EU accepts that decisions should be taken 'as closely as possible to the citizen.'[9] Accordingly, EU democracy and power-allocation become of vital importance.

Statement #1 is concerned with where (or at what level) decisions are made, engaging the principle of subsidiarity (discussed below) and the so-called 'distance issue' of democratic legitimacy.[10] It concerns the *process* (or *structure*) of decision-making and is therefore concerned with *input legitimacy*. However, although the EU is 'founded on representative democracy',[11] possessing elements of direct and indirect representation,[12] it has been argued that, as a 'regulatory state', the EU's legitimacy is derived from its *outcomes*,[13] notably the single market.[14] This reflects the EU's historical reality;[15] but, owing to the inevitability of functional 'spillover',[16] the EU has delved into more politically sensitive areas,[17] surely strengthening the case for greater input legitimacy. However, this response at the supranational level is not without issue. Firstly, as aforementioned, reverting to *ad hoc* international agreements limits the effectiveness of states to achieve economically interdependent goals:[18] input and output legitimacy are not necessarily causally intertwined. Secondly, transplanting state structures into the supranational level is to be discouraged because of 'the disinclination of citizens simply to shift their sense of allegiance'.[19] This is illustrated by voter apathy in European Parliament (EP) elections.[20] Furthermore, this approach could leave the EU open to the charge of becoming a super-state, which could further damage its legitimacy.[21] Instead, Menon and Weatherill advocate a conception of legitimacy based on the efficient problem-solving capability of the EU.[22] On this view, there is 'a division of legitimation labour',[23] whereby different types of legitimacy exist to different extents at different levels of a multi-level governance system.

This nuanced, efficiency-based conception is surely only appropriate to the EU as a purely 'regulatory state'. Therefore, where the EU strays into more sensitive areas, the answer is not to increase input legitimacy, but to reconfigure 'where the limits of its activity properly lie'.[24] Accordingly, statement #1 can be reinterpreted to mean that *certain types of decisions* about the UK should be taken in the UK. Therefore, although it is inappropriate to base the EU's legitimacy on input, output legitimacy can only be relied upon insofar as the EU attends to issues of little salience to voters.[25] Although this argument is, to some extent, self-fulfilling in its 'mobilization of bias',[26] arguing for greater input legitimacy ignores the *purpose* of the

[9] Consolidated Version of the Treaty of the European Union [2008] OJ C115/13 (TEU), art 10(3).
[10] Craig and de Búrca (n 8) 152.
[11] TEU, art 10(1).
[12] TEU, art 10(2).
[13] See e.g. Giandomenico Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 ELJ 5; Giandomenico Majone, 'The European Commission: The Limits of Centralization and the Perils of Parliamentarization' (2002) 15(3) Governance 375; Menon and Weatherill (n 6) 6-7.
[14] Menon and Weatherill (n 6) 8.
[15] Paul Craig, 'Integration, Democracy, and Legitimacy' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 15–17.
[16] Craig and de Búrca (n 8) 24.
[17] Menon and Weatherill (n 6).
[18] ibid 7.
[19] ibid.
[20] Craig and de Búrca (n 8) 52.
[21] Craig (n 15) 37.
[22] Menon and Weatherill (n 6) 7.
[23] ibid 24.
[24] Menon and Weatherill (n 6) 23.
[25] Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 JCMS 603, 615–17.
[26] Elmer Eric Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (New York, Holt, Rinehart and Winston 1960); Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533, 551.

EU, of ensuring 'a stable, long term and predictable future for economic actors'.[27]

Accepting the necessity of international policy-coordination, the descriptive and normative pitfalls of input legitimacy at EU-level, and the analytical validity of output legitimacy within the EU's limited mandates,[28] a broad understanding of statement #1 is not irreconcilable with membership of the EU, thus calling into question its validity.

The subsidiarity principle[29] reinforces the proposition that statement #1 *can* be reconciled with EU membership, casting further doubt on its legitimacy as a concern. This is because of the presumption (flowing from the principle of governing 'as closely as possible to the citizen')[30] 'restrict[ing] intervention by the [EU] … in areas of shared competence to those tasks that [MSs are] … unable to realize independently'.[31] This consists of both an economic ('comparative efficiency') and democratic rationale, thus, theoretically striking a balance between output and input legitimacy (and between the EU and MSs).[32] In short, there is a presumption in favour of statement #1. However, Davies argues that this perceived balance is undermined by the privileging of EU objectives,[33] giving the EU 'a head start':[34] indeed, the case law[35] suggests that, '[w]here uniformity is necessary, only the [EU] … will be able to act.'[36] This stems from the imbalance between the economic and democratic dimensions, a tension that goes to the heart of EU integration.[37] However, Davies overstates his case in arguing that MSs do not have 'a seat on the board.'[38] As Craig argues, this ignores the reality of the EU's legislative process.[39] Although there may be 'structural bias'[40] in the application of subsidiarity as a judicial principle, MSs *do* have a 'seat on the board' in the form of their involvement in the legislative process (particularly in the Council). This reinforces the point that membership of a supranational structure such as the EU requires cooperation and compromise. This is part of the trade-off for the realisation of unilaterally unachievable goals.

Furthermore, subsidiarity has a political dimension: draft legislation is sent to National Parliaments[41] (NPs) which have eight weeks to respond with 'reasoned opinion[s]' if they object on subsidiarity grounds (the 'early warning system').[42] The Commission is obliged to review the legislation (*from the perspective of subsidiarity*) where one-third of NPs raise subsidiarity-based objections.[43] This engagement is narrowly focussed: the content of legislation is not up for debate.[44] However, Craig's analysis of the EU's institutional framework is pertinent and the enhanced 'deliberation about the nature and purpose of EU lawmaking'[45] is welcomed. Finally, the 'numbers issue'[46] is an important part of the subsidiarity picture (and of the EU's legitimacy more broadly). Craig identifies 'just over ten cases … where there has been a real subsidiarity challenge'.[47] Likewise, the early warning system has been triggered three times. Therefore, it is debatable whether commentators such as Davies are responding to a real

[27] Menon and Weatherill (n 6) 8.
[28] Moravcsik (n 25) 607.
[29] TEU, art 5(3).
[30] TEU, art 10(3).
[31] Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw' (2012) 50(2) JCMS 267, 268.
[32] Marija Bartl, 'The way we do Europe: Subsidiarity and the Substantive Democratic Deficit' (2015) 21(1) ELJ 23, 25.
[33] Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CMLRev 63, 67–68.
[34] ibid 77.
[35] See e.g., Case C-491/01 *R v Secretary of State for Health, ex parte British American Tobacco* [2002] ECR I-11453; Case C-58/08 *Vodafone v Secretary of State for Business Enterprise* [2010] ECR I-4999.
[36] Davies (n 33) 75.
[37] Bartl (n 32) 25–26.
[38] Davies (n 33) 68.
[39] Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 JCMS 72, 81.
[40] Davies (n 33) 64.
[41] Lisbon Treaty, Protocol (No 1) on the Role of National Parliaments in the European Union, art 2.
[42] Lisbon Treaty, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, art 6.
[43] ibid art 7(2).
[44] Davor Jancic, 'The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and Political Dialogue' (2015) 52 CMLRev 939, 951.
[45] ibid 950.
[46] Craig (n 39) 80.
[47] ibid 80.

problem. Although from an input perspective, a more active role for NPs would increase EU-legitimacy,[48] from the output perspective, the numbers suggest that the subsidiarity principle satisfactorily bolsters the division of competence, respecting MS-autonomy while allowing the EU to operate to further its aim of securing the internal market.[49]

There is much virtue in the wish to self-govern that is evident in statement #1. However, some goals are unattainable through domestic policy alone. The EU is constructed to respect MS (input) legitimacy (by the operation of the principle of subsidiarity) while securing its own legitimacy (and supporting that of its MS) through its output (most obviously, the internal market).

2.2 'Remaining in the EU meant little or no choice about how the EU expanded its membership or powers'

Taken at face value, there is an irony in the argument that 'remaining [in the EU] meant little or no choice about how the EU expanded its membership or powers' ('statement #2'). Clearly, leaving the EU relinquishes any control that the UK may have had over EU expansion. Of course, this may not matter to those who wished to leave the EU but, as will be seen, what happens in the EU will impact the UK post-Brexit. Therefore, in assessing the legitimacy of statement #2, it is important to consider what control MSs *do* have over EU integration and enlargement. Integration will be addressed first.

The EU is a supranational body: it is *above* the state. As such, '[EU] officials do … matter in daily decisions', by virtue of a process of delegation of powers from MS to the EU.[50] There is also relatively wide discretion owing to the inherent generality of Treaty provisions, thus requiring 'political choices and value judgments' to be made.[51] However, MSs are not absent from this political arena. The Council provides important MS-representation: legislation cannot be adopted without its approval.[52] The European Council sets the tone for integration and is particularly important at times of Treaty-revision.[53] What's more, there are strong normative reasons in favour of MS governments transferring power, 'either because the political benefits outweigh the costs of the political control thereby foregone, or because of the benefits of shifting responsibility for unpopular decisions.'[54] This aforementioned, interconnecting, multi-level governance system[55] provides a basis on which to defend the EU's legitimacy and an explanation of the day-to-day functioning of the EU, which is a combination of constrained EU law-making[56] and decentralised implementation.[57] However, the impetus for *further* integration comes from the MSs themselves and is explained by the international policy externalities mentioned above. Therefore, on a liberal intergovernmentalist theory of integration, this 'institutional delegation' is a result of an ongoing process of 'foreign economic policy preference formation [and] … inter-state bargaining'.[58]

This theoretical analysis is supported by the practical application of two flexible provisions in the Lisbon Treaty.[59] Article 352(1) TFEU provides a general power to adopt necessary measures where a specific power has not been expressly provided. Three important points should be made. Firstly, this provision is rarely used owing to the broad and comprehensive nature of the Lisbon Treaty. Secondly, there is a high degree of collaboration, involving the Council, Commission and EP.[60] Thirdly, this provision does not allow 'for widening the scope of [Union] powers beyond the general framework created by the provisions of the [Treaties]'.[61] The EU cannot, of its own accord, outgrow itself. Likewise, article 114 TFEU (which provides for 'approximation' of MS

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[48] Jancic (n 44).
[49] TEU, art 3(3).
[50] Andrew Moravcsik, 'Liberal Intergovernmentalism and Integration: A Rejoinder' (1995) 33 JCMS 611, 612.
[51] Craig (n 15) 39.
[52] TEU, art 16(1). See also Craig and de Búrca (n 8) 44.
[53] Craig and de Búrca (n 8) 48.
[54] Craig (n 15) 22.
[55] Menon and Weatherill (n 6) 23.
[56] Moravcsik (n 25) 606–10.
[57] ibid 608–09.
[58] ibid 612.
[59] Consolidated Version of the Treaty on the Functioning of the European Union [2008] C115/01 (TFEU), arts 114 and 352(1).
[60] TFEU, art 352(1).
[61] Opinion 2/94 *Re Accession of the Community to the ECHR* [1996] ECR I-1759.

laws[62]) does not grant 'a general power to regulate the internal market'.[63] It is clear then that MS are the driving force behind integration, undermining statement #2.

On expansion of EU membership, the process of accession involves collaboration between the EU institutions and MS, suggesting that the UK (*within* the EU) does have an appreciable level of influence. Although there are certain criteria for applicant states to meet,[64] accession depends more on 'political and fluctuating considerations … than on the objective fulfilment of pre-determined criteria.'[65] Accordingly, there is strong discretion regarding the Union's 'integration capacity',[66] granting MS 'close to a carte blanche to veto any accession as it is invariably possible to argue that entry will destabilise some aspect of … Union policy'.[67] Perhaps the most important accession requirement from the point of view of MS is that of MS-ratification.[68] From this perspective, the UK retains a high level of control over EU expansion.

It has been argued that, when considered against the background of globalisation, the purposes of the EU, and the existing checks and balances, the two statements do not stand up to scrutiny. However, they should not be discounted. The UK voted to leave the EU on these bases and, therefore, any politically sustainable alternative must attend to these concerns (while promoting the importance of transnational cooperation). Although the UK appears to be heading for a somewhat 'harder' Brexit,[69] an analysis of the Norway model will reveal the challenges of pursuing *any* course that is committed to achieving the best trade deal while attempting to uphold the principle in statement #1.

3 THE NORWAY MODEL: AN ALTERNATIVE?

As an EFTA-EEA member, Norway has significant access to the single market.[70] EEA-relevant EU law is adopted by the EEA,[71] which, in turn, is integrated into the Contracting Parties' 'internal legal order[s]',[72] enjoying primacy over national legislation.[73] This process contains a number of democratic flaws,[74] acknowledged by the Norwegian Government itself.[75] Accordingly, David Cameron, among others, has dismissed this option, as it fails to strengthen sovereignty.[76] However, this position, it has been argued, is 'misguided':[77] 'EFTA-EEA membership represents the only pre-existing institutional *modus operandi* for the UK to maintain a voice within the EU apparatus.'[78] Notwithstanding the accuracy of this critique, the EEA does not – as those who share the view expressed in statement #1 would call for – return huge amounts of sovereignty to the UK. In reality, the Norway model does this in a limited number of areas (for example, in October 2013, EFTA-EEA states had to implement almost 95% of internal market-related EU Directives).[79] Most significantly, the areas of agriculture, fisheries and external relations, are excluded.[80] Although these areas are important, it is

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[62] TFEU, arts 114(1).
[63] Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, para 84.
[64] Damian Chalmers, Gareth Davies and Giorgio Monti, 'Chapter 5A: The Authority of EU Law beyond the Union' <http://www.cambridge.org/download_file/839883> accessed 28 January, 6–7.
[65] Christophe Hillion, 'EU Enlargement' in Craig and de Búrca (n 15) 206.
[66] ibid 203–05.
[67] Chalmers, Davies and Monti (n 64) 7.
[68] TEU, art 49.
[69] 'Brexit: UK to Leave Single Market, says Theresa May' (17 January 2017) <http://www.bbc.co.uk/news/uk-politics-38641208> accessed 19 January 2017.
[70] HM Government, *Alternatives to membership: possible models for the United Kingdom outside the European Union* (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504661/Alternatives_to_membership_possible_models_for_the_UK_outside_the_EU_Accessible.pdf> accessed 25 January 2017, 13.
[71] Agreement on the European Economic Area [1994] OJ L1/3 (AEEA), art 102.
[72] ibid art 7.
[73] AEEA, Protocol 35 On the Implementation of EEA Rules.
[74] Chalmers, Davies and Monti (n 64) 21.
[75] HM Government (n 70) 20.
[76] Ciarán Burke, Ölafur Ísberg Hannesson and Kristin Bangsund, 'Life on the Edge: EFTA and the EEA as a Future for the UK in Europe' (2016) 22 European Public Law 69, 82.
[77] ibid 82.
[78] ibid 82.
[79] Chalmers, Davies and Monti (n 64) 11.
[80] ibid.

doubtful whether they are central concerns of voters.[81] A further concern raised in the poll, which concerns EU immigration, would suggest that this was an area of particular salience. However, Norway is obliged to accept free movement of people[82] – and the EU remains obstinately committed to this freedom.[83] Therefore, a cost-benefit analysis reveals that limited gains in sovereignty are offset by several losses: namely, control over EU law-making and integration, external trade agreements[84] and the potentially harmful effects of leaving the Customs Union.[85]

It is also doubtful whether the Norway model would result in greater autonomy in *judicial* decision-making. The principle of homogeneity converges EU and EEA law,[86] and stems from the fact that the two are substantively identical.[87] Consequently, the EFTA Court typically shadows the European Court of Justice,[88] while homogeneity also dictates that national courts ascribe '[s]trong weight' to EFTA Court rulings.[89] Therefore, although 'national judges are never obliged to refer cases for advisory opinions to the EFTA Court',[90] it would be misleading to conclude that judicial decisions in the UK could be taken free from European influence.

4 CONCLUSION

In conclusion, accepting the need for transnational cooperation in the modern world, the EU's limiting of the UK's sovereignty is justifiable. However, the extent to which it is justifiable corresponds to the EU's ambit of activity, which, it is argued, should be tightly constrained. At present, this is achieved satisfactorily through the checks and balances involved in the process of integration: the EU cannot expand on its own accord. The EU may not be perfect, but, compared to alternative models, it offers wide-ranging benefits to its MS while granting them relatively high levels of influence over its functioning.

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[81] ibid.
[82] HM Government (n 70) 13.
[83] Jennifer Rankin, 'Freedom of Movement: the Wedge that will split Britain from Europe' *The Guardian* (6 October 2016) <https://www.theguardian.com/politics/2016/oct/06/freedom-of-movement-eu-uk-brexit-negotiations-theresa-may> accessed 19 January 2017.
[84] HM Government (n 70) 17.
[85] ibid.
[86] AEEA, art 6.
[87] Vassilios Skouris, 'The Role of the Court of Justice of the European Union in the Development of the EEA Single Market: Advancement through Collaboration between the EFTA Court and the CJEU' in The EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Hart 2014) <https://www.bloomsburycollections.com/book/the-eea-and-the-efta-court-decentred-integration/> accessed 25 January 2017, 5.
[88] Chalmers, Davies and Monti (n 64) 17.
[89] ibid 17.
[90] Burke, Hannesson and Bangsund (n 76) 89.

MENTAL HEALTH AS AN ENFORCEABLE RIGHT

Kerry McFarlane[*]

> For too long, mental illness has been something of a hidden injustice in our country, shrouded in a completely unacceptable stigma and dangerously disregarded as a secondary issue to physical health.[1]

1 INTRODUCTION

This 'secondary' status of mental health is visible in the examination of resource and funding allocation decisions made by NHS England (hereafter 'NHS'); this aspect of health is persistently treated unequally compared to its physical counterpart, and is consequently underfunded. Winstanley, the head of the charity Rethink Mental Illness, encapsulates the key concern that 'mental health [is] all too often the casualty' within resource allocation decisions, as those in charge of making resource allocations occasionally make these 'based on gut feeling'.[2] Although 'an absence of robust data makes it difficult to provide a definitive assessment of the state of mental health services',[3] statistics consistently support Winstanley's assertions that mental health is disproportionately underfunded and sufficient support for such issues is lacking.[4] For example, the NHS Providers and the Healthcare Financial Management Association found that 'only 52% of providers reported that they had received a real terms increase in funding of their services in 2015/16',[5] and in 2015 the King's Fund reported that 'only 14% of patients say that they received appropriate care in a crisis'.[6]

The NHS, a publicly funded healthcare system, has finite monetary resources, and so decisions regarding which services and treatments to fund have to be made. Newdick recognises that such 'hard choices are required between competing demands for treatment because decisions to invest in some types of diseases (e.g. cancer or mental illness) impose … "opportunity costs"'.[7] These 'opportunity costs' are measured through quality adjusted life years (QALYs), and they are commonly calculated through instruments which Brazier states are 'problematic for use in psychiatric disorders'.[8] Indeed, 'it is unlikely that [such] generic measures will be adequate for [assessing] all mental health conditions',[9] as the QALY method focuses on 'years of life gained', which is much more difficult to generically prove in the case of mental health treatment. This suggests that, presently, mental healthcare may be systematically underfunded because the most commonly used technique is far more appropriate for somatic illnesses, conveying an inherent bias in the structure of NHS resource allocation.

The Prime Minister of the United Kingdom, Theresa May, explicitly acknowledged the lack of parity between physical and mental health at the

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1 Theresa May, 'The Shared Society' (Charity Commission Annual Meeting, London, 9 January 2017) <https://www.gov.uk/government/speeches/the-shared-society-prime-ministers-speech-at-the-charity-commission-annual-meeting> accessed 6 April 2017.

2 Mary O'Hara, Interview with Mark Winstanley 'Mental Health Cuts are "Driving People to the Edge"' *The Guardian* (London, 13 May 2015) <https://www.theguardian.com/society/2015/may/13/mental-health-cuts-driving-people-edge-mark-winstanley> accessed 6 April 2017.

3 The King's Fund, 'Mental Health Under Pressure' (Briefing, The King's Fund, November 2015) <https://www.kingsfund.org.uk/sites/files/kf/field/field_publication_file/mental-health-under-pressure-nov15_0.pdf> accessed 6 April 2017, 1.

4 O'Hara (n 2).

5 NHS Providers & Healthcare Financial Management Association, 'Funding Mental Health at Local Level: Unpicking the Variation' (Foundation Trust Network, May 2016) <https://www.nhsproviders.org/media/1945/nhs-providers_hfma_mental-health-survey.pdf> accessed 6 April 2017.

6 The King's Fund (n 3), para 1.

7 Christopher Newdick, 'Health Care Rights and NHS Rationing: Turning Theory into Practice' (2014) 32 Revista Portuguesa de Saúde Pública 151, 152.

8 John Brazier, 'Is the EQ-5D Fit for Purpose in Mental Health?' (2010) 197 British Journal of Psychiatry 348, 348.

9 ibid.

beginning of 2017, in the speech quoted above,[10] furthering the previous coalition government's goal of 'parity of esteem' for the two aspects of healthcare.[11] However, 'the way we deal with mental health problems right across society' cannot be 'transformed' as she intends without appropriate legislative enforcement.[12] The provision of mental healthcare via the NHS is found at the intersection of two separate but related areas of law: first, human rights law, and the question of whether a right to mental health actually exists; and secondly, public law, and the question of whether UK residents can legally demand the NHS *provide* mental healthcare. Genuine parity between mental and physical health can only exist if there is a recognition of a right to mental healthcare within the UK, and if this right is enforceable in circumstances where the NHS is not providing care under the same conditions that it would provide physical healthcare.

Against this backdrop, concerning external contributors to healthcare, this article will explore whether an enforceable right to mental health that is treated equally to a right to physical health exists in the UK. The nature of the right to health in international human rights law will be investigated in section 2. In section 3, the UK's obligations regarding the provision of such a right stemming from regional European human rights instruments will be investigated, with a specific focus on whether or not mental healthcare is an enforceable component of those obligations. These two sections together will demonstrate that while there is a right to health that has been recognised as containing a mental health dimension, the health-related obligations stemming from those international and regional instruments do not result in clearly *justiciable* rights. Given those findings, in section 4, the public law framework underpinning the NHS's approach to rationing of healthcare provision will be analysed, in order to assess whether it obliges the promised 'parity' between mental and physical healthcare. Finally, the question of whether or not such 'parity' can be enforced via the UK courts will be considered. It will be argued that the content of any right to mental health must be reflected through strong, legally enforceable domestic law in order to realise the government's aim of ensuring parity for mental health alongside physical health, which is presently lacking.[13]

2 NAVIGATING THE 'RIGHT TO HEALTH' IN INTERNATIONAL LAW

In order to investigate if the NHS is inadequately delivering a right to health to all of its citizens through persistently neglecting mental health, it is of the utmost importance to establish whether such a right, with appropriate legal weighting, exists. A prominent argument throughout this paper is that the controversy surrounding the existence of an enforceable right to mental health has significant implications for the adequacy of resource allocation for mental health issues. After all, if there is no such enforceable right, there cannot be a rights-based obligation for the NHS to *provide* mental healthcare, let alone ensure parity in provision of physical and mental healthcare. This controversy is made up of two dimensions: firstly, the content of the right to health, and specifically how successfully mental health has been subsumed into this, and secondly, the enforceability of socioeconomic rights (including the right to health) in general. Both of these issues will be explored within this chapter.

2.1 Contents of the 'Right to Health'

Mental health has long suffered from a 'stigmatisation [which] reflects a failure to recognise the legitimacy of mental illness', and has yet to obtain parity with somatic health.[14] In 2014, the British Medical Association (BMA) acknowledged that:

> for too long there has been an acceptance in society, even in the medical profession, that people with mental health problems … will suffer because of unmet health needs.

They also provide the uncomfortable statistic that 'someone with a mental health condition will typically

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[10] May (n 1).
[11] Department of Health, *No Health Without Mental Health: A Cross-Governmental Mental Health Outcomes Strategy for People of All Ages* (Department of Health, February 2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213761/dh_124058.pdf> accessed 6 April 2017; Norman Lamb, 'Achieving Parity of Esteem Between Mental and Physical Health' (London, 19 June 2013) <https://www.gov.uk/government/speeches/achieving-parity-of-esteem-between-mental-and-physical-health> accessed 6 April 2017.
[12] May (n 1).
[13] May (n 1); *No Health Without Mental Health* (n 11).
[14] Aviv Shamash, 'A Piecemeal, Step-by-Step Approach Toward Mental Health Parity' (2011) 7 Journal of Health & Biomedical Law 273, 274.

die between 15 and 20 years earlier than someone without'.[15]

However, there has been an increasing acceptance of the concept of 'health' as encompassing both mental and somatic elements. This is evident in both society and recent medico-legal theories, such as Woolfolk and Doris' view that:

> on numerous philosophically respectable ways of understanding the importance of healthcare, there is little basis for distinguishing psychological and somatic illness.[16]

Indeed, an inclusive right to health pervades in international law: the International Covenant on Economic, Social and Cultural Rights (ICESCR) defines the right to health as the pursuance of the 'highest attainable standard of *physical and mental* health'.[17] Venkataparum offers a 'conceptual framework for a theory of global health justice', focusing particularly on the 'capability to be healthy',[18] which appears to conform with the ICESCR's definition of the 'right to health'.[19] However, such a holistic and inclusive definition of 'health' has not been welcomed by all. The Nuffield Council on Bioethics recently highlighted that controversy exists regarding 'what comes under the banner of "health" rather than "social" need, and [whether] there is any consensus on when "demands" become "needs".[20] Buyx synthesises this debate in a literature review, noting Richardson's 'challenge [of] Venkatapuram's broad scope for a notion of health, which becomes difficult to distinguish from the idea of wellbeing', and claiming that Venkatapuram 'has gone too far and left behind the biological dimension of health.'[21] Through essentially relegating mental health into a sub-category of 'wellbeing', it is proposed that Richardson's critique is representative of the dated view of what health encapsulates.[22]

Such a view is countered by the Preamble of the World Health Organisation (WHO) Constitution which defines health as 'a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity.'[23] Similarly, Weale explores how the 'right to health' should be defined 'by means of the institutions of a modern medical care system', arguing that 'the character of the right is not being changed, but its implications are being spelt out in a particular historical and institutional context'.[24] Woolfolk and Doris analysed how Szasz's assertion in the 20th century that mental illness is a myth:[25] 'may still carry too much weight in medical practice and policy formation', despite the fact that 'there does not seem to be a cogent philosophical distinction between the entities categorised as mental or somatic illness.'[26] Further, it has been acknowledged that 'mental ill health is a clear, coherent and substantial need which cannot be usefully separated into health and social components', and thus integrating mental health within the concept of overall health is key to ensure individual's needs are met.[27]

International legislation has endeavoured to give the right to health legal weighting through encompassing it as a key socioeconomic right, which at least attempts to '[award] political legitimacy to [individual's] demands for their satisfaction of their,

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[15] British Medical Association (BMA), 'Recognising the Importance of Physical Health in Mental Health and Intellectual Disability: Achieving Parity of Outcomes' (BMA Science and Education Department and the Board of Science 2014) vi.
[16] Robert L Woolfolk and John M Doris, 'Rationing Mental Health Care: Parity, Disparity and Justice' (2002) 16 Bioethics 469, 474.
[17] International Covenant on Social, Economic and Cultural Rights (ICESCR) (adopted and opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 12.
[18] Alena Buyx, Eszter Kollar & Sebastian Laukötter, 'Sridhar Venkatapuram's Health Justice: A Collection of Critical Essays and A Response from the Author' (2016) 30 Bioethics 2, 2.
[19] ICESCR, art 12 (n 17).
[20] Katherine Wright, 'Funding Pressures in the NHS: An Ethical Response' (Background Paper, Nuffield Council on Bioethics, 13 May 2014).
[21] Buyx, Kollar & Laukötter (n 18) 3.
[22] ibid.
[23] World Health Organisation (WHO), *Constitution of the World Health Organisation, Basic Documents* (45th edn, World Health Organisation October 2006) 1.
[24] Albert Weale, 'The Right to Health Versus Good Medical Care?' (2012) 15 Critical Review of International Social and Political Philosophy 473, 480.
[25] Thomas S Szasz, *The Myth of Mental Illness: Foundations of a Theory of Personal Conduct* (Harper & Row 1961).
[26] Woolfolk & Doris (n 16) 476, 485.
[27] Simon Duffy, 'Resource Allocation in Mental Health' (Discussion Paper, The Centre for Welfare Reform, 25 October 2010) 7.

otherwise overlooked, material needs'.[28] However, there remains an ongoing and heavily contested debate regarding the effectiveness and status of socioeconomic rights, including the right to both physical and mental health.

2.2 Enforcing Socioeconomic Rights (Such as a 'Right to Health')

Socioeconomic rights are set out in a number of international instruments, with the most prominent being the ICESCR. To date, this document has been ratified by 164 states, including the UK, and was adopted by the UN General Assembly in 1966.[29] 'Economic, social and cultural rights include the rights to adequate food, to adequate housing, to education, [and] to health', to name but a few.[30] While a detailed discussion of every facet of the debate surrounding socioeconomic rights is outside the scope of this article, key elements pertaining to issues of enforceability will now be addressed in order to address why, despite ongoing efforts in international law, the right to health still lacks successful implementation.

The controversy surrounding the right to health is by no means a new issue, but one which has remained at the forefront of medico-legal debate for decades and only seems to be increasing in its prominence throughout the mainstream media and within government decisions.[31] In 1993, Leary stated:

> if the right to health is considered as a fundamental human right, significant differences in access to health care and the health status of individuals must be seen as violations of the principle of equality.[32]

This is an insightful obligation but one which seems to have remained largely side-lined in a legal context fourteen years later.

It has been alleged that socioeconomic rights suffer from a 'painful lack of prevision';[33] indeed, de Wet complains of 'the vague formulation of the term social'.[34] Thus, deliberation surrounding the enforceability of socioeconomic rights 'has led to much ink being spilt'.[35] However, after decades of debate, the academic consensus implies a 'strong case for the widespread incorporation of legally enforceable socioeconomic rights'.[36] Further promulgation of this argument is essential to underpin the legitimacy of the 'right to health'.

A reluctance to engage socioeconomic rights in a legally enforceable manner stems from 'the presumption that socioeconomic rights [are] positive rights'.[37] Positive rights mean that the holder 'is entitled to provision of some good or service', and thus the government must ensure that relevant policy reflects such a right.[38] Negative rights, on the other hand, 'place no obligation on [one] to provide goods to other people'.[39] Therefore, it is contended by some that enforcing positive rights may place an unfeasible onus on the government; however, Wiles convincingly argues that it is 'questionable' whether socioeconomic rights are necessarily positive.[40]

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[28] Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 Human Rights Quarterly 796, 797.
[29] ESCR-net, 'Section 5: Background Information on the ICESCR' (ESCR-Net) <https://www.escr-net.org/resources/section-5-background-information-icescr> accessed 6 April 2017.
[30] United Nations, 'Economic, Social and Cultural Rights' (United Nations Human Rights) <http://www.ohchr.org/EN/Issues/ESCR/Pages/ESCRIndex.aspx> accessed 6 April 2017.
[31] Michael Buchanan, 'Blocked Beds Blight in Mental Health Care' (*BBC News*, 6 January 2017) <http://www.bbc.co.uk/news/health-38517648> accessed 6 April 2017.
[32] Virginia A Leary, 'Implications of a 'Right to Health'' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff 1993) 481, 483.
[33] Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 U Pa L Rev 1, 69.
[34] Erika de Wet, *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa* (Butterworth 1996) 18.
[35] Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 MLR 532, 532.
[36] Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) 22 Am U Int'l L Rev 35, 64.
[37] ibid 46.
[38] Leif Wenar, 'Rights' (Stanford Encyclopaedia of Philosophy, first published 19 December 2005 substantive revision 9 September 2015) <https://plato.stanford.edu/entries/rights/> accessed 6 April 2017.
[39] Andrew Bradley, 'Positive Rights, Negative Rights and Healthcare' (2010) 36 Journal of Medical Ethics 838, 838.
[40] Wiles (n 36) 46.

Shue has explored this false dichotomy further, explaining that 'any right is likely to entail both negative and positive duties'[41] and thus strictly distinguishing between negative and positive rights is 'intellectually bankrupt'.[42] To propound this argument, the European Convention on Human Rights (ECHR),[43] which 'contain[s] … traditional so-called civil and political statements of human rights'[44] framed in negative terms, such as Art 2 EHCR (the right to life),[45] and Art 8 ECHR (right to private and family life),[46] shall be compared with the ICESCR, which seemingly consists of positive socioeconomic rights.

de Wet argues that the courts possess a 'wealth of political and historical knowledge, experience and significance' in relation to civil and political rights, the inference being that this is absent from social rights.[47] However, Woods criticises de Wet's presumption, stating that 'this argument overlooks the valuable work that is being done on the international level to define these norms', and that 'courts are equally competent to apply [similar] techniques to develop a jurisprudence of social rights.'[48] Woods also critiques the 'Lockean paradigm [which] conflates property and liberty', as its influence through time has led to citizens being 'more uncomfortable with judges openly making decisions affecting fiscal policy', as inevitably occurs with socioeconomic rights.[49]

Whilst socioeconomic rights may entail 'judges *openly* making [fiscal] decisions',[50] Alston and Quinn argue that the:

> reality is that the full realisation of civil and political rights is heavily dependent on the availability of resources and the development of the necessary societal structures.[51]

Ssenyonjo illustrates this through the example of the right to a fair trial enshrined in Art 6 ECHR.[52] This 'encompasses the right of access to a court in cases of determination of criminal charges and rights and obligations in a suit at law', and access to 'free legal aid if this is 'indispensable for an effective access to court'.[53] It is thus clear how, though framed in terms of a negative right, this ECHR right also contains positive qualities. This weakens the objection to the enforcement of socioeconomic rights on the basis that they entail positive obligations, as Art 6 ECHR is enforced by the courts regularly.[54]

Furthermore, positive rights such as 'health care, education, food and shelter … can be tied to … rights of life, liberty, and the pursuit of happiness', which Bradley identifies as negative rights found in the US Declaration of Independence.[55] This further supports the argument that the distinction between negative and positive rights (and thus civil and political and socioeconomic rights, respectively) has been overstated, and that the right to health, including the right to mental health, includes both positive and negative qualities. Indeed, Daniels has argued that 'we ought to subsume healthcare under a principle of justice guaranteeing fair equality of opportunity',[56] which Bradley refers to in order to conclude that 'regarding health care, equality of opportunity simply means eliminating barriers to an individual's reasonable life plans that arise from deviations from

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[41] James W Nickel & Lizbeth L Hasse, 'Review of *Basic Rights* by Henry Shue' (1981) 69 CLR 1569, 1571.
[42] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996) 51.
[43] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[44] Jean McHale, 'Fundamental Rights and Health Care' in Elias Mossialos (ed), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (CUP 2010) 283.
[45] ECHR, art 2.
[46] ECHR, art 8.
[47] de Wet (n 34) 41.
[48] Jeanne M Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' (2003) 38 Tex Int'l LJ 763, 772.
[49] ibid.
[50] ibid (emphasis added).
[51] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Hum Rts Q 156, 172.
[52] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Bloomsbury 2016) 91; ECHR, art 6.
[53] ibid.
[54] *Van Kück v Germany* ECHR 2003-VII 1; *Perez v France* ECHR 2004-I 93; *Khamidov v Russia* App no 72118/01 (ECtHR, 23 October 2006).
[55] Bradley (n 39) 840.
[56] Norman Daniels, 'Health-Care Needs and Distributive Justice' (1981) 10 Phil & Pub Aff 146, 160.

normal functioning'.[57] Therefore, if we accept that certain positive rights can be viewed as an integral aspect of the widely accepted right to life, this would aid their enforcement and allow the right to health to be considered as part of a 'fundamental human right'.[58]

The South African case of *Minister of Health and Others v Treatment Action Campaign and Others* (2002) (*TAC*) illustrates how a court may:

> require the State to take measures to meet its constitutional obligations to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[59]

This judicial commentary illustrates how, as Wood also concludes, 'judicial enforcement of collective legislative commands does not entail a significant divergence from the classic judicial role'.[60] O'Connell agrees that 'the courts [can], consistent with the principles of constitutionalism play a role in the vindication of socioeconomic rights'.[61] However, his assertion that 'under the concrete circumstances of neo-liberal globalisation, they are very unlikely to do so' suggests that the reasoning in *TAC* is something of an exception on a global scale.[62]

Indeed, there is evidence of the courts alluding to the 'on-going issue of contention' regarding the 'justiciability of economic, social and cultural rights', which hinders their enforceability.[63] For a matter to be justiciable, it must be 'proper to be examined in courts of justice'.[64] Pereira-Menaut referred to *Airey v Ireland* (1979)[65] decided by the European Court of Human Rights (EHCtR) in order to propose that the judicial enforcement of such rights leads to a 'choice among instrumental social policies' and may increase 'politicisation of the courts'.[66] This assertion alludes to the separation of powers argument, a prominent Western model of governance,[67] and consists of fears that the courts will 'encroach[…] on the prerogatives of other co-equal branches of government', namely the legislature and the executive.[68] The role of the courts is to enforce the law rather than create law, which has led to a difficulty enforcing socioeconomic rights as they often require a reallocation of resources.[69] However, Siegal posits a strong counter-argument against such a strict formulation of the separation of powers, emphasising the fact that such facets of justiciability:

> often accomplish little or nothing other than to make judicial review needlessly cumbersome, and … the restraints they impose are not well-aligned with the purpose that they are said to serve.[70]

This reflects Llewellyn's realist account of the role of law:

> [t]he conception of society [is] in flux typically faster than the law … [and] law needs re-examination to determine how far it fits the society it purports to serve.[71]

This may be best achieved by the courts voicing the fact that the government is not meeting an international obligation: if a country is a signatory to a binding instrument such as the ICESCR, the court has a

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[57] Bradley (n 39) 840.
[58] Leary (n 32).
[59] (2002) 5 SA 721 (CC) [38].
[60] Woods (n 48) 772.
[61] O'Connell (n 35) 553.
[62] ibid.
[63] 'Justiciable', *Jowitt's Dictionary of English Law* (4th edn, Sweet & Maxwell 2015).
[64] ibid.
[65] [1979] 2 EHRR 305.
[66] Antonio Carlos Pereira-Menaut, 'Against Positive Rights' (1988) 22 Val U L Rev 359, 360.
[67] MJC Vile, *Constitutionalism and the Separation of Powers* (2nd edn, Liberty Fund Indianapolis 1967).
[68] Diane A Desierto, 'Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' (2009) 11 Asian-Pacific Law and Policy Journal 114, 153.
[69] Vile (n 67).
[70] Jonathan R Siegel, 'A Theory of Justiciability' (2007) 86 Tex L Rev 73, 177.
[71] Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harv L Rev 1222, 1236.

legitimate function to enforce the rights within the document.

As mentioned, the ICESCR states that the parties 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[72] The WHO further expands on the allusion to the 'right of *everyone*',[73] stating that this right must be delivered 'without distinction of race, religion, political belief, economic or social condition'.[74] The WHO enjoys legal capacity in each signatory state as is 'necessary for the fulfilment of its objective' and 'exercise of its functions'.[75] Despite this, Gostin, Sridhar and Hougendobler argue that the WHO suffers from a lack of 'normative authority' due to the 'chaotic global health architecture', and has consequently 'failed to live up to the exalted expectations of the postwar health and human rights movement'.[76]

Aside from the more general issues of enforceability, it is contended that the wording of the ICESCR's right to health has a particular impact on its enforceability. The obligation to recognise a right to both physical and mental health is not a strong enough compulsion to address the issues faced by many of the signatories of a lack of funding within certain healthcare sectors.[77] A Member State may defend themselves on the basis that although they have recognised such a right, they are faced with limited funding and resources and thus have to make difficult decisions. Whilst this is a statement rooted in political reality, as demonstrated in the introduction, the issue that has come to light is that mental health funding consistently loses out on resource allocation, thereby introducing inequalities within the right to health. While it is of some merit that the ICESCR has explicitly referred to the right to health as also encompassing mental health issues, a further obligation on signatories to have a more active role than merely 'recognising' this right is necessary to aid enforceability.[78]

The judicial enforcement of socioeconomic rights has been referred to as 'the weakest link in the international human rights system'.[79] However, Langford did acknowledge less than ten years ago that 'social rights jurisprudence is nascent'.[80] In 1976, Chayes enunciated the view that 'judicial action only achieves … legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society'.[81] Socioeconomic rights are grounded on principles of equality and dignity, commonly related to the concept of justice.[82]

Chayes, drawing on Holmes, proposed we accept what is occurring with the law 'in fact',[83] which is that judicial decisions 'have widespread effects on persons not before the court and require the judge's continuing involvement, administration and implementation.'[84] The opposition to legal enforceability of socioeconomic rights rests largely on a refusal to accept the reality of the legal landscape: that in practice, 'all governmental officials, including judges, have exercised a large and messy admixture of powers, and that is as it must be'.[85] Fortunately, however, the consensus that these rights 'can be made legally enforceable in practice, but on the condition that certain mechanisms are put in place to ensure that their enforcement is effective' seems to prevail.[86] The next step is thus to assess the robustness of enforceability, either via regional human rights obligations or via domestic law. This shall be analysed on a narrower scope, focusing particularly on the right to health itself.

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[72] ICESCR, art 12.
[73] ibid (emphasis added).
[74] WHO, *Constitution of the World Health Organisation* (n 23).
[75] ibid, art 66.
[76] Lawrence O Gostin, Devi Sridhar and Daniel Hougendobler, 'The Normative Authority of the World Health Organisation' (2015) 129 Public Heath 854, 854.
[77] ICESCR, art 12.
[78] ibid.
[79] Douglas Donoho, 'Human Rights Enforcement in the Twenty-First Century' (2006) 35 Ga J Int'l & Comp L 1, 5.
[80] Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009) 3.
[81] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 The Harvard Law Review Association 1281, 1316.
[82] Evadné Grant, 'Human Dignity and Socioeconomic Rights' (2012) 33 Liverpool L Rev 235, 236.
[83] Chayes (n 81) 1282.
[84] ibid 1284.
[85] ibid 1307.
[86] Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) 22 Am U Int'l L Rev 35, 63.

3 ENFORCING THE RIGHT TO HEALTH THROUGH REGIONAL INSTRUMENTS

It has now been established that the right to health is not illusory, which has been evidenced through the analysis of existing international law. However, the existence of such law is not itself sufficient to ensure parity of mental and somatic health, as socioeconomic rights are only meaningful if they are enforced, and this enforcement is likely to only take place at a regional or domestic level. As the primary focus of this paper is to explore whether the NHS is failing to adequately deliver a right to mental health to its citizens, the discussion shall now turn to the enforceability of this right on a regional level, in order to assess whether the UK's membership of the Council of Europe or the EU may compel domestic level enforcement of a right to mental health.

3.1 European Social Charter

The Council of Europe created the European Social Charter (ESC) in 1961, and revised this in 1996.[87] The UK is a founding member of the Council of Europe, created in 1949 (this institution is a separate entity from the European Union). The ESC document sets out 'the right to protection of health' in article 11 and the 'right to social and medical assistance' under article 13. It is worthwhile to note that, unlike the ICESCR, the ESC does not explicitly refer to both physical and mental health, but just 'health' as one entity.

A study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs in 2016 concluded that the ESC has 'been largely ignored from the more recent developments concerning the protection of fundamental rights' for both countries as both 'members of the EU and as States parties to the European Social Charter'.[88] The Council has attempted to aid enforceability of these rights through 'the mandatory reporting system, and, since 1998, the collective complaints procedure'.[89] The collective complaints procedure allows 'certain non-governmental organisations' to lodge complaints 'concerning non-compliance of a State's law or practice with one of the provisions of the Charter'.[90] The State Parties also 'regularly submit a report on the implementation of the Charter in law and in practice', which are examined by the European Committee of Social Rights (ECSR), which then publishes its conclusions regarding complicity with the ESC.[91]

In terms of enforcing the ESC, the approach delineated in *International Federation of Human Right Leagues v France* initially appeared promising:

> [t]he Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.[92]

However, as Harris identifies, particularly 'in the context of collective complaints' the ECSR 'has indicated its willingness to make some … allowance' for 'financial constraints', despite there being no allowance for this reasoning in the text of the ESC.[93] This is evidenced through its approach to the matter in *Autism-Europe v France*:

> [w]hen the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.[94]

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[87] European Social Charter (1961) 2 ETS 35 (ESC).
[88] Directorate-General for Internal Policies, *The European Social Charter in the Context of Implementation of the EU Charter Fundamental Rights* (Policy Department Citizens' Rights and Constitutional Affairs 2016) <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf> accessed 6 April 2017.
[89] Henriette Roscam Abbing, 'The Right to Care for Health: The Contribution of the European Social Charter' (2005) 12 EJHL 183, 185.
[90] 'The Collective Complaints Procedure' (*Council of Europe*) <http://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure1> accessed 6 April 2017.
[91] ibid.
[92] *International Federation of Human Rights Leagues (FIDH) v France* 12 [2005] IHRR 1153 [29].
[93] D J Harris, 'Collective Complaints Under the European Social Charter: Encouraging Progress?' in Kaiyan Homi Kaikobad & Michael Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice Essays in Honour of Colin Warbrick* (Martinus Nijhoff 2009) 11.
[94] *Autism-Europe v France* 11 [2004] IHRR 843 [34].

It is contended that the right to health, encompassing both physical and mental health, would be regarded as 'exceptionally complex', and 'particularly expensive to resolve',[95] particularly when considering the reality that the NHS in general is currently facing a 'funding crisis'.[96] Therefore it is likely that if a collective complaint regarding the lack of funding for mental health (in breach of articles 11 and 13 ESC) was submitted, the ECSR would likely proffer a similar judgment to that in *Autism-Europe* and subsequent cases.[97] In reality, a judgment of this kind is unlikely to ensure an increase in allocation of mental health resources in the near future.

Furthermore, the enforceability of the reporting system has been found to be lacking. The ECSR previously expressed concerns in 2001 that 'the organisation of health care in the United Kingdom is manifestly not adapted to ensure the right to health for everyone' with regard to concerns over an increase in waiting times.[98] However, although 'the Conclusions adopted within the reporting system are declaratory', 'one cannot require the Committee's conclusions to be enforced in domestic law'.[99] For example, 'the UK has been in breach of article 12.1 of the Charter for (at least) the period from the beginning of 2001 until the end of 2011', which may be interpreted as a measure of the lack of success the ECSR has suffered from in terms of generating real change and legitimising social rights in the domestic realm.[100] Consequently, it may be argued that the mechanisms for enforcing the right to health through the ESC are inadequate.

3.2 Charter of Fundamental Rights of the European Union[101]

It is noted that the UK's decision to leave the European Union may affect the impact of the Charter of Fundamental Rights of the European Union (CFR) in the near future. However, as the details of this are as yet unknown, this paper shall proceed on the fact that the CFR remains, at present, binding on the UK insofar as the UK has not opted out of it.

Article 35 CFR states that:

> everyone has the right of access to preventative health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level on human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

Therefore, we have evidence of yet another regional document which alludes to a right to health. The CFR, like the ESC, however, neglects to identify health as encompassing both physical and mental health.

Following the Treaty of Lisbon, 'the Charter became legally binding on the EU institutions and on national governments'[102] through article 6(1) Treaty on European Union, which states that the CFR must be regarded with the same status as the Treaties of the European Union.[103] Hence, it may be thought that the CFR would allow for a more tangible right to health. However, the following discussion demonstrates that the CFR also lacks the ability to ensure that the UK delivers a right of access to mental healthcare, and, further, that the fact that this is the case may be attributed largely to the UK.

The UK's attitude towards the substantive content of the CFR allows one to infer that the UK was 'fervently opposed to the inclusion of … 'costly' and aspirational (social) rights' which were included in the CFR when negotiations to make the document a

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[95] ibid.
[96] Jon Stone, 'Government 'Systematic Underfunding' to Blame for NHS Humanitarian Crisis, Labour says' The Independent (London, 7 January 2017) <http://www.independent.co.uk/news/uk/politics/nhs-humanitarian-crisis-red-cross-labour-jeremy-hunt-underfunding-spending-cuts-a7514626.html> accessed 6 April 2017.
[97] *Marangopoulos Foundation for Human Rights v Greece*, Complaint No 30/2005, European Committee of Social Rights.
[98] European Committee of Social Rights, *European Social Charter: Conclusions XV-2 Volume 2* (Council of Europe 2001) 599.
[99] Council of Europe 'Reporting System of the European Social Charter' (Council of Europe) <http://www.coe.int/en/web/turin-european-social-charter/reporting-system> accessed 6 April 2017.
[100] Daniel Cashman, 'Not Reaping the Benefits: The United Kingdom's Continuing Violation of Art 12.1 of the European Social Charter' (*Oxford Human Rights Hub*, 6 February 2014) < http://ohrh.law.ox.ac.uk/not-reaping-the-benefits-the-united-kingdoms-continuing-violation-of-art-12%C2%A71-of-the-european-social-charter/> accessed 6 April 2017.
[101] Charter of Fundamental Rights of the European Union (CFR) [2000] OJ C362/02.
[102] European Commission, 'EU Charter of Fundamental Rights' <http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm> accessed 6 April 2017.
[103] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01, art 6(1).

binding and integral part of the Treaty began.[104] This animosity towards the binding nature of the CFR was managed somewhat by the inclusion of Protocol 30 CFR, which 'not[ed] the wish of Poland and the United Kingdom to *clarify* certain aspects of the Charter' and noted that, with relation to the social rights included in the CFR:

> nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.[105]

However, the substantive effect of the Protocol is somewhat lacking. Pernice explains that it 'can hardly be understood as a reservation or an opt-out [Protocol]'.[106] The 'Charter simply restated existing law … [and] the Court of Justice lacks power to annul national law anyway; only national courts can do that.'[107] Nonetheless, the insistence of the UK to emphasise the fact that the now binding CFR does not create any justiciable social rights implies that the UK intends to limit judicial engagement with socioeconomic rights, including the article 35 right to health care, due to concerns of limited resources.

Furthermore, it is made explicit that the:

> Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.[108]

Thus, it is inconceivable to regard the conversion of the CFR to a binding instrument as an alternative mechanism to establish and enforce a 'right to health' on a regional level.

In addition to Protocol 30 CFR, articles 51(1) and 52(5) of the CFR distinguish between rights and principles in the CFR at the UK's behest. The Member States are under an obligation to 'respect the rights, observe the principles and promote the application thereof',[109] and that:

> principles may be implemented … by acts of Member States when they are implementing Union law … They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.[110]

In the case of *Wolfgang Glatzel v Freistaat Bayern*,[111] article 26 CFR (relating to the 'integration of persons with disabilities') was referred to by the Court of Justice of the European Union (CJEU) as a 'principle … [which] does not require the EU legislature to adopt any specific measure'.[112] The CJEU further commented that:

> in order for that art to be *fully effective* it must be given more specific expression in European Union or national law. Accordingly, that art cannot by itself confer on individuals a subjective right which they may invoke as such.[113]

The CJEU in *Glatzel* referred to the 'Explanations relating to the Charter of Fundamental Rights',[114] which labels article 26 CFR a 'principle'[115] rather than a right. Importantly, this document uses the same phrasing ('the principle[s] set out in this Art')[116] with regard to article 35 CFR. Therefore, if one were to invoke article 35 CFR to argue that their right to accessing mental healthcare was in breach in the UK, it is likely that the CJEU would reiterate the message that, in absence of 'specific expression in … national

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[104] Jasper Krommendijk, 'Principled Silence or Mere Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 Eu Const L Rev 321, 321.
[105] CFR, Protocol 30 (emphasis added).
[106] Ingolf Pernice, 'The Treaty of Lisbon and Fundamental Rights' in Stefan Griller and Jaques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 247.
[107] Steve Peers, 'The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12 HR L Rev 375, 379.
[108] CFR, Protocol 30.
[109] CFR, art 51(1).
[110] CFR, art 52(5).
[111] Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern* [2014] ECLI 350.
[112] *Wolfgang* (n 111) [78].
[113] ibid (emphasis added).
[114] ibid para 74.
[115] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303, 17.
[116] ibid.

law'[117], article 35 CFR would not 'confer … a subjective right'.[118]

3.3 European Convention on Human Rights

As neither the ESC nor the CFR adequately enforce the 'right to health', there remains an interesting question of whether the 'right to health' may to be considered an ECHR right. The ECHR is litigated in cases before the ECtHR. Therefore it is important to consider whether, when reading the ECHR purposively, a 'right to health' may be justiciable in the UK through the ECHR's implementation into domestic law through the Human Rights Act 1998 (HRA).

The HRA states that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'.[119] NHS organisations are considered public authorities. Weale notes that although this agreement 'do[es] not assert a right to health', an 'interesting reference to the protection of health' is made.[120] This can be found in article 8 ECHR, where it is asserted 'that the protection of health is a valid reason for suspending or modifying the force of other rights, for example the right to private property'.[121] It is contended that since the right to health is 'powerful' enough to qualify other explicit ECHR rights, it is considered of great importance within agreements such as the ECHR.[122] Indeed, the right to health has been awkwardly shoehorned into other ECHR rights over time; namely the article 2 ECHR right to life,[123] article 3 ECHR right to be free from torture and degrading or inhuman treatment,[124] and article 8 right to private and family life.[125]

One may attempt to refute the need for an explicit right to health in the ECHR with the fact that the ESC 'is in effect the counterpart of the ECHR in the field of economic and social rights,' and thus the inclusion of a 'right to health' in the ESC is sufficient.[126] However, the issues of enforceability discussed in section 3.1 illustrate the inadequacy of the substantive effect of the ESC. While this encompasses a separate issue which, as argued in section 3.1, should be addressed, we must look at the law in its present form. Currently, the ESC does not provide for an individual to bring a claim that their 'right to health' is being infringed, and therefore the available route in regional law is to bring a claim under a relevant article of the ECHR.

Koch lends further weight to Weale's assertion that the right to health implicitly permeates a number of existing ECHR rights,[127] arguing that 'health issues are … closely related to …civil and political rights'; 'the interdependence and inter-relation between the right to life [in particular] and the right to health is obvious'.[128] Indeed, Koch also notes that the 'right to health is traditionally considered a right exclusively belonging to the category of social rights',[129] despite the fact that other social rights such as the 'right not to be denied an education'[130] has been incorporated into the ECHR as well as the ESC. The reasoning for distinguishing between the nature of the right to health and the right to education is unclear, particularly as in *Şahin v Turkey* (2005) the ECtHR ruled that if a State has institutions of higher education, they 'will be under an obligation to afford an effective right of access to them', as 'in a democratic society, the right to education [is] indispensable to the furtherance of human rights'.[131] However, as Koch explains, 'the enjoyment of health is one of the fundamental preconditions for the enjoyment of other rights':

> One dies sooner or later if a serious disease is not being properly treated … [and] the lack of

[117] *Wolfgang* (n 111) [78].
[118] *Wolfgang* (n 111) [78].
[119] Human Rights Act 1998, s 6.
[120] Weale (n 24) 476.
[121] ibid.
[122] ibid.
[123] See e.g. *Ilhan v Turkey* ECHR 2000-VII 267; *Cyprus v Turkey* ECHR 2001-IV 1.
[124] See e.g. *D v United Kingdom* (1997) 42 BMLR 149; *McGlinchey v United Kingdom* ECHR 2003-V 183.
[125] See e.g. *Glass v United Kingdom* ECHR 2004-II 25; *Tysiąc v Poland* ECHR 2007-I 219.
[126] Alice Donald, Jane Gordon and Philip Leach, *The UK and the European Court of Human Rights* (Research Report Series, Equality and Human Rights Commission 2012) 7 <https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf> accessed 6 April 2017.
[127] Weale (n 24) 476.
[128] Ida Elisabeth Koch, *Human Rights As Indivisible Rights: The Protection of Socio-economic Demands Under the European Convention on Human Rights* (Martinus Nijhoff 2009) 59–60.
[129] Koch (n 128) 59.
[130] ECHR, art 2 Protocol 1.
[131] ECHR 2005-XI 115, para 137.

> medical care, sanitary facilities as well as the lack of training of staff in e.g. prisons and psychiatric hospitals increases the risk of inhuman and degrading treatment.[132]

Therefore, an explicit statement of the 'right to health' in the ECHR would mark at least some progression towards ensuring that its status in international law as a 'fundamental right' is respected.[133]

IB v Greece[134] and *Kiyutin v Russia*[135] confirmed that an applicant may bring a claim under article 14 ECHR, the right to non-discrimination, in conjunction with article 8 ECHR on the basis of health. However, there are multiple cases which illustrate the circular difficulty of bringing a claim that there has been a breach of a right to health based on the decision not to fund a treatment. In *Sentges v The Netherlands*, for example, the ECtHR acknowledged that 'there may be positive obligations inherent in effective respect for private or family life'.[136] However, the Court ultimately dismissed the claim and held that article 8 can only be applicable 'in exceptional cases' and, even if such circumstances are found to exist, the State enjoys a 'margin of appreciation [which] is even wider when … the issues involve an assessment of the priorities in the context of the allocation of limited State resources,'[137] drawing on the landmark case of *Osman v UK* in support.[138] The court noted that:

> In view of their familiarity with the demands made on the healthcare system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court.[139]

Applying this reasoning on an expansive scale, the ECtHR's 'hands off' approach leads to broad discretion for a national authority to evade the right to health by reasoning that they have to make difficult decisions due to the global issue of limited resources. This renders rights in the ICESCR of minimal effectiveness, as it seems if a state has a healthcare system in place which mirrors the rhetoric of ensuring they have 'recognise[d] the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' courts will be extremely reluctant to intervene with resource allocation decisions.[140]

The case of *Powell v UK*[141] involved 'a boy who died allegedly because a seldom – but curable – disease was not diagnosed in time'.[142] Although the ECtHR 'declared the case inadmissible', they did state that article 2 ECHR:

> enjoins [Member States] not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

And, furthermore:

> it could not be excluded that the acts and omissions of the authorities in the field of healthcare policy might in certain circumstances engage their responsibility under the positive limb of Art 2.[143]

This *obiter* statement perhaps implies that an individual who feels that they are not accessing appropriate mental healthcare in order to 'safeguard the[ir] lives'[144] may be able to make a claim under article 2 ECHR. Indeed, in *Savage v South Essex Partnership NHS Foundation Trust*, it was held by Baroness Hale that where there is a:

> "real and immediate risk to life" about which the authorities knew or ought to have known at the time … the duty is … as it was put in *Keenan's* case, … to do "all that reasonably

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[132] Koch (n 128) 59, 60.
[133] WHO, *Constitution of the World Health Organisation* (n 23).
[134] ECHR 2013-V 113.
[135] ECHR 2011-II 29.
[136] App no 27677/02 (ECtHR, 8 July 2003).
[137] ibid.
[138] ECHR 1998–VIII 3124.
[139] *Sentges* (n 136).
[140] ICESCR, art 12.
[141] ECHR 2000-V 397.
[142] Koch (n 128) 62.
[143] *Powell* (n 141) [400].
[144] ibid.

> could have been expected of them to prevent that risk".[145]

However, it is contended that the requirement of a 'real and immediate risk to life' does not successfully realise a right to mental health that provides appropriate preventative care and treatment before the issue reaches this climatic point.[146]

3.4 Is There a Regional Obligation to Enforce a 'Right to Mental Health'?

The exploration of the ESC, CFR and ECHR has shown that the right to health, and particularly a right to mental health, has become somewhat diluted in the text of regional legislation, and enforceability has been further weakened. Additionally, none of the regional legal and quasi-legal instruments make any explicit reference to mental health when referring to health. Although this by no means equates to an exclusion of mental health from their considerations, it is important to reiterate the point made in section 2.1 that mental health is often side-lined with regard to what law and policymakers perceive to fall within the scope of 'health'.

Although it is evident that regional courts may address concerns regarding the right to health through ECHR rights, it is equally manifest that they are reluctant to do so. Due to the legal weighting of the ECHR, encompassing the right to health in this instrument *rather* than the ESC may be favourable, as has occurred with the right to education.[147] However, at present this does not seem politically viable, especially given the UK's explicit animosity towards making socioeconomic rights binding, as evidenced in section 3.2. Therefore, the next section will address domestic legislation and case law to assess whether explicit mental and physical health parity may be achieved through these mechanisms.

4 A RIGHT TO MENTAL HEALTH IN THE UK

Thus far, it has been illustrated how international law does attempt to promote a complete definition of a 'right to health' through explicitly stating that such a right encompasses the 'highest available standard of both standard of physical and *mental* health'.[148] However, the enforceability of international obligations rests on successful implementation into national or regional legislation, and the socioeconomic status of the right to health has thwarted this. The exploration of various regional instruments highlighted a lack of enforceability via the Council of Europe or the EU, leaving too wide a margin for national law to attribute countries' shortcomings to a lack of resources. The need for stronger enforcement mechanisms for the ICESCR and ESC has been propounded throughout our discussion, and we will now investigate whether the UK has provided such mechanisms, to ensure that the national rhetoric of 'parity of esteem'is a legally enforceable reality.[149]

Such an exploration requires an analysis of the legal framework that regulates the services provided by the NHS, generally known as the rules regarding resource allocation. These rules have been described as:

> a game of forensic 'pass the parcel'. No one wants to decide, and no one wants to be seen not to want to decide. The law in this area is a set of legislative and judicial ruses to ensure that the music keeps on going until the decision is back in the hands of the Trust.[150]

The above statement thus far seems a regrettably accurate metaphor for the law in terms of making difficult decisions regarding resource allocation. This section shall first 'pass the parcel' to the legislature, assessing the impact of recent developments in primary law on the realisation of the right to mental health, before considering the domestic courts' public law approach to matters of allocating healthcare resources.

4.1 Domestic Legislation & The Right to Mental Health

It is contended that national legislation is a crucial starting point to enforce the international obligation to deliver a right to mental health, and that this will enable courts to intervene where this has not been met. The contents and effects of three key pieces of

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[145] [2008] UKHL 74, [2009] 1 AC 681 [100] (Baroness Hale).
[146] ibid.
[147] ECHR, art 2 protocol 1.
[148] ICESCR, art 12 (emphasis added).
[149] *No Health Without Mental Health* (n 11).
[150] Charles Foster, 'Simple Rationality? The Law of Healthcare Resource Allocation in England' (2007) 33 JME 404, 404.

legislation in relation to mental health shall be analysed: the Mental Health Acts (MHA)[151] and the Health and Social Care Act 2012 (HSCA).[152]

4.2 Mental Health Act 1983 & Mental Health Act 2007

The Mental Health Act 1983 (MHA 1983), as amended by the Mental Health Act 2007 (MHA 2007), 'is the main piece of legislation that covers the assessment, treatment and *rights* of people with a mental health disorder'.[153] As the purpose of this article is to assess whether the NHS is delivering an acceptable right to mental health, primarily in terms of access to adequate resources, it is outside the scope of this paper to delve into the intricacies of the assessment and treatment procedures with regard to sectioning. However, this legislation remains relevant for two reasons: we will firstly explore the attitude of the legislature with regard to those with mental health issues, before analysing how the MHA 1983 is presently used improperly by medical professionals to attempt to allow individuals to be treated for their mental health needs.

A brief account of the state provision of mental health services substantiates a key theme throughout this paper: it is only in relatively recent times that mental health issues have begun to be viewed through the same lens as physical illnesses by the government. Indeed, the history of asylums for those suffering from mental health issues, which 'isolated [those admitted] from the local community', has been well-documented.[154] In the 19th century, 'no psychiatric opinion was sought prior to admission', and patients were kept 'in hospital when they had recovered from the acute stage of their illness'.[155] However, developments throughout the 20th century involved a focus on improving the 'poor standards of care and quality of life'[156] in the asylums and the Mental Health Act 1959 clarified 'reasons why an individual might need to be admitted to hospital and treated against their will'.[157] Further, Moncrieff notes that 'the Mental Health Act 1983 reflected a renewed concern with protecting patients' interests, accounting for the progressive social landscape influence[d by] … civil rights movements'.[158] This reformist attitude by the legislature with regard to a right to mental health is evidenced further by the review of the MHA 1983 in 1999.[159] An Expert Committee was set up by the government to:

> advise on [further] reform of the MHA, endors[ing] two fundamental principles: non-discrimination against those with a mental illness … and respect for patient's autonomy.[160]

However, the following analysis shall suggest that despite this positive temporal overview, there remain prevalent issues which imply this domestic legislation creates obstacles with realising a right to good mental health. Glover-Thomas and Chima neatly conceptualise the central issue surrounding the MHA:

> the legal framework for detaining and treating people without their consent has no corresponding enforceable right … to ensure appropriate treatment.[161]

This statement will be explored through analysis of the contents of the amended legislation.

The MHA 2007 experienced a long route to actualisation: the 'Reforming the Mental Health Act' White Paper was first presented in 2001, and only the third draft Mental Health Bill passed through all the

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[151] Comprising the Mental Health Act 1983, and the Mental Health Act 2007.
[152] Health and Social Care Act (HSCA) 2012.
[153] NHS Choices, 'The Mental Health Act: Your Rights – Easy Read' (*NHS England*, 24 April 2016) <http://www.nhs.uk/nhsengland/aboutnhsservices/mental-health-services-explained/pages/thementalhealthact.aspx> accessed 6 April 2017 (emphasis added).
[154] Helen Killaspy, 'From the Asylum to Community Care: Learning from Experience' (2006) 79–80 British Medical Bulletin 245, 247.
[155] ibid 248.
[156] ibid 249.
[157] Killaspy (n 154) 248.
[158] Joanna Moncrieff, 'The Politics of a New Mental Health Act' (2003) 183 British Journal of Psychiatry 8, 9.
[159] Department of Health Expert Committee, 'Review of the Mental Health Act 1983' (Department of Health 1999).
[160] George Szmukler & Frank Holloway, 'Reform of the Mental Health Act: Health or safety?' (2000) 177 British Journal of Psychiatry 196, 196.
[161] Nicola Glover-Thomas and Sylvester C Chima, 'A Legal "Right" to Mental Health Care? Impediments to a Global Vision of Mental Health Care Access' (2015) 18 Nigerian Journal of Clinical Practice 8, 9.

parliamentary stages.[162] This in itself conveys to some extent the controversies and uncertainties the legislature faced when attempting to formulate rules on how those with mental illness should be treated.

Indeed, when the draft Mental Health Bill 2004, which was 'subsequently dropped',[163] was still being considered, commentators complained that it was certainly 'not informed by the principles enunciated in either national or international mental health policies'[164] which, as discussed throughout section 2, focus on the importance of the wellbeing of the individual and the need for parity with physical health.[165] Mullen argues that the bill was shaped too much by public fear and resentment due to homicides carried out by individuals suffering from mental illness and the resulting 'culture of blame'.[166] *Clunis v Camden and Islington Health Authority* provides an example of the type of incident which contributed to this attitude thought to be held by society.[167] In this instance, an individual who had been detained in hospital for psychiatric treatment carried out an unprovoked fatal attack upon release.[168] The MHA 2007 aimed to appease such public fear through introducing community treatment orders (CTOs).[169] CTOs allow clinicians to 'discharge a detained patient from hospital subject to his being liable to recall'[170] if the patient requires medical treatment for their disorder or poses a risk to him or herself or to other persons.[171] A report from the Mental Health Association claimed that 'CTOs are being used preventatively and probably inappropriately in around one third of cases, and raises serious concerns about human rights'[172] based on data which suggests that 36% 'of patients on CTOs are not recorded as posing any risk of harm to themselves or to others'.[173] This amendment to the legislation raises concerns about the content of the right to mental health, as one may speculate about the consequences on one's perception of their mental health if a CTO is inappropriately attached to their conditions of discharge. Moreover, these provisions appear to be at least somewhat induced by a public perception of those suffering from serious mental health problems as dangerous, fuelled by the media, and the statistics show they are being used in a similarly precautionary manner. This is significant because if stigma is still infiltrating into primary legislation, it is unlikely that the legislature will be willing to take the steps necessary to meaningfully enforce parity between somatic and mental illnesses in an appropriate manner.

The case of *MS v UK* further illustrates how the MHA 1983 permits those suffering from mental illness to be treated in a detrimental manner, and in a way which they would not be treated if they were suffering from a physical illness.[174] The applicant was found 'behaving in a highly agitated manner' in his car, and thus was detained under section 136 of the MHA 1983 and 'transferred to a police station, where it was noted that he was clearly suffering from some form of mental illness'.[175] Following the detention, the police found that the applicant had assaulted his aunt. Section 136 of the MHA 1983 allows a constable to remove 'a person suffering from mental disorder' who is 'in immediate need of care or control' to 'remove that person to a place of safety … for up to 72 hours'. Section 135 lists a 'police station' as an example of such a 'place of safety'. The applicant remained in the police cell for four days before being transferred to a hospital, as appropriate resources could not be made available before then. The ECtHR held that the applicant was 'in dire need of appropriate psychiatric treatment' during his time in the police cell, which 'diminished excessively his fundamental human dignity' and 'reached the threshold of degrading

[162] Department of Health, *Reforming the Mental Health Act* (White Paper, Cm 5016, 2001).
[163] Catherine Jackson, *The Mental Health Act 2007: A Review of its Implementation* (Mental Health Alliance, May 2012) 3 <http://www.mentalhealthalliance.org.uk/news/MHA_May2012_FINAL.pdf> accessed 6 April 2017.
[164] Paul E Mullen, 'Facing up to our Responsibilities: Commentary on … The Draft Mental Health Bill in England: Without Principles' (2005) 29 Psychiatric Bulletin 248, 248.
[165] WHO, *Constitution of the World Health Organisation* (n 23).
[166] Mullen (n 164) 248.
[167] [1998] QB 978 (CA).
[168] ibid.
[169] MHA 2007, s 32.
[170] MHA 1983, s 17A.
[171] MHA 1983, s 17E.
[172] Jackson (n 163) 6.
[173] ibid; Care Quality Commission, *Monitoring the use of the Mental Health Act in 2009/10* (Care Quality Commission 2010).
[174] App no 24527/08 (ECtHR, 11 May 2012).
[175] ibid [8].

treatment for the purposes of Art 3'.[176] Spurrier notes that the suitability of the 'use of police stations as places of safety' has led to concerns 'been raised by a number of organisations, including Mind, the Royal College of Psychiatrists and the Mental Health Alliance', and it is contended here that the provision is less than desirable if we are to fully realise a right to mental health devoid of stigma and perceived in the same way as a right to physical health.[177]

Glover-Thomas and Chima identify how although MHA 1983 section 117 imposes a statutory duty on 'clinical commissioning groups and local authorities to provide aftercare services until patients no longer require them', there is no such duty to provide such services for 'mental health patients with different statuses', and therefore the 'costs of providing such services for patients … fall with the local authority'.[178] Those exempt from entitlement to aftercare include voluntary patients,[179] people detained under section 2 of the MHA 1983 for assessment, and people who have been detained in an emergency under section 4. Lack of entitlement to aftercare services has been contested as discrimination under article 14 ECHR in conjunction with article 5 ECHR (right to liberty and security of the person); however, it was held that the legislation was not 'incompatible with European obligations' as the claimant 'was not materially in the same position as those who receive aftercare under the provisions of section 117 MHA'.[180] Whilst it is true that the position of the patient may differ, these restrictions evidence a failure to aid implementation of an inclusive right to mental health as those patients would still benefit from 'greater opportunities to access services in the community' available through MHA 1983 section 177 aftercare.[181]

Additionally, the MHA 2007 'sought to respond to … the policy shift from hospital based treatment to care in the community'.[182] In 2014, the Royal College of Psychiatrists found that:

> [m]ore than a third of psychiatric trainees surveyed said that a colleague had used the Act to detain a patient knowing it would make provision of care more likely, while 24 per cent reported that bed managers had told them unless a patient had been sectioned they would not get a bed.[183]

This data indicates a flaw relating to the diagnosis of individuals and the corresponding treatment provided by the NHS. Currently, this leads to some individuals who are suffering from mental health issues wrongly being sectioned as it seems that, in some cases, this is the only way healthcare professionals can guarantee patients access to health resources when community-based care is insufficient. This misuse of the MHA conveys that the international 'right of everyone to the enjoyment of the highest attainable standard of physical and *mental* health' is not being appropriately implemented into domestic legislation.[184]

4.3 Health and Social Care Act 2012

The HSCA was implemented to safeguard the future of the NHS through 'put[ting] clinicians at the centre of commissioning, free[ing] up providers to innovate, empower[ing] patients and giv[ing] a new focus to public health.'[185] One amendment to the HSCA in particular implies that the new legislation aimed to signpost a change in perception of the right to health via 'parity of esteem'.[186] The HSCA 'was altered during its passage to include specific reference to

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[176] ibid (n 174) [44]–[45].
[177] Martha Spurrier, 'European Court got it Right on Mental Health Detention Delay' (*UK Human Rights Blog*, 7 May 2012) <https://ukhumanrightsblog.com/2012/05/07/european-court-got-it-right-on-mental-health-detention-delay-martha-spurrier/> accessed 6 April 2017.
[178] Glover-Thomas and Chima (n 161) 11.
[179] NHS Choices, 'Mental Health Aftercare' (*NHS England*, 15 January 2015) <http://www.nhs.uk/Conditions/social-care-and-support-guide/Pages/mental-health-aftercare.aspx> accessed 6 April 2017.
[180] *DM v Doncaster Metropolitan Borough Council* [2011] EWHC 3652 (Admin), [2012] MHLR 120 [74].
[181] Glover-Thomas and Chima (n 161) 11.
[182] Nicola Glover-Thomas, 'The Health and Social Care Act 2012: The Emergence of Equal Treatment for Mental Health Care or Another False Dawn?' (2013) 13 Med L Int'l 279, 282.
[183] The King's Fund (n 3) para 4.
[184] ICESCR, art 12.
[185] Department of Health, 'The Health and Social Care Act 2012 Fact Sheet' (Department of Health 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/138257/A1.-Factsheet-Overview-240412.pdf> accessed 6 April 2017.
[186] *No Health Without Mental Health* (n 11).

mental health'.[187] Baroness Hollins stated in the House of Lords that:

> When the word "illness" is mentioned, I suspect that in most people's minds there are images of physical illnesses such as heart disease, stroke, kidney failure and so on' and that it is 'time for a paradigm shift in the way we think about the health of the people in this country.[188]

Accordingly, the National Health Service Act 2006 (NHSA) was amended, to promote the provision of 'a comprehensive health service designed to secure improvement in the *physical and mental health* of the people of England'.[189] During the debate, Lord Howe noted that 'references to the prevention, diagnosis and treatment of illness would already apply to both physical and mental illness without the need for those additional words'[190] as section 275 of the NHSA includes mental disorder in the definition of illness. Whilst it is therefore clear that the legal definition of what is to be provided for in the promotion of health has not altered, the importance of the legislative amendment regarding public policy and the Clinical Commission Groups (CCGs) allocation of resources is important to some extent, not least because it marks a shift in the legislative branch in terms of recognising the need to reinforce the message that when the law refers to 'health', it encompasses both mental and somatic health.

However, the success of the legislation has been doubted, with the BMA reporting in 2016 that 'only 5% [of doctors] believe it has improved the quality of services for patients'.[191] Evaluating the full nature and breadth of these changes is outside the scope of this paper, and only those which it can be argued affect one's right to mental health shall be considered.

Weait, writing as the HSCA was implemented, regarded the alteration in the wording that 'the legislation no longer imposes upon the Secretary of State (SoS) for health a duty to "provide or secure" health services in England (a duty reaffirmed in NHS legislation since 1948)' as 'momentous'.[192] Section 1 HSCA instead imposes a duty to 'promote … a comprehensive health service designed to secure improvement'. In response to criticism from the suspected impact that the change in legislation may have on accountability of resource allocation, the Department of Health stated that 'removing the SoS's duty to provide alters his political accountability but it does not remove it'.[193] The SoS remains politically accountable for the NHS and legally accountable for the statutory functions conferred on him by the 2006 Act'.[194] Section 3(1) of the NHSA previously stated that 'the SoS must provide throughout England, to *such extent as he considers necessary to make all reasonable requirements*' (emphasis added) a range of proscribed services. It is accepted that the substantive effect of this alteration may be minimal, as section 3(1) NHSA had been interpreted narrowly. In *R v North and East Devon Health Authority, ex p Coughlan*[195] it was recognised that the 'duty to provide services is qualified by what is "reasonable"'[196] and thus 'in exercising his judgment the Secretary of State is entitled to take into account the resources available to him and the demands on these resources'.[197] Indeed, the court acknowledged in this case that 'a comprehensive health service may never, for human, financial and other resource reasons, be achievable'.[198] Nevertheless, as West argues, the decision to remove section 3(1) NHSA may contribute to the NHS

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[187] Elizabeth Parkin, *Mental Health Policy in England* (Briefing Paper No 07547, House of Commons Library, 9 May 2016) 4.
[188] HL Deb 2 Nov 2011, vol 731, col 1274.
[189] National Health Service Act (NHSA) 2006, s 1(1).
[190] HL Deb 2 Nov 2011, vol 731, col 1293.
[191] BMA, 'Health and Social Care Act… It's not Working!' (*BMA*, 21 November 2016) <https://www.bma.org.uk/collective-voice/policy-and-research/nhs-structure-and-delivery/hsca> accessed 6 April 2017.
[192] Matthew Weait, 'The United Kingdom: The Right to Health in the Context of a Nationalized Health Service' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds) *Advancing the Human Right to Health* (OUP 2013) 209.
[193] Department of Health, 'Response to Opinion of Stephen Cragg, published by 38 Degrees, on Duty of the Secretary of State to Provide a National Health Service' (Department of Health 2011) para 5.
[194] ibid.
[195] [2001] QB 213 (CA).
[196] David Lock QC, 'Secretary of State's Duty to Promote a Comprehensive Health Service' (24 November 2014) <http://www.cliveefford.org.uk/promoting> accessed 6 April 2017.
[197] *Coughlan* (n 195) [26].
[198] ibid [25].

'gradually ceas[ing] to be a provider of health care and shift to being a commissioner of health care',[199] thus changing the way the role of the NHS is perceived. Indeed, the removal of section 3(1) seems to follow the UK's trend of seeking to remove any positive legal obligations to enforce socioeconomic rights, as evidenced with regard to the CFR. Therefore, though it seems that an individual's route to recourse through seeking to rely on the Secretary of State's 'duty to provide' services was always limited, the HSCA seems to have only restricted this further.[200]

The HSCA also altered the structure of the NHS, replacing Primary Care Trusts with CCGs. The aim of the legislation was to 'delegate more responsibility for rationing decisions to doctors', as NHS England is responsible for allocating resources to the 209 local CCGs, overseeing their activities and 'providing national leadership'.[201] The positive implications of CCGs being able to tailor allocation of resources to best meet the needs of their local patients is noted, however it is argued that there is a need for legislation to strengthen the leadership role of NHS England, to highlight the importance of safeguarding parity of esteem for mental health, and ensuring this is respected by all CCGs. The present legislation does not address this issue, and the 'decision not to ring-fence … funding' in any way has had very real consequences on mental health provision.[202]

For example, in 2016:

> only half of England's CCGs … increase[d] their child and mental health services budget, despite all of them receiving a share of £1.4bn designated by the government for that specific purpose.[203]

Furthermore, in June 2016, NHS England's Chief Executive pledged that a 'contingency fund' of £800m would be 'available from CCGs for mental health services, community health services, primary care and other things'.[204] However, the emergence of a letter from Baumann, NHS England's Chief Financial Officer, confirmed that the 'full amount' of this fund would be used 'to offset the provider deficit position'.[205] An NHS spokesperson has defended this decision by claiming that 'this is uncommitted money that would otherwise have been invested at the discretion of commissioners',[206] again evidencing the persistent underfunding and re-direction of funding with regard to mental health. Therefore, as CCGs and the NHS possess broad discretion over their budgets, it is possible to redirect money, which was previously earmarked for mental health services, elsewhere within the NHS.

As Glover-Thomas notes, 'making improvements for mental health provision is dependent upon good implementation', otherwise the legislative provision is little more than empty rhetoric.[207] Accounting for the ongoing issues regarding CCGs misdirecting mental health funding, recourse to the domestic courts appears to be necessary to allow individuals to enforce their internationally-respected 'right to the highest attainable standard of … mental health'[208] and the domestic duty on the SoS to promote improvement in the 'mental health of the people' through the 'prevention, diagnosis and treatment of … [mental] illness[es]'.[209] The discussion will now therefore turn

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[199] Charles West, 'A Failure of Politics' in Raymond Tallis & Jacky Davis (eds), *NHS SOS* (Oneworld Publications 2013) 133.
[200] ibid.
[201] Emily Jackson, *Medical Law: Text, Cases & Materials* (OUP 2016) 40.
[202] Emily Frith, 'Children and Young People's Mental Health: Time to Deliver. The Report of the Commission on Children Young People's Mental Health' (*Education Policy Institute*, November 2016) < http://epi.org.uk/wp-content/uploads/2016/11/time-to-deliver-web.pdf> accessed 6 April 2017.
[203] National Health Executive, 'CCGs Still Diverting Mental Health Funds, Despite Parity Commitments' (21 Dec 2016) <http://www.nationalhealthexecutive.com/Mental-Health/ccgs-still-diverting-mental-health-funds-from-frontline-despite-parity-commitments> accessed 6 April 2017.
[204] Simon Stevens, 'Speech to NHS Confederation Conference 2016' (NHS Confederation Conference, Manchester, 17 June 2016) <https://www.england.nhs.uk/2016/06/simon-stevens-confed-speech/> accessed 6 April 2017.
[205] Letter from Paul Baumann to CCGs (15 March 2017).
[206] Neil Roberts, 'RCGP Slams Diversion of £800m Primary and Community Care Funding to Cover Deficits' (*GP Online*, 17 March 2017) <http://www.gponline.com/rcgp-slams-diversion-800m-primary-community-care-funding-cover-deficits/art/1427767> accessed 6 April 2017.
[207] Glover-Thomas (n 182) 289.
[208] ICESCR, art 12.
[209] NHSA, s 1(1)(b).

to an analysis of the judicial role in enforcing the right to mental health.

4.4 Judicial Engagement with the 'Right to Health'

This section will analyse how the judiciary has dealt with resource allocation issues relating to the right to health, as one can only 'attain the highest standard of … health' if the necessary resources are made available to them.[210] If a person:

> believes that a CCG has wrongly deprived her of treatment, [she] can apply for judicial review, but only on the grounds that the CCG had acted illegally, unfairly or disproportionately and irrationally.[211]

As has been illustrated throughout this article, a person may potentially also argue that the decision amounts to a breach of human rights under the HRA. The courts' overarching approach to judicial review will be explored, before assessing the limitations of applying this in a mental health context.

The previously discussed case of *MS v UK* can be returned to in order to illustrate how the court exacerbates the consequences of inadequate legislation, which stigmatises mental health patients, rather than applying judicial discretion in order to domestically enforce the right to mental health. As Brown recognises:

> detention in police cells was not, *per se*, the important legal issue[, it] was the inability to secure the man's onward admission into the NHS and the subsequent degradation suffered.[212]

The County Court in England did not perceive a breach in article 3 ECHR as:

> the applicant had been lawfully detained and his basic needs had been met [and] the fact that he had spent an extra 12–24 hours at the police station did not make the situation so appalling as to breach Art 3.[213]

This supports the argument that the English judiciary, through the inadequate legislation concerning mental health, fails to grasp the fact that allowing an individual to suffer from severe mental health problems with no access to adequate treatment is 'appalling'.[214] If one replaced the applicant's severe psychiatric episode experienced in the police cell with a severe physical illness, one does not imagine that the same issues regarding an inability of the NHS to provide a bed and appropriate care within four days would arise.

Additionally, the courts initially took an averse approach towards issues brought through judicial review, particularly within the realm of health. In *R v Cambridge Health Authority, ex parte B,* Sir Thomas Bingham MR held that:

> difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage over the maximum number of patients. This is not a judgment which the court can make.[215]

Similar legal principles were enunciated in *R (Murphy) v Salford Primary Care Trust*, where Burnett J accepted that previous case law illustrated that 'the court's role is not to express opinions as to the effectiveness of medical treatment or the *merits* of medical judgment'.[216] This *dicta* implies that the court may be reluctant to voice the opinion that a CCG should direct funding towards mental health services. Further, the cases which have come before the court can be distinguished from the issues grappled with in this paper, as they centre on instances where resources have been made available by a CCG and then subsequently denied to an individual.[217] In contrast, one of the primary issues within mental health is that there is a lack of resources and funding being made

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[210] ICESCR, art 12.
[211] Emily Jackson (n 201) 74–75.
[212] Michael Brown, '*MS v United Kingdom*' (*Mental Health Cop*, 4 May 2012) <https://mentalhealthcop.wordpress.com/2012/05/04/ms-v-uk-2/> accessed 6 April 2017.
[213] *MS v United Kingdom* (n 174) para 26.
[214] ibid.
[215] [1995] 1 WLR 898 (CA) 906 (Sir Thomas Bingham MR).
[216] [2008] EWHC 1908 (Admin) [6] (Burnett J).
[217] *R (Ann Marie Rogers) v Swindon Primary Care Trust and the Secretary of State* [2006] EWHC 171 (QB), (2006) 88 BMLR 177; *R (Otley) v Barking & Dagenham NHS Primary Care Trust* [2007] EWHC 1927 (Admin), (2007) 98 BMLR 182.

available to this aspect of healthcare on a far larger scale.

The reasoning in *R v North West Lancashire Health Authority, ex parte A; D and G*, which concerned a general policy not to fund gender reassignment surgery without regarding the merits of individual cases, may be applied to cases regarding the access of mental healthcare resources.[218] Significant comparisons can be drawn between transsexualism and mental illness: the progression of medical science has led to the development of empirically effective treatments, gender reassignment surgery, cognitive behavioural therapies and medication. Moreover, neither of these are clearly somatic illnesses. Indeed, transsexualism has long been categorised as a mental health condition. In the 1950s, healthcare professionals considered transsexualism a 'sexual perversion',[219] and gender reassignment faced strong opposition because 'the proper way to deal with a diseased mind was to treat the brain; to do otherwise constituted collaboration with the mental illness'.[220] Although both society and the majority of the healthcare profession no longer consider transsexualism as an issue within the category of mental health,[221] the WHO still refers to transsexualism as a mental and behavioural disorder.[222] This ongoing classification of transsexualism as a mental illness is significant when analysing Auld LJ's reasoning in *North West Lancashire*, as it means that ultimately the case is an example of inadequate enforcement of a right to mental health.[223] The specific issue in *North West Lancashire* was that:

> the health authority had adopted a restrictive referral policy for transsexuals seeking gender reassignment surgery at the country's only specialist Gender Identity Clinic.[224]

Auld LJ held that 'it is natural that each authority … will give greater priority to life-threatening and other grave illnesses than to others obviously less demanding of medical intervention'.[225] He continued that:

> a policy to place transsexualism low in an order of priorities of illnesses for treatment … is not in principle irrational, provided that the policy genuinely recognises the possibility of their being an overriding clinical need and requires each request for treatment to be considered on its individual merits.[226]

Henceforth:

> the authority should reformulate its policy to give proper weight to its acknowledgement that transsexualism is an illness, apply that weighting when setting its level of priority for treatment and make effective provision for exceptions in individual cases from any general policy restricting the funding of treatment for it.[227]

Therefore, one should also '[acknowledge] that [mental health] is an illness and apply that weighting when setting its level of priority for treatment'.[228] However, Auld LJ justified a low prioritisation for transsexualism as health authorities will 'natural[ly] … give greater priority to life-threatening illnesses'; but many mental health issues are life-threatening, and would therefore require high priority.[229] Auld LJ's justification for placing transsexualism as a low priority is interesting within the context of exploring the judiciary's view of what is considered a 'grave illness',[230] as often people identifying as transsexual also report poor mental health, including 'depression,

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[218] [2000] 1 WLR 977 (CA).
[219] George H Wiedeman, 'Transvestism' (1953) 152 JAMA 1167, 1167.
[220] Dallas Denny, 'Changing Models of Transsexualism' (2004) 8 Journal of Gay and Lesbian Psychotherapy 25, 27.
[221] Rebeca Robles and others, 'Removing Transgender Identity From the Classification of Mental Disorders: A Mexican Field Study for ICD-11' (2016) 3 The Lancet Psychiatry 850.
[222] WHO, *International Statistical Classification of Diseases and Related Health Problems* (10th revision, WHO 2016).
[223] *North West Lancashire* (n 218) 991 (Auld LJ).
[224] Emily Jackson (n 201) 77.
[225] *North West Lancashire* (n 218) 991 (Auld LJ).
[226] ibid 995 (Auld LJ).
[227] ibid 995 (Auld LJ).
[228] ibid.
[229] ibid 991 (Auld LJ).
[230] ibid.

anxiety, self-harm and suicidal ideation'.[231] The salient point from this case is that health issues with a 'mental' origin are still treated as a lower priority relative to purely physical health issues.

North West Lancashire also implies that where mental healthcare is not already provided for by CCGs, the courts will be reluctant to compel them to remake the decision in order to redirect their funding.[232] Similarly, *R (A) v Secretary of State for Health ('A'*) conveys the way in which the domestic courts declined to enforce a right to an NHS-funded abortion when funding is not allocated for that particular individual.[233]

A concerned a 15-year-old Northern Irish girl, who had become pregnant and, as the Abortion Act 1967 does not extend to Northern Ireland (NI), had to fund travel to England to have an abortion.[234] Her argument that she should be reimbursed for the expenditure because, as a UK citizen, she should be 'entitled to obtain abortions with the English NHS free of charge, given that [she] cannot obtain abortions in NI' was dismissed.[235] King J's High Court ruling was followed by the Court of Appeal and the Supreme Court (by a 3:2 majority) which, as de Mars notes, 'indicates [they] cannot simply ignore the public law in order to rule on the human rights issue before [them].'[236] King J ruled that aticles 8 and 14 ECHR merely required NI residents to 'access abortions in England as any other UK citizen can'.[237] In the Court of Appeal, Elias LJ criticised the appellants submission as it meant the Secretary of State:

> should choose to make additional funds available for *one particular type of health provision* … [and] the Strasbourg court has on many occasions said that there is considerable leeway afforded to governments in relation to economic and social matters, particularly where expenditure is concerned.[238]

Similar reasoning could, under the present law, be applied should one bring a claim arguing that their CCG does not provide adequate resources for mental healthcare. If an individual is able to privately fund mental healthcare, the courts may argue that their right to access is met, which 'flies in the face of the philosophy underpinning the NHS: to provide treatment on the basis of need, regardless of ability to pay for it'.[239]

North West Lancashire and *A* illustrate two separate issues which arise in judicial challenges to mental health provision. *North West Lancashire* illustrates that health issues regarded as having a mental origin are treated by the UK courts as a lower priority when making resource allocation decisions. *A*, meanwhile, illustrates the manner in which the Court exercises its public law jurisdiction and how this can prevent a successful rights-based argument. This 'hands off' approach taken by the Court thus permits the government to deny any obligation to allow genuine provision of specific services so long as the treatment is available through some means within the UK. This is a low standard to hold the NHS to in order to deliver a meaningful right to mental health, and thus the law requires 're-examin[ation] to [fit] the society it purports to serve'.[240]

It is interesting to note the distinct lack of case law relating to allocation of resources for mental health issues through judicial review. A factsheet provided by Rethink Mental Illness entitled 'Challenging Cuts' highlights to mental health service users that judicial review 'can be stressful, expensive and time consuming' and that the judge may only consider 'whether the local authority or NHS made the decision in the right way', rather than whether it was the 'wrong

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[231] Jack McNeil et al, 'Trans Mental Health Study 2012' (Equality Network 2012) 3 < https://www.gires.org.uk/assets/Medpro-Assets/trans_mh_study.pdf> accessed 6 April 2017.
[232] *North West Lancashire* (n 218).
[233] [2017] UKSC 41.
[234] Abortion Act 1967, s 7(3).
[235] *R (A) v Secretary of State for Health* [2014] EWHC 1364 (Admin), [2014] Med LR 246; Sylvia de Mars, 'Case Note: Rights Versus Remuneration – The English NHS and Abortion Services for Women from Northern Ireland' (2014) 65 NILQ 449, 449.
[236] de Mars (n 235) 452.
[237] ibid 452.
[238] *R (A) v Secretary of State for Health* [2015] EWCA Civ 771, [2016] 1 WLR 331 [52] (Elias LJ) (emphasis added).
[239] de Mars (n 235) 452.
[240] Llewellyn (n 71).

decision'.[241] Therefore, vague legislation is essentially immune from challenge due to its political nature. The added strain on an already vulnerable individual may dissuade one from pursuing a judicial review claim, particularly when the limits of the mechanism have been reinforced through Parliamentary debate. In his former capacity as Secretary of State for Justice, Grayling emphasised how judicial review 'was never intended to put the courts above the elected Government in taking decisions over the *essential interests* of this country'.[242] The present funding issues with regard to the NHS may set a higher threshold of what decision by the CCG may be considered 'irrational',[243] particularly as choosing to fund one service necessarily entails reducing funding from another area of healthcare due to budgetary limitations on each CCG, as has been evidenced by *A*.[244]

However, there is some evidence that the mere threat of judicial action can impact on the decisions to cut mental health services. In 2016 'a judicial review, backed by Manchester Users Network – which represents mental health patients – was brought against the trust and CCGs, accusing them of "failing in their duty" to disadvantaged people' following a decision to 'axe … eight [mental health] services'.[245] This resulted in the city's commissioners deciding not to pursue the case and rethink its decision following a 'wider consultation'.[246]

Overall, there seems to be possibilities, albeit limited, through which individuals may argue that decisions to deny adequate access to mental health resources are illegal through judicial review. However, the courts seem unwilling to acknowledge that they are permitted, to some extent, to enforce positive obligations on the NHS, and consequently their role in ensuring 'parity' between mental and physical healthcare in the UK is likely be limited under the current applicable law.

5 CONCLUSION

The acknowledgment of 'parity for mental and physical health'[247] seems commendable. However, when one considers the possibilities of enforcing this rhetoric by studying the interpretation of the relevant legislative instruments by the domestic and regional courts, it transpires merely to be the same idealistic phrasing as that of the unenforceable WHO Constitution and the ICESCR. As the NHS is suffering generally from a lack of funding, it appears that both the legislature and judiciary are increasingly uneasy to aid decision-making with regard to the 'hard choices' resource allocation entails.[248] Given these difficult considerations, it is argued that stigma, socio-historic influences and an impractical method of assessing the success of resources permeate many CCGs, leading to mental health resources being consistently overlooked. Indeed, Sharac and colleagues argued that 'stigma can act as a disincentive to invest in mental health services to the same extent as investment in other areas of healthcare', despite a prevalent need for this aspect of healthcare in society.[249]

There is a glimmer of hope for future progression of domestic legislation in that the House of Lords recognised the importance of promoting a 'paradigm shift in the way we think about … health' as encompassing both physical and mental health during the passage of the HSCA.[250] However, this piece of legislation does not go far enough. It is evident that the judiciary still feel reluctant to direct CCGs to allocate funds to one type of health provision, and this paper has conveyed how mental health is disproportionately underfunded.[251] Therefore, what is required is an explicit legislative provision stated that there is an obligation on CCGs to ensure that, where there is need,

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[241] Rethink Mental Illness, *Challenging Cuts: Campaigning, Complaining and Judicial Review* (Rethink Mental Illness 2015) 8 <https://www.rethink.org/resources/c/challenging-closures-factsheet> accessed 6 April 2017.
[242] HC Deb 1 Dec 2014, vol 589, col 70 (Christopher Grayling PC).
[243] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410 (Lord Diplock).
[244] *A* (n 233).
[245] Jennifer Williams, 'Plan to Cut £1.5m Worth of Mental Health Services is Axed in Extraordinary U-turn' *Manchester Evening News* (Manchester, 13 July 2016) < http://www.manchestereveningnews.co.uk/news/greater-manchester-news/mental-health-cuts-manchester-axed-11610764> accessed 6 April 2017.
[246] ibid.
[247] May (n 1); *No Health Without Mental Health* (n 11).
[248] Newdick (n 7).
[249] Jessica Sharac and others, 'The Economic Impact of Mental Health Stigma and Discrimination: A Systematic Review' (2010) 19 Epidemiology and Psychiatric Sciences 223, 223.
[250] HL Deb 2 Nov 2011, vol 731, col 1274.
[251] *A* (n 233) [52] (Elias J).

mental healthcare resources are to be given the same level of priority as physical healthcare resources. This would reflect the realities of society, as '1 in 4 people in the UK will experience a mental health problem each year'.[252] An explicit statement of parity by the legislature, rather than merely rhetoric propounded by the executive, would allow individuals to enforce their right to mental health through the courts.

[252] 'Mental Health Facts and Statistics' (*Mind*) <http://www.mind.org.uk/information-support/types-of-mental-health-problems/statistics-and-facts-about-mental-health/how-common-are-mental-health-problems/> accessed 6 April 2017.

CHAMPIONING AUTONOMY – DOES *MONTGOMERY* TRULY PROTECT PATIENT'S INTERESTS?

Gavin Murphy[*]

1 INTRODUCTION

A distinct medical morality has existed since antiquity. However it has only been in the last half a century that the law in the United Kingdom has become significantly involved in medical practice.[1] Recently the law has begun interpreting a physician's role not as paternalistic, but emphasising the new axiom – 'patient choice.'[2] The purpose of this paper is to explore that legal evolution by examining its efficacy in protecting patients. This discussion comes in the wake of the Supreme Court judgment in *Montgomery v Lanarkshire Health Board*,[3] which overruled the House of Lords in *Sidaway v Board of Governors of the Bethlem Royal Hospital.*[4] *Montgomery* represents a culmination of judgments that have served to steer medical law away from paternalism. While this paper is entirely a proponent of increased patient involvement it finds issue in the manner in which it has been promoted.

Employing a holistic view of the topic, this article intends to investigate three inherently connected principles: informed consent, autonomy and capacity. A substantive discussion of *Montgomery* hopes to establish the full effect the judgment will have on the medico-legal world – primarily the change in regard to the 'duty of disclosure.' *Montgomery* has presented a 'material risk' test that, due to its subjectivity, will result in more information being given to patients. It is suggested that the courts promote a harmful consumerist culture in which patients are given large quantities of information (that might in fact hinder their decision making ability) or be given the opportunity to demand futile treatment. *Choice* has become a political buzzword, and the courts must more thoroughly consider its practical realities to ensure patients and doctors are protected. Such ethical underpinnings, considered through philosophers like Kant and Mill, are found in the concept of *autonomy* Synonymous with self-determination, autonomy lays the foundations for the principle of consent – without the ability to act autonomously one cannot give meaningful consent. Autonomy is connected to informed consent insofar as *Montgomery* appears to equate more information with more autonomous decision making. This paper contends that this is a fallacy and harmful to many seriously ill patients.

A conceptual distinction is found between *liberty* and *autonomy*.[5] It is suggested that a patient, while always having the liberty (independence unfettered by the state) to make their own decision, is not always capable of making a fully autonomous decision. This is due to the basic premise that the nature of serious illness may result in some form of diminished autonomy in patients. In such instances, the dichotomy of knowledge between doctor and patient is ignored in the name of anti-paternalism. It is suggested that when a patient is seriously ill their physical independence and their ability to make a fully autonomous decision is diminished because of the nature of their situation (i.e. minor and routine procedures present fewer complexities and will not be referred to). It is further suggested that rationality must be the basis of all autonomous decisions and, as such, a complete exclusion of paternalism from medical practice may result in harm in those who are incapable of acting rationally. The promotion of the rhetoric of *choice* and *autonomy* will doubtless help those who are capable of wielding them. What *Montgomery* fails to consider are those who cannot make genuine choices or make authentically autonomous decisions, and need paternalistic care to successfully recover.

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[1] Andrew Grubb and Ian Kennedy, *Medical Law* (OUP 2005) 1–2.

[2] *Chester v Afshar* [2004] UKHL 41, [2005] AC 134 [16] (Lord Steyn).

[3] [2015] UKSC 11, [2015] 1 AC 1430.

[4] [1985] AC 871 (HL).

[5] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (5th edn, OUP 2001) 2–3.

A brief investigation into capacity, or competence, will demonstrate those whom, in the eyes of the law, do not act autonomously (and as such are not capable of granting informed consent). This will highlight potential contradictions in the law by discovering where society deems medical paternalism to be appropriate with consideration of what a patient's best interests might be.[6]

The crux of the argument is that *Montgomery*, in its determination to keep up with modern social standards of patient autonomy and consent, may have restricted paternalism to a harmful extent. *Montgomery* places too much importance on patient consumerism and denies the realities of the doctor/patient relationship, by promoting a concept of political liberty without due consideration of conceptually authentic autonomy. *Montgomery* demands a level of information disclosure that will not only overwhelm seriously ill patients but will promote a consumerist driven medical system in which treatment is demanded rather than chosen. The 'therapeutic privilege' of physicians to limit information in the interests of patients must not be jettisoned as it allows doctors to effectively heal they who desire to be healed.[7] The 'material risk' test presented in *Montgomery* must also be revised, reconsidering its subjectivity. Doctors have little guidance in regard to precisely how much information must be provided, thereby leaving them open to unpredictable litigation.

Rejecting paternalism in every form will fail to protect those who are unable to make rational decisions as a result of their illness or a lack of capacity. Proponents of absolute autonomy suggest no one but the patient themselves are capable of recognising what is in their best interests, but as will be explored through capacity, this is at the very least contradictory to the wider law.[8] A level of paternalism, and perhaps a more malleable concept of capacity, is required to protect those who make objectively harmful decisions.

2 MONTGOMERY V LANARKSHIRE HEALTH BOARD

The proceedings in *Montgomery* originated with the birth to the appellant on 1 October 1999 of a son. The son was born with serious disabilities. The appellant sought damages against Dr McLellan (the obstetrician and gynaecologist in charge of her labour and birth) and Lanarkshire Health Board, claiming her doctor did not reach the required standard of care and was therefore negligent. The appellant suffered from insulin dependent diabetes which posed an extra complication to childbirth in that there could be up to a 10% chance of shoulder dystocia (the shoulder being too wide to pass through the pelvis easily.)[9] This dystocia was accompanied by injury to the brachial plexus and an occlusion of the umbilical cord (becoming trapped against the pelvis) and hypoxia resulting in one arm paralysis and cerebral palsy in the baby. There was less than a 0.1% risk of this occurring.[10] Approaching the estimated time of birth, the appellant expressed concerns about a vaginal delivery of a baby that had shown to be in the 95th percentile of size, garnering reassurance from Dr McLellan that in all likelihood a vaginal delivery would be uneventful and if required a caserean section would be performed.[11] Shoulder dystocia or its risks were not mentioned.[12]

It was asserted that: (i) information of the risk of shoulder dystocia ought to have been discussed as well as a possibly alternative caesarean section as a result of that discussion; and (ii) Dr McLellan mismanaged the case by failing to proceed with a caesarean section as a result of abnormalities in the size of the baby indicated by cardiotocograph traces.[13] The appellant claimed she would have demanded a caesarean if warned of the risks of dystocia.[14] In the Court of Session, Outer House,[15] the Lord Ordinary (Lord Bannatyne) concluded that even if the information was provided, the appellant was in fact unlikely to opt for a caesarean due to the small risk of harm associated with shoulder dystocia. The difficulty arose in the fact that the vast majority of cases of shoulder dystocia are

[6] Raymond Tallis, *Hippocratic Oaths: Medicine and its Discontents* (Atlantic 2004) 24.
[7] Beauchamp and Childress (n 5) 84.
[8] Daniel Groll, 'Medical Paternalism – Part 1' (2014) 9 Philosophy Compass 86.
[9] *Montgomery* (n 3) [13] (Lords Kerr & Reed JJSC).
[10] ibid [12] (Lords Kerr & Reed JJSC).
[11] ibid [23] (Lords Kerr & Reed JJSC).
[12] ibid [13] (Lords Kerr & Reed JJSC).
[13] ibid [2] (Lords Kerr & Reed JJSC).
[14] ibid [3] (Lords Kerr & Reed JJSC).
[15] [2010] CSOH 104.

clinically resolved relatively easily.[16] Despite a significant chance of shoulder dystocia (10%) the Lord Ordinary felt that no warning was necessary – not because of the chance of dystocia itself, but the diminutive chance of serious damage to mother or child. Indeed, 'in the vast majority of … cases … shoulder dystocia was dealt with by simple procedures and the chance of a severe injury to the baby was tiny.'[17]

The Lord Ordinary's judgment was in contradiction of the judgment in *Jones v North West Strategic Health Authority*,[18] which held that a 10% chance of dystocia was grave enough to warrant disclosure. The Lord Ordinary had rejected both claims in accordance with *Hunter v Hanley*[19] (as affirmed in *Sidaway*). He relied on expert medical opinion, satisfied that if a body of experts would have acted in the same vein as Dr McLellan, her actions were acceptable. Drawing on *Maynard v West Midlands Regional Health Authority*,[20] it was made clear that it is not enough to retrospectively claim a procedure was unjustified or justified, but it was necessary to prove that the contemporary action was not common practice. The Lord Ordinary's ruling was affirmed by the Inner House.[21] Lord Eassie (feeling he was 'effectively bound' by the House of Lords in *Sidaway*) rejected the claim[22] stating that Dr McLellan had no obligation to disclose information which she had not been asked directly about. He rejected that 'communication of general anxieties or concerns, in a manner which does not clearly call for the full and honest disclosure of factual information in reply'[23] obliged Dr McLellan to inform the appellant about the risks of shoulder dystocia.

The *locus classicus* of such a common practice test referred to by the Lord Ordinary is found in *Bolam v Friern Hospital Management Committee*.[24] There, it was held by McNair J that: 'If a doctor reaches the standard of a responsible body of medical opinion, he is not negligent.'[25] The Claimant was a patient at the mental health facility Friern Hospital. He agreed to electric shock therapy but was not given muscle relaxant nor restrained during the procedure. As a result of his body flailing, he incurred a number of serious injuries and sued the hospital. The court ruled that the amount of information provided was adequate if it was in keeping with the medical practice of the day. As such, it allowed the very people the law was trying to regulate to create their own standard. Indeed, it has been suggested that *Montgomery* is the culmination of 'De-Bolamisation'.[26] Why then, was *Bolam* accepted for so long? Firstly, the majority of physicians at the time believed placing restraints on a patient undergoing electric shock therapy would in fact make the patient more susceptible to fractured bones. Faced with this body of knowledge the courts agreed that it would have been more dangerous indeed for the doctors in question to depart from this school of thought. Secondly, when interviewed, the deputy superintendent at the hospital stated:

> I say that every patient has to be considered as an individual … If they are unduly nervous, I do not say too much. If they ask me questions, I tell them the truth. The risk is small, but a serious thing when it happens; and it would be a great mistake if they refused to benefit from the treatment because of fear. In the case of a patient who is very depressed and suicidal, it is difficult to tell him of things you know would make him worse.[27]

As will be further discussed below, this discretion embodies what is known as the therapeutic privilege[28] – a doctor's ability and right, in light of their knowledge and experience, to not disclose certain information if deemed potentially harmful – as recognised in law in Australia, Canada and the United

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[16] ibid [28] (Lords Kerr & Reed JJSC).
[17] ibid [28] (Lords Kerr & Reed JJSC).
[18] [2010] EWHC 178 (QB).
[19] [1955] SC 200 (IH).
[20] [1984] 1 WLR 634 (HL).
[21] [2013] CSIH 3, [2013] SC 245.
[22] ibid [26] (Lord Eassie).
[23] ibid [26] (Lord Eassie).
[24] [1957] 1 WLR 582 (QB).
[25] ibid 587 (McNair J).
[26] Jose Miola, 'Bolam: Medical Law's Accordion' in J Herring and J Wall (eds), *Landmark Cases in Medical Law* (Hart Publishing 2015) 12.
[27] *Bolam* (n 24) 590 (McNair J).
[28] DK Sokol, 'Update on the UK Law on Consent' (2015) 350 BMJ 1481.

States. The therapeutic privilege and a 'necessity clause' (a doctor may act in a clinical emergency in which the patient cannot make a decision) are the two exceptions to the rule laid down in *Montgomery*, with the prior being the more controversial. It might be argued that a doctor ought not withhold any information from a patient and therefore abolish this concept of therapeutic privilege. This, to a less absolute extent, is the prevailing social sentiment of anti-paternalism that was echoed in the Supreme Court (where the appeal was allowed unanimously). Lords Kerr and Reed, in reference to *Bolitho v City & Hackney Health Authority*,[29] made clear that judgments like *Bolam*, and to a lesser extent *Sidaway* and *Chester*, no longer reflect what a modern patient expects from a doctor.

A patient should no longer be treated as though they are incapable of self-determination, which allowed doctors to be judged, not against what the patient expects, but what is considered the common practice of the day. This, in essence, is a fresh perspective on what a doctor's 'duty of care' requires. The High Court of Australia defined 'material risk' as any risk the patient themselves would find synonymous with serious harm i.e. 'whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.'[30] This is the *volte face* between the 'prudent professional test' of *Bolam* and the 'prudent patient' test of *Montgomery*.[31]

The Supreme Court distinguished itself from the Court of Session by stating it was not the small risk of harm the lower court should have focused on, but the choice the appellant might have made if she had all the necessary information i.e. it is the concept of material risk that is central. The 'prudent patient test' functions by allowing the patient to determine what harm is the most damaging to them, regardless of its risk of happening. It asks what a reasonable person in the patient's position would consider material.[32] A great social impetus for the decision in *Montgomery* can be found in the pressure English courts were under to keep up with international developments in medical law (particularly in Australia and the decision in *Rogers v Whitaker*).[33] Indeed, the Supreme Court have formally aligned their test for materiality with that of the High Court of Australia in *Rogers*. In *Rogers*, the Australian courts saw fit to depart from *Bolam* in the name of patient autonomy and consent. As the primary influence on *Montgomery*, it is necessary to scrutinise the Australian test for materiality and use its effectiveness as a guide.

In *Rogers* the test for materiality was presented as twofold. The first, and more objective aspect, asks not what a particular patient would want to know but what *any* reasonable patient in their position would expect to be told. It has been suggested the idea of *in their position* is untenable.[34] While tests that include the concept of a 'reasonable person' exist successfully throughout the law, in terms of medical history and specific anxieties, it is unlikely the definition of 'reasonable patient' will suitably correlate with what a patient might find material in reality. The only thing the courts can make objective is a very preliminary look at physical factors. For instance, in *Rogers* the fact that the respondent was already lacking an eye would be such an obvious physical factor – this being in reference to the 'hierarchy of harm.' The court hopes to move to looking at the potential harm not in percentages, but at the severity of the harm in the context of a specific patient. This places a large amount of pressure on doctors, threatening litigation if a doctor cannot deduce certain aspects of an individual, often less obvious than a missing eye, particularly if the patient has no duty to ask specific questions about their anxieties. Such a 'hierarchy of harm' leads to the second part of the test, which resides in a more subjective realm i.e. by amalgamating, for example, the religious or socio-economic characteristics of a particular patient and disclosing to the patient what the doctor *knows or ought to know* should be disclosed. In *Rosenberg v Percival*,[35] in what might be described as the first test of *Rogers*, it

[29] [1998] AC 232 (HL).
[30] *Rogers v Whitaker* (1992) 175 CLR 479, 490 (High Court of Australia) (Mason CJ, Brennan, Dawson, Toohey & McHugh JJ).
[31] See General Medical Council, *Consent: Patients and Doctors Making Decisions Together* (General Medical Council 2008) <https://www.gmc-uk.org/static/documents/content/Consent_-_English_0617.pdf> accessed 8 January 2018.
[32] *Montgomery* (n 3) [87] (Lords Kerr & Reed JJSC).
[33] *Rogers* (n 30).
[34] José Miola, 'Medicine and the Law' (2004) 364 The Lancet 48.
[35] [2001] HCA 18, (2001) 205 CLR 434 (High Court of Australia).

was implied that the only way a doctor might be litigated against for not disclosing something to a patient that he 'ought' to have would be when a direct question were asked and it remained unanswered. It appears unreasonable to expect physicians to deduce what a patient, in very specific terms, would want to know – as conceded in Lord Scarman's speculative speech in *Sidaway*.[36]

How, in practice, will a doctor be able to suitably predict what a patient might find material, beyond that which is most obvious? As will be discussed below, one need only look to a book on drug formulations to find hundreds of pages of drug interactions – how then are doctors expected to start a 'dialogue' and make sure the patient fully understands 'the gravity of their situation and the risks and benefits of the alternative treatment'?[37]

Lords Kerr and Reed acknowledged in their judgment in *Montgomery* there were certain ostensible criticisms of their ruling. They first concede it is impossible to discuss literally all risks involved in a procedure in a typical consultation.[38] They rebuked this critique in two ways; firstly, claiming that even though it is not possible to discuss all risks, the ruling will at least promote more dialogue from those doctors who might be less communicative;[39] and secondly, that harm should not be relegated to percentages.[40] They suggest there is a lot more to harm than the chance of it happening, including its nature and circumstantial effect on the patient.[41] This is again in reference to the 'hierarchy of harm'; while a broken finger is not a serious injury for most, it is a very serious injury for the concert pianist. While a hierarchy of harm is important for the dialogue between doctor and patient, *Montgomery* cannot be dinstinguished from percentages. If it were the nature of the harm being considered, Dr McLellan was justified in not warning of shoulder dystocia, as in the vast majority of cases the harm is not serious. Indeed, it is a stressful experience for mothers, but as was put before the court through medical expert evidence, it is normally clinically resolved without incident.[42] The nature of the harm that did materialise was grave, but its severity does cannot mandate disclosure of every possible outcome that has a 0.1% chance of happening.[43]

Such a dilemma alludes to another serious critique of the judgment: the fear of increased litigation. If the appellant was compensated for not being informed of shoulder dystocia, do all patients qualify for compensation if not told of similar risks of 10% likelihood or less, or perhaps of anything with a 0.1% chance of happening? There is a possibility that this complete departure from *Bolam* will result in inconsistency in future rulings due to the subjective nature of the test of material risk and a complete departure from percentages. If the court turns its back on percentage risk it will rely entirely on a circumstantial and subjective hierarchy of harm. While the arbitrariness of *Bolam* did not suit all cases it at least provided a bench mark for litigation. Lords Kerr and Reed argued this benchmark has in fact been raised; but a definitive 'bar' to reach following *Montgomery* is not evident.[44]

Dr McLellan's reason for not providing more information about the potential dystocia was policy based. Indeed,

> if you were to mention shoulder dystocia to every [diabetic] patient, if you were to mention to any mother who faces labour that there is a very small risk of the baby dying in labour, then everyone would ask for a caesarean section, and it's not in the maternal interests for women to have caesarean sections.[45]

If such a floodgate were opened it would place unimaginable strain on an already overstretched health system. The trade off for such a flood would be increased autonomy in expectant mothers, which is clearly desirable. Despite Lady Hale DPSC stipulating that 'in any case where either a mother or a child is at heightened risk from vaginal delivery' a caesarean

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[36] *Sidaway* (n 4) 888 (Lord Scarman).
[37] *Montgomery* (n 3) [90] (Lords Kerr & Reed JJSC).
[38] ibid [92] (Lords Kerr & Reed JJSC).
[39] ibid [90] (Lords Kerr & Reed JJSC).
[40] ibid [89] (Lords Kerr & Reed JJSC).
[41] ibid [89] (Lords Kerr & Reed JJSC).
[42] ibid [10] (Lords Kerr & Reed JJSC).
[43] ibid [12] (Lords Kerr & Reed JJSC).
[44] ibid [22] (Lords Kerr & Reed JJSC).
[45] ibid [13] (Lords Kerr & Reed JJSC).

section must be, if not offered, thoroughly discussed.[46] Such a policy may affect a vast number of expectant mothers. The Court clearly sees this as a welcome trade off to protect mothers like the appellant.

With such an emphasis on the importance of discussing 'material risk,' it appears likely anyone would be seriously concerned about the risks of shoulder dystocia, regardless of the virtually immaterial risk (0.1%) of serious disability resulting from it. *Montgomery* is about that virtually immaterial risk, because it is that risk that tragically materialised. It is not about speculating that if the appellant was aware of the chance of shoulder dystocia and potential complications, *and* was aware of the tiny chance of severe disability resulting that she would have demanded a casarean section against the will of (the policy driven) Dr McLellan. I agree that the risk of shoulder dystocia ought to have been disclosed but I reject the demand for information in regard to the tiny chance of disability or the need to litigate against Dr McLellan on the grounds that the appellant may have speculatively demanded a casarean section.

The Court appreciated that the appellant was a 'highly intelligent' person; she was graduate and had doctors in her immediate family.[47] It was understood that if she was unhappy with the advice or professionalism of Dr McLellan she would been more than capable of challenging Dr McLellan and even requesting a different doctor. Indeed, a general practitioner in her immediate family attended one of the appellant's biweekly consultations. The Supreme Court has in fact infantilised the appellant, suggesting 'few patients do not feel intimidated or inhibited to some degree.'[48] The Supreme Court considered that this justified its assertion that it did not matter if the appellant did not ask the right questions. While I do not relegate disclosure to the answering of specific questions, it may be argued that unless specific reservations are brought up it is a challenge for any doctor to alleviate such anxieties. Indeed, the more precise the questions that are asked by a patient, the more the patient is likely to know (it is in fact they who do not ask questions that need the most information). The Democratic Health Network illustrated this problem (in response to the likes of Lords Kerr and Reed categorising patients as 'consumers exercising choices'[49]) by asking: '[w]hy are we talking about extending choice when we know that any real choices going will be exercised by those who need least support? … because … choice is a sacred word.'[50] This highlights a problem in medico-legal discourse and judgments: principles like 'choice' and 'autonomy' are pursued ostensibly because they match what is socially expected from modern medicine. Harvey suggests that they appeal to our 'intuition and instincts.'[51] Such rhetoric, while being based in important principles, can be meaningless without proper consideration of the limits of their ethical and practical application, and doing everything to promote patient consumerism will not be beneficial for patients if freedom to choose surpasses, in significance, their recovery. Montgomery and Montgomery suggest this reasoning made *Montgomery* about *a* hypothetical patient, not the appellant herself.[52] They suggest Dr McLellan was demonised; it was suggested that it was her belief in the moral superiority of natural birth that led her to not provide information. This suggestion, again, is a disservice to the appellant. It reduces her from an autonomous patient to a patient that describes anxieties, powerless under the moralising of the tyrannical Dr McLellan.[53] While a strong case can be presented that Dr McLellan ought to have informed the appellant about the risks of shoulder dystocia, the real grievances brought to the Court's attention were a result of harm that was serious in nature, but very unlikely to occur. The Supreme Court made clear that it is this serious nature that is the most important factor when considering disclosure.[54]

Montgomery is a clear step away from paternalism, while at the same time being a natural evolution in case law, in particular from *Bolitho* (where it was

[46] ibid [111] (Lady Hale DPSC).
[47] ibid [6] (Lords Kerr & Reed JJSC).
[48] ibid [58] (Lords Kerr & Reed JJSC).
[49] ibid [75] (Lords Kerr & Reed JJSC).
[50] F Campbell, 'How will greater "consumer choice" impact on the NHS?' (Democratic Health Network) <http://www.healthmatters.org.uk/issue54/consumerchoice> (accessed 10 January 2017).
[51] David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 25.
[52] Jonathan Montgomery and Elsa Montgomery, 'Montgomery on Informed Consent: an Inexpert Decision?' (2016) 42 Journal of Medical Ethics 89, 90.
[53] *Montgomery* (n 3) [14], [58], [73], [94], [104] (Lords Kerr & Reed JJSC).
[54] ibid [89] (Lords Kerr & Reed JJSC).

established that despite some contemporary support from other clinicians, a doctor may still be found negligent). The Supreme Court did not find Dr McLellan's reason for withholding the information sufficient, categorising her behaviour as unwarranted paternalism by making decisions for the patient that they ought to be making themselves. The appellant was awarded £5.25 million in damages.[55] Socially, the court must protect the appellant as the law must reassure expectant mothers they will legally be able to make their own decisions on the back of adequate information, but the judgment has not given stability to this part of the law.

3 MEDICAL PATERNALISM

Gerald Dworkin summarised paternalism as 'the interference with a person's liberty of action, justified by reasons referring exclusively to the welfare, good, happiness, needs, interest or values of the person being coerced.'[56] In the 20th century, a time rife with inequality, it was thought the expertise and experience of a doctor was a privilege that ought to be received gratefully. This was as archaically illustrated in the 1847 American Medical Association Code of Medical Ethics:

> The obedience of a patient to the prescriptions of his physician should be prompt and implicit. He should never permit his own crude opinions as to their fitness, to influence his attention to them.[57]

Thomas Percival, in his seminal work of 1803 – *Medical Ethics* – also spoke of 'the authority and independence of the physician.'[58]

John Stuart Mill, in *On Liberty*, became the most prominent dissentient voice against paternalism. Mill, a great utilitarian, supposed a more functional view on morality, making it clear that it was never justified to interfere with a fellow person unless their action was potentially harmful to others. He posited that:

> [t]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[59]

This completely rejected the idea that a doctor, even if he is acting in the very best interest of the patient, had authority to do so. This was reflected in the *Belmont Report* concerning medical ethics of 1980, which stated that there is an obligation to 'give weight to autonomous persons' considered opinions and choices while restraining from obstructing their actions unless they are clearly detrimental to others.'[60] However, Mill conceded that if one is a child or lacking mental capacity, it may 'require being taken care of by others, [and] must be protected against their own actions as well as against external injury.'[61] Where the line is drawn between those who need protection and those who ought be left alone requires exploration. Mill describes an unsafe bridge, certain to collapse and cause death if trod on. He suggests that if a wandering traveller should stray in its direction, it is justified for the likes of a public official to seize his arm and save his life.[62] If it were only a slight danger of harm, Mill conditions, no such intervention is justified. *Montgomery* has made very clear that Mill's liberalism is the future of medical law, but what happens when a physician feels they might so intrusively bare upon another's liberty that they cannot seize the arm of the traveller? This paper is not focused on those patients who are truly of sound mind, rather this paper finds a key point in Mill's distinction of a *certainly* fatal bridge and a *potentially* fatal bridge. The former must

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[55] *Montgomery* (n 15) [1] (Lord Bannatyne).
[56] Gerald Dworkin, *The Theory and Practice of Autonomy* (CUP 1989) 65.
[57] American Medical Association, *Code of Medical Ethics* (H. Ludwig & Co 1848) 16.
[58] Maliha Hashmi 'To Take or Not to Take: Bioethical Conflicts with Non-adherence to Medications due to Religious Beliefs' (Digitial Access to Scholarship, Harvard 2010)8 <https://dash.harvard.edu/bitstream/handle/1/8822186/Hashmi%2c%20Maliha.pdf?sequence=1> accessed 8 January 2018, 8.
[59] John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son 1859) 21–22.
[60] National Commission for the Protection of Human Subjects, *The Belmont Report:Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (DHEW Publication No. (OS) 78-0012, US Government Printing Office 1981) <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html> accessed 8 January 2018, 5.
[61] Mill (n 59) 22–23.
[62] ibid 172–173.

be recognised as the rightful home of paternalism and should never be rejected. While open to abuse, limited paternalism is not condescending, oppressive or presumptively derogatory; it is the name given to what naturally fills the gap in an asymmetrical relationship like that of the doctor/patient – the very word 'paternalism' is indicative of a benevolent relationship. While in the past it has been used to gain the assent, as opposed to the consent, of patients – that should not diminish the function it must perform in the medical world today. The negative connotations of medicine in previous centuries more aptly describes authoritarianism; paternalism is not the antithesis of autonomy. While they are indeed opposing, they are capable of producing the same result.

Medical paternalism exists on a spectrum, from hard to soft. McKinstry provides examples of practitioners from each end of that spectrum.[63] He begins with the 'autocratic doctor' who represents the 20th century physician. Falsehoods are happily told to the patient to ensure they acquiesce to whatever treatment the more qualified and knowledgeable doctor sees fit. While a suitably harsh depiction of what doctors once were, it is highly rare to find such behaviour in modern practice.[64] McKinstry then presents the 'paternalistic doctor', who embodies the Hippocratic Oath i.e. the wellbeing of the patient comes before all else. He will not disregard a patient's volition, but upon facing an irrational decision from that patient, will readily bend the truth. This may manifest itself in the exaggeration of potential repercussions upon, for example, the patient stopping their medication. While indicative of a sense of superiority over the patient, it is rarely, if ever, malicious.[65]

The 'doctor as agent' might be classified as soft paternalism. They would never knowingly deceive a patient, leaving all decisions to them. They may, however, make presumptions as regards minor judgments. They might find it impossible, or highly impractical to detail every potential outcome of every potential decision – because either the patient is unlikely to want all that information, or if the patient had all that information it would hinder them in making a rational choice.[66] It was in this capacity I suggest Dr McLellan was acting. Finally comes the 'autonomous patient' (the clear goal in the *Montgomery* decision). This allows for the patient to make any decision, no matter how rational or harmful, autonomously and without influence. This, interestingly, includes the common decision to delegate completely to the doctor. By refusing to discuss potential outcomes, although the doctor may be acting *prima facie* paternalistically, is still their choice, and is to be respected.[67] McLean pessimistically warns that:

> The discipline of healthcare law is at risk of being transformed – moving from a discipline in which the moral values of medical ethics (and those of the non-medical health professions) are a central concern, to one in which they are being supplanted by an amoral commitment to choice and consumerism.[68]

It is indeed this idea of patient-consumerism that is most troubling, rallying for patient rights 'framed in the language of human rights,'[69] abjuring even the most unavoidable paternalism. The following section will investigate informed consent and consider its role in combating paternalism.

4 INFORMED CONSENT

The idea of 'informed consent' is the tool by which the Supreme Court hoped to empower patients. Before such a concept bcame established a far more simplistic idea of patient consent prevailed. In previous centuries, reflective of paternalism, an *implied* consent was garnered simply by a sick patient coming to a doctor and seeking treatment.[70] Serious crimes against autonomy in the field of medical research (particularly with human testing) prompted Faden and Beauchamp to claim modern informed consent '…has its origins in the experience of moral suffering and moral outrage

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[63] Brian McKinstry, 'Paternalism and the Doctor Patient Relationship in General Practice' (1992) 42 British Journal of General Practice 340.
[64] ibid 340.
[65] ibid 340-341.
[66] ibid 341.
[67] ibid 341.
[68] Sheila McLean, *Old Law New Medicine: Modern Medical Ethics and Human Rights* (Pandora 1998) 2.
[69] Robert Veatch, *Models for Ethical Medicine in a Revolutionary Age* (Hastings Centre Report 1972) 5, 6–7.
[70] See e.g. *Slater v Baker & Stapleton* (1767) 2 Wils KB 359, 95 ER 860.

caused by moral abuses.'[71] Examples of such abuses can be found in the Porton Down scandal, the Willowbrook State School study and the Tuskegee syphilis study. Notably, these all occurred at the time anti-paternalistic sentiment was gaining traction not only in the medical field but elsewhere, with the birth of many civil and legal rights movements. From such atrocities came the likes of the Nuremburg Code and new practice rules from the British Medical Research Council, but also a change in the tide of public opinion on patient autonomy, paving the way to *Montgomery* half a century later.

In *R v Brown* Lord Mustill considered what differentiated a criminal with a blade from a surgeon with a scalpel and suggested it was not only consent but the general context of the medical setting.[72] It appears, in all likelihood, that the majority of practitioners might not have heard of *Sidaway*. They will know the general legal framework as presented to them in guides of practice, but this doctor-patient discussion, as Jones warns, is in danger of taking on the formalistic process of the law by the abandonment of 'the language of the consulting room for the language of the courtroom' and leaving the reality behind.[73] As O'Neill posits, the idea of informed consent is all around us, from borrowing a book from the library to getting married, but its formality increases when there is more at stake.[74] In reference to Faden and Beauchamp, he recognises that as medicine moves away from paternalism it becomes gradually more formalistic and more akin to legal agreements than a doctor-patient relationship.[75] Just like a contract, the doctor-patient relationship is void without full understanding of the proceedings by both parties. This development is not exclusively a medical one in that many traditional professional relationships have become more bureaucratic, primarily (in the eyes of the professionals) to protect themselves against litigation. This formalism has prompted concern that informed consent has been reduced to the phrase 'please sign here.' Given that the courts still rely on doctors to deduce what constitutes a 'material risk' – and therefore needs to be disclosed – doctors may begin to feel they must obtain some kind of waiver for their protection. Indeed, in *Re W* Lord Donaldson MR described consent as merely a 'legal flak-jacket.'[76] Skegg also commented that 'The role of consent is often seen to be that of protecting a practitioner from a risk of legal proceedings: information is disclosed to ensure that consent is "legally effective."'[77] If *Montgomery* has set a precedent that doctors can be litigated against when they get the materiality judgment wrong, doctors might become less concerned with a genuine understanding and consent from their patient and more concerned with mitigating the opportunities for litigation.

The main aim of this section is to determine if the ever developing legal character of 'informed consent' is concomitant with its practical reality. The concept was addressed in *Chatterton v Gerson* by Bristow J:

> In my judgment once the patient is informed in broad terms of the nature of the procedure, which is intended, and gives her consent, that consent is real, and the cause of action on which to base the claim for failure to go into risk and implications is negligence.[78]

Prior to *Montgomery*, as Brazier suggested, it might have been easier to compile what was *not* required to be disclosed, seeing as doctors had no concrete threshold of disclosure to meet, other than what was expected of them by professional standards.[79] *Montgomery* addressed this requirement for only a 'broad' disclosure of information by requiring the specificity to increase as potential harm increases. *Montgomery*, while not providing a concrete threshold of information required to be disclosed, has promoted higher quantities of information resulting from uncertainty as to what constitutes material risk. As will be considered in the following section, higher quantities of information can in fact be harmful for the

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[71] Ruth Faden and Tom L Beauchamp, *A History and Theory of Informed Consent* (OUP 1986) 55.
[72] [1994] 1 AC 212 (HL) 266 (Lord Mustill).
[73] M Jones, 'Informed Consent and Other Fairy Stories' (1999) 7 Med L Rev 103, 107.
[74] O O'Neill, 'Some Limits of Informed Consent' (2003) 29 Journal of Medical Ethics 4.
[75] ibid 4.
[76] *Re W (a minor) Medical Treatment: Court's Jurisdiction* [1993] Fam 64 (CA) 78 (Lord Donaldson MR).
[77] P Skegg, 'English Medical Law and 'Informed Consent': An Antipodean Assessment and Alternative' (1999) 7 Med L Rev 135, 149.
[78] *Chatterton v Gerson* [1981] QB 432 (QB) 443 (Bristow J).
[79] Margaret Brazier, 'Patient Autonomy and Consent to Treatment: the Role of the Law?' (1987) 7 LS 169, 179.

patient, and the court must readdress the standard doctors are judged against in regards materiality.

Besides material risks, *Montgomery* has affirmed that, insofar that they are reasonable, 'alternative or variant treatments' must also be discussed.[80] Unpredictability in the eyes of practitioners will result in what might be classified as reasonable. The Supreme Court in *Montgomery* failed to consider the preceding cases of *Birch v University College London NHS Foundation Trust*[81] and *Meiklejohn v St. George's Healthcare NHS Trust*,[82] both of which considered the duty to disclose alternative treatments and may have provided more certainty for doctors. In *Birch*, the patient suffered a stroke as a result of a cerebral catheter angiogram. This was a small, but known, risk of such a procedure. The claim was brought as the patient was not informed of a less risky alternative; a magnetic resonance imaging scan, that would have been less medically effective.[83] Just as with *Montgomery*, it was suggested that without the option of the alternative, the patient 'was denied the opportunity to make an informed choice.'[84] It appears the disclosure of such an alternative while impeding a physician doing what they believe will be most effective is reasonably in the hands of the patient. Although the vast majority of angiograms do not result in stroke, the less risky alternative ought to be disclosed.[85] Although it is likely most patients will choose the less effective procedure, it will be their choice.

Meiklejohn very effectively illustrated the complexities that a discussion of variant treatments and diagnoses might present, particularly for the patient. It also provided an example of where the law might have difficulty defining what must be reasonably disclosed without deference to the medical profession. The case revolved around a difficult diagnosis: one of either acquired aplastic anaemia or another, but very similar, inherited bone marrow disease like dyskeratosis congentita. The diagnosis of aplastic anaemia led to treatment using a drug that had a small risk of avascular necrosis (the death of bone) which materialised. The claim was rejected on grounds of causation, but in terms of what ought to have been disclosed such a situation remains legally problematic. While it might be argued, because the harm that materialised was serious, the patient ought to have been told of all inherent risks attributed to treatment, but also alternative possible diagnoses. Such a situation might illustrate where the boundaries of disclosure lie. Is it asking too much of patients to choose not only between potential treatments, but also diagnoses? The following section considers what ought to be expected from patients, and what *Montgomery* may be inexpertly promoting.

5 INFORMATION & COMMUNICATION

In *Sidaway* Lord Templeton warned that 'the provision of too much information may prejudice the attainment of the objective of restoring the patient's health.'[86] If patient autonomy is facilitated by informed consent then informed consent is facilitated by effective communication to patients about material that they are not always in an optimum position to receive, since they are not medically trained. Williams contends this is a very under-considered aspect of medical law which in fact underpins many of the problems *Montgomery* faces.[87] Preceding *Montgomery*, *Al Hamwi v Johnson* was the only case in which effective communication was tackled. The question was asked whether doctors have a duty to not only disclose information, but to ensure patients have understood it on more than a cursory level?[88] Lords Kerr and Reed went some way to address the issue, saying:

> [T]he doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed effectively if the information provided is comprehensible. The doctor's duty

[80] *Montgomery* (n 3) [87] (Lords Kerr & Reed JJSC).
[81] [2008] EWHC 2237 (QB), (2008) 104 BMLR 168.
[82] [2014] EWCA Civ 120.
[83] *Birch* (n 81) [77] (Cranston J).
[84] ibid [79] (Cranston J).
[85] ibid [71] (Cranston J).
[86] *Sidaway* (n 4) 904.
[87] Kevin Williams, 'Comprehending Disclosure: Must Patients Understand the Risks they Run?' (2000) 4 Medical Law International 97, 98.
[88] [2005] EWHC 206 (QB), [2005] Lloyd's Rep Med 309 [43] (Simon J).

> is not therefore fulfilled by bombarding the patient with technical information which she cannot reasonably be expected to grasp.[89]

What remains clear is that the idea of informed consent, dependant on complexity, is mere rhetoric if not underpinned by a patient's willingness and ability to understand the information given to them. Are Lords Kerr and Reed's words expecting too much from doctors by denying the truth that to make an informed decision one cannot relegate important medical factors to 'technical information'? To aim for an authentically informed decision the law must believe patients are capable of as thorough an understanding of their situation as the doctor has. It is argued that is not the reality. Indeed, '[studies] have shown that patients remain inadequately informed, even when extraordinary efforts are made to provide complete information and to ensure their understanding. This appears to be true regardless of the amount of information delivered'.[90] Duff and Campbell contend that where a patient is not able to fully comprehend the information being provided the doctrine of informed consent does not apply.[91]

Clarke contends that the contract formed between doctor and patient is not comparable to other contracts in terms of breadth of information involved.[92] Taking the example of a proposed invasive surgical procedure, Clarke described the relevant information as, *inter alia*,

> a full explanation of techniques, the chances of success, incidence of complications, risks involved, available alternatives, and the relative risks and complications of alternatives, costs involved, and the role of each member of the team in the procedure.[93]

While Savulescu and Momeyer argue that doctors have an ethical responsibility to ensure a patient's contextual understanding,[94] Ost argues patients have an ethical responsibility to accept information.[95] It is impractical, in light of the breadth of the aforementioned risks to reach the level of patient understanding required to fulfil the modern definition of informed consent. This of course is not to infantilise the patient, but it is realistic. In a study of 1057 patients, only 9% percent of patients gave their consent based on the careful consideration of the information in front them, thereby failing to meet the study's definition of a complete decision.[96] Indeed, it has been found that up to 61% of the population have low health literacy skills,[97] which is a basic understanding of the language used in practical medicine.

While *Montgomery* purports to increase the information given to patients, it still requires that a 'doctor must make a judgment as to how best to explain the risks to the patient.'[98] This is a contradiction, as it allows for the paternalistic 'therapeutic privilege'. Accepted to some degree in *Montgomery*,[99] this privilege allows doctors to withhold certain information if it will have a negative effect on the patient's health. Such a sentiment can be traced back to the Hippocratic oath, which warns of excessive information: 'for many patients through this cause have taken a turn for the worse.'[100] The limitations of the therapeutic privilege remain very unclear, in part as it has never been successfully relied upon in court.[101] The dilemma with the privilege is that it relies upon some idea of best interests. As will be

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[89] *Montgomery* (n 3) [90] (Lords Kerr & Reed JJSC).
[90] Barrie R Cassileth and others, 'Informed Consent – Why are its Goals Imperfectly Realized?' (1980) 302 New Eng J Med 896, 896.
[91] Raymond S Duff and AGM Campbell, 'Moral and Ethical Dilemmas in the Special-Care Nursery' (1973) 287 New Eng J Med 890, 893.
[92] Steve Clarke, 'Informed Consent in Medicine in Comparison with Consent in Other Areas of Human Activity' (2001) 39 Southern Journal of Philosophy 169, 175–176.
[93] Malcolm de Roubaix, 'Are There Limits to Respect for Autonomy in Bioethics' (2008) 27 Medicine & Law 365, 369.
[94] J Savulescu and RW Momeyer, 'Should Informed Consent be Based on Rational Beliefs?' (1997) 23 Journal of Medical Ethics 282.
[95] David E Ost, 'The "Right" to Know' (1984) 9 Journal of Medicine & Philosophy 301, 308.
[96] Clarence H Braddock and others, 'Informed Decision Making in Outpatient Practice' (1999) 282 Journal of the American Medical Association 2313, 2317.
[97] Gillian Rowlands and others, 'Health Literacy and the Social Determinants of Health: A Qualitative Model from Adult Learners' (2017) 32 Health Promotion International 130, 133.
[98] *Montgomery* (n 3) [85] (Lords Kerr & Reed JJSC).
[99] ibid [91], [95] (Lords Kerr & Reed JJSC).
[100] Tallis (n 6) 88.
[101] Kate Hodkinson, 'The Need to Know – Therapeutic Privilege: a Way Forward' (2013) 21 Health Care Analysis 105, 120.

discussed in section 7 below, the idea of a doctor deciding what is in the best interests of the patient is one of the themes *Montgomery* opposes. Specifically, the privilege is to prevent any reaction in a patient that goes beyond the usual stress and anxiety a patient might feel when told of a diagnosis or treatment options. What *Montgomery* made emphatically clear was that the privilege was not justified when the doctor hopes to change the potential decision of a patient. I agree with this sentiment but suggest that therapeutic privilege has value in facilitating patients in making their own decisions and, as such, should not be rejected as merely a tool for manipulation. Clarke goes even further in asserting many patients do not want to know vast quantities of information that will only serve to frighten and confuse.[102] By placing a stringent legal burden on full disclosure may in fact limit the autonomy of patients by not given them the choice *not to choose* i.e. taking away their ability to delegate to the professional.[103] Generally, as seen in *Pearce v United Bristol Healthcare NHS Trust*[104] and *Montgomery*, the courts have equated providing information to the patient as patient autonomy. The next section intends to highlight the flawed simplicity of that approach.

6 AUTONOMY

It can be established that there is no such law of 'informed consent'; consent being a defence to the tort of battery.[105] The concept in fact garners its authority and import from outside of the law i.e. from the principle of autonomy. The concept of 'patient autonomy' has been described as 'by far the most significant value to have influenced the evolution of contemporary medical law'[106] and finding its home in the modern paradigm of bioethics alongside beneficence, non-maleficence and distributive justice. Although the principle dates back into antiquity, one may find the origin of western autonomy in the Enlightenment of the 17th and 18th centuries, and in particular the deontological work of Immanuel Kant. In the *Groundwork of the Metaphysic of Morals*, Kant rejected a divine morality and proclaimed we are all a moral authority unto ourselves (this being at the heart of modern bio-ethical autonomy).[107] Kant supposes all autonomous decisions come about through our own rationality.[108] For Berlin, this raises the difficult question of how far can an irrational decision be classed as autonomous.[109]

Just like Mill in On Liberty, I contend that a patient's right to self-determination is not absolute. Indeed, if someone is absolutely autonomous they will invariably encroach upon another's autonomy, for example, if one decides to autonomously imprison another, the autonomy of the prisoner is removed. This may come in the form of policy considerations in the National Health Service. If every patient had full autonomy over the resources available, others would inevitably suffer. Axtell-Thompson describes this as 'a conflict between autonomy for the individual patient versus justice for the collective patient population.'[110] The law in regard to medicine makes clear that patients are not allowed to actively decide what treatment they receive (like demanding invasive surgery in response to the chicken pox), rather they are making a choice between options the doctor knows would best tackle the illness. This distinction was in fact recognised in *R (Burke) v General Medical Council*.[111] There, Mr Burke wished to continue treatment of artificial nutrition and hydration until his death by natural causes. In essence, it was a question of whether or not the patient has the right to demand treatment beyond what is clinically justified. If it is acceptable to demand a treatment deemed futile by multiple doctors, the health system would not function.

Lady Hale DPSC made the observation in *Montgomery* that a doctor is under no obligation 'to offer treatment which he or she considers to be futile or inappropriate.'[112] The patient has the liberty to make

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[102] Clarke (n 92) 175.
[103] Michael A Jones and Kirsty Keywood, 'Assessing the Patient's Competence to Consent to Medical Treatment' (1996) 2 Medical Law International 107, 109.
[104] [1998] 48 BMLR 118 (CA).
[105] *Collins v Wilcock* [1984] 1 WLR 1172 (DC) 1177 (Robert Goff LJ).
[106] JK Mason and GT Laurie, *Mason and McCall Smith's Law and Medical Ethics* (9th edn, OUP 2013) 8.
[107] Immanuel Kant, *Groundwork of the Metaphysic of Morals* (HJ Paton ed, Huthinson University Library 1948) 93.
[108] ibid 93.
[109] Isiah Berlin, 'Political Ideas in the Twentieth Century' in Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 40.
[110] Linda Axtell-Thompson, 'Consumer Directed Health Care: Ethical Limits to Choice and Responsibility' (2005) 30 Journal of Medicine & Philosophy 207, 222.
[111] [2005] EWCA Civ 1003, [2006] QB 273.
[112] *Montgomery* (n 3) [115] (Lady Hale DPSC).

their own choice, but their autonomy is limited by the nature of her situation. Jennings posits that there is an important distinction between the words 'liberty' and 'autonomy' in medico-legal discourse.[113] It is suggested that liberty refers to more of a political ability to be unencumbered by the state (which might extend to independence in a healthcare system) whereas 'autonomy' holds the more complicated philosophical ground of 'freedom of will.' Indeed, the distinction is made by Mill himself, stating: 'The subject of this Essay is not the so-called Liberty of the Will [rather] the nature and limits of the power which can be legitimately exercised by society over the individual.'[114] I suggest that the ethics that guided Montgomery, based primarily on Mill and Kant, do not give due regard to this distinction. The example of an individual with a low mental age was provided by Jennings as a person who, while having the inability to act autonomously in a medical setting, might enjoy a great deal of liberty; no one will coerce the individual, but their recovery from illness, if so desired, is beyond their control. *Montgomery* failed to recognise this distinction by working on an agenda that propagates a notion of liberty and ostensible independence without considering if the 'fully autonomous' decision they promote, fortified by informed consent, is realistic. It is understandable that the Supreme Court's consideration of autonomy is far from carefully conceived as they are restricted to the facts before them. Indeed, many of the arguments presented in this paper are not fact-specific to Montgomery, rather a critique of the wider implications it has produced.

In a practical setting, as Komrad contended, it is rare to see a patient who is totally confident in their autonomous decision making.[115] He uses the example of a man suffering from angina who tells his doctor he is joining a jogging club. After a number of weeks, his cardiovascular health does improve, until one day he has a heart attack. The patient, and society, then holds the doctor entirely at fault for not forbidding the patient to start jogging in the first place.[116] Each patient is different, and the fact remains that an informed decision is a rational decision.

Autonomy can be mercurial, existing on a continuum. Beauchamp and Childress go as far as to contend that while we are all autonomous persons, in practical life 'people's actions are rarely, if ever, fully autonomous.'[117] Our ability to wield autonomy can be dictated by our situation, and I argue that when one is seriously ill, we are reliant on others to the extent that we are not able to act fully autonomously. Parsons describes this position of reliance: '[By] definition of the sick role, the sick person is helpless and therefore in need of help … He is not only generally not in a position to do what needs to be done but he does not know what needs to be done or how to do it.'[118]

Pollock and Leys further this argument by stating that 'When people are really sick they are seldom in a position to exercise rational choice … most people don't know what health care they need … nor can they pick and mix.'[119] This is not to reduce the argument once again to patient ignorance, as there is in fact a qualitative difference between the reliance a householder with a faulty lavatory has on a plumber and the reliance a patient has on a doctor. This reliance can even be contrasted against the relationship between client and lawyer. Despite a similar discrepancy in knowledge and experience, the client will very seldom face the same vulnerability that a severely ill patient might. This article defines the 'seriously ill' as they who have their independence, either physically or mentally, diminished. That is to say, they cannot leave the hospital and carry on with daily life, make totally autonomous decisions, uninfluenced by their medical situation.

The psychological pressure of a serious illness (anxiety, despair or guilt etc) can incapacitate someone as seriously as one with a prescribed mental illness (let alone any physical affects the illness may have on decision making in terms of, for example, nutrition). Indeed, Healy argued that '[i]t is recognized that patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational

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[113] B Jennings, 'Autonomy' in B Steinbock (ed), *The Oxford Handbook of Bioethics* (OUP 2007) 72–73.
[114] Mill (n 59) 7.
[115] MS Komrad, 'A Defence of Medical Paternalism: Maximising Patients' Autonomy' (1983) 9 Journal of Medical Ethics 38, 43.
[116] ibid 41.
[117] Beauchamp and Childress (n 5) 88.
[118] Talcott Parsons, *Social Structure* (Free Press 1951) 441.
[119] Allyson Pollock and Colin Leys, *NHS Plc* (Verso 2004) 234.

decision.'[120] Pellegrino suggested that illness is an 'ontological assault [which is] aggravated by the loss of the freedoms we identify as particularly human.'[121] This is not to say all patients (or specifically the appellant in *Montgomery*) would be so drastically affected when making their imperative decisions. I by no means suggest that all severely ill patients will be unable to make a somewhat autonomous decision and certainly do not categorise pregnancy as a diminished state of autonomy, but I do contend that all patients suffering from serious illness, or in a clinical emergency, will have diminished autonomy to a varying extent. It is here that well managed paternalism ought not to be rejected.

What may be the case in the future, however, is that autonomy is so highly regarded that a patient who may already be suffering from the often crippling mental pressure of illness is given large quantities of information they do not fully understand and told to make an 'autonomous' decision with it. Here, the best interests of the patient are superseded by the rhetoric of autonomy and the formalistic process of avoiding litigation. It is ostensible, not authentic, autonomy. The anti-paternalistic sentiment in *Montgomery* is synonymous with anti-interference. As Ackerman suggests, if a strict policy of non-interference were followed, a doctor's job would in fact be relegated to a 'competent technician' presenting the patient with facts and acting in accordance to their response.[122] Smith and Pettegrew suggest that 'the patient can be in control of his/her health only if the physician has no role in decision making except as an expert providing information about the risks and benefits of all possible alternatives.'[123]

It must be asked what is expert about simply providing large quantities of information to a patient, just as a textbook might. This neither is the reality of the physician's role, nor is it a preferable reality. Cassell claims the doctor's role is to 'return control to the patient.'[124] This necessitates the doctor taking, temporarily, some limited control. As discussed, an autonomous decision ought to be based in rationality. I do not intend on addressing the many philosophical attitudes toward what might be considered rational, nor do I advocate rampant moralising on the part of doctors or combatting sincere religious convictions. What is suggested, however, is that a doctor's role is more than that of a technician and includes being in a suitable position to counsel patients. Where a patient might bring harm unto themselves as a result of a belief that is simply untrue, the doctor must intervene. The doctor must at least try and rebuke a patient's pride in aesthetics (which will not tolerate anything that might leave a scar) which impede rationality, as suggested by Gillon.[125] The refusal of treatment for irrational reasons was dealt with in *Re T*, which discussed the level at which a closely held belief (particularly a religious conviction) becomes a coercion from an ulterior influence and renders autonomy as morally inauthentic.[126] Lord Donaldson MR stated that

> …whether the reasons for making that choice are rational, irrational, unknown or even non-existent. That his choice is contrary to what is to be expected of the vast majority of adults is only relevant if there are other reasons for doubting his capacity to decide.[127]

As displayed in *Re T*, 'other reasons' can include delusional beliefs that threaten life.

Those proponents of abolishing paternalism entirely would claim that no matter how irrational, as Lord Donaldson MR states, autonomous individuals should be respected in their decision making.[128] I concede that capable adults should be able to make whatever decision they please insofar that their rationale for such a decision does not push them into the realms of incapacity. Henry Ford once reputedly said his customers could choose any colour they desired, as long as it was black. I do not suggest the respect given to a particular autonomous decision

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[120] John Healy, *Medical Negligence* (Sweet & Maxwell 1999) 119.
[121] Edmund D Pellegrino, 'Toward a Reconstruction of Medical Morality: the Primacy of the Act of Profession and the Fact of Illness' (1979) 4 Journal of Medicine & Philosophy 32, 44.
[122] Terrence F Ackerman, 'Chemically Dependent Physicians and Informed Consent Disclosure' (1996) 15 Journal of Addictive Diseases 25.
[123] David H Smith and Loyd S Pettegrew, 'Mutual Persuasion as a Model For Doctor-Patient Communication' (1986) 7 Theoretical Medicine 127, 134.
[124] Eric J Cassell, *The Healer's Art* (MIT Press 1995) 44.
[125] Raanon Gillon, 'Autonomy and the Principle of Respect for Autonomy' (1985) 290 BMJ 1806, 1807.
[126] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 (CA).
[127] ibid 113 (Lord Donaldson MR).
[128] ibid 102 (Lord Donaldson MR).

should be dictated by that decision being objectively right or wrong, rather, not respecting a decision that was not in fact autonomous in the first place.

Re T illustrated a clearly irrational decision. *T* refused a vital blood transfusion on the grounds that she believed her blood to be 'evil' and as such did not wish the transfused blood to also become evil. While she did suffer from other mental illness, it was found that *T* suffered from no psychosis (her blood being evil was a genuine belief). As such, Ward J ruled that her irrationality could be taken as indicator of reduced capacity *in and of itself.* While one school of thought may hold T had every right to believe her blood was evil and threaten her life accordingly another might suggest, as did the court, such a view denies the paternalism seen throughout society. It denies the function of physicians not just to inform, but to counsel. Indeed, as Mill stated:

> It would be a great misunderstanding of this doctrine, to suppose that it is one of selfish indifference, which pretends that human beings have no business with each other's conduct in life, and that they should not concern themselves about the well-doing or well-being of one another … Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter.[129]

It might be argued that there is a law requiring the use of a seatbelt for a reason and those who oppose it are considered extremely irrational (like the one in *Re T*) but this does not constitute some form of reduced capacity as they must also concede that there is, at the very least, a paternalistic law for the protection of the rest of society. The concept of capacity and its intrinsic role in the process of an autonomous decision is explored in the following section.

7 CAPACITY

Capacity (or 'competency') is a central tenet of a patient's decision making. A patient's capacity refers to their ability: '(1) to take in and retain information, (2) to believe it and (3) to weigh that information balancing risks and needs.'[130] There is a presumption of capacity in those over 18 years old, while those suffering from serious mental illness and minors (generally) are presumed to lack capacity.[131] Those who are deemed not to have capacity receive paternalistic care focused toward the patient's 'best interests.'[132] Mill, the champion of anti-paternalism, conceded: 'Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.'[133] The courts have made it clear that the idea of 'best interests' ought not to come into consideration when determining the capacity of a patient.[134]

I argue that the law is narrowing the category of 'they who need to be taken care of' in the name of patient autonomy without due consideration. The granting of capacity is used as a justification of harmful decisions made by patients. While capacity should remain a presumptive right, its purpose (to protect those who want help) should be expanded to those seriously ill patients, or seriously deluded patients, that fall into the category of 'uncertain capability.' They who come to a hospital in search of care, only to threaten their life as a result of a deluded belief, or a simple inability to understand the information provided, ought to be considered incapable of making a rational decision.

Indeed, Lords Kerr and Reed made clear: 'An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken.'[135] This is a sentiment with which I wholeheartedly concur. What the Supreme Court has overlooked, most fundamentally, is what can be defined as a 'sound mind.' It is clear from Lord Kerr and Reed's judgment in *Montgomery* that there is some kind of criteria to be a person of sound mind. For example, it is suggested that doing great harm to oneself by refusing treatment based on a belief that is objectively irrational (like a person's blood being evil) is not indicative of a sound mind and as such does not deserve the same respect that a truly sound mind would. This is not a matter of moral disagreement; every patient has the right to

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[129] Mill (n 59) 135–136.
[130] *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290 (Fam) 292 (Thorpe J).
[131] *Re T* (n 126) 112 (Lord Donaldson MR).
[132] ibid 113 (Lord Donaldson MR).
[133] Mill (n 59) 22–23.
[134] *Re B (Adult: Refusal of Medical Treatment)* [2002] EWHC 429 (Fam), [2002] 2 All ER 449.
[135] *Montgomery* (n 3) [87] (Lords Kerr & Reed JJSC).

believe what they wish. It would be fallacious, however, to suggest that our society does not promote rational beliefs over irrational ones (one need only look to our many prohibitive laws). Furthermore, there does exist a professional code of ethics that doctors must distinguish from their own morality. It would never have been justified for Dr McLellan to have steered the appellant in *Montgomery* in the direction of natural birth because she thought it morally superior. Only if it complied with the professional ethics of beneficent healers might it be justified to persuade her in a direction that did not appear to be her preference.

Lord Donaldson MR has stated that capacity, too, exists on a continuum i.e. the more serious the likely harm, the more stringent the test for capacity.[136] That is to say, for the most routine procedures far more patients have the capacity to make a rational, autonomous choice compared to a highly complex procedure with potentially life-threating consequences (a malleable standard of competence). It is only where an irrational decision threatens life or serious harm is a level of paternalism advocated. Those lacking capacity can be primarily distinguished into two groups: those who are normally competent but have been rendered incompetent by illness, clinical emergency or intoxicants; and those who suffer from long term disability or mental illness (including they who are in a vegetative state and totally uncommunicative). This is not to say that once marked incompetent, one is unable to make any medical decisions (in fact a patient might be deemed capable of one decision while incapable of another.)[137] The presumed incapacity of minors, particularly those on the cusp of adulthood provides an interesting case study into how paternalistic our legal system can be. In the seminal *Gillick v West Norfolk and Wisbech Area Health Authority*,[138] where the granting of contraception to a 16 year old was challenged by the parent, it was established that 16–18 year olds were indeed *capable* of being capable, but circumstantially. There remains, however, a strange arbitrariness between a 16 year old supposedly being able to act autonomously, while a child only days younger might be presumed unable to act autonomously. Considering the ethical basis of the law of capacity provides an interesting insight into when paternalism is socially accepted. Capacity bears particular import in this paper as it concerns, particularly in those lacking capacity, an arguably paternalistic concept of 'best interests.' The idea that there is an objectively best outcome of any medical procedure, and that this outcome should be pursued by the physician, is entirely controversial as it challenges the intrinsic value of autonomy. I assert that when capacity is in question, and the consequences of poor patient decision making might result in serious harm or death, then an objective idea of 'best interests' ought to be pursued just as it is in patients who are deemed incapable under the current law. That is not to say a decision to die is indicative of lacking capacity.

In *Re B* the patient was on long-term artificial ventilation and decided she wished to be taken off the apparatus, therefore ending her own life. After time was spent with the patient, and her capacity was established, her death was granted to her.[139] Just as the court found in *Re T*, there is a difference between a patient wanting to end their life on rational grounds and a patient threatening their life as a result of a belief that calls into question their capacity to make an autonomous decision in the first place.[140]

To first show the existence and worth of a concept of 'best interests' we can look to how the law treats incapable mentally ill patients and minors. Section 4 of the Mental Capacity Act 2005 (MCA) provides a legislative definition of 'best interests.' The MCA firstly made clear that those lacking capacity and still able to communicate ought to be involved in the decision making process despite not having the final say. It is then for the doctor to balance any previous opinion, sentiment or indication garnered from the patient in relation to such a medical decision and their own professional opinion as to what would be the best possible outcome. The MCA stipulates when making a decision in the supposed best interests of the patient the following must be considered:

> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by her when she had capacity),

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[136] *Re T* (n 126) 113 (Lord Donaldson MR).
[137] *Skegg* (n 77) 149.
[138] [1986] AC 112 (HL).
[139] *Re B* (n 126134).
[140] *Re T* (n 126).

(b) the beliefs and values that would be likely to influence his decision if she had capacity, and
(c) the other factors that she would be likely to consider if she were able to do so.[141]

The 'best possible outcome' tends to be objective in nature (such as achieving the least amount of harm or preserving life). It appears to be a contradiction to assert that a patient should have the ability to die as a result of a delusion in the name of autonomy while also conceding that the 'best interests' of someone with uncertain mental stability comes before any decision they might make. 'Best interests' do exist and when the capability of a patient is in question, or their ability to make an autonomous decision as a result of their illness is in question, a doctor should consider what those interests might be and work toward them.

8 CONCLUSION

Before concluding, it might be pertinent to consider some of the limited case law that we have seen post *Montgomery* in order to see how courts may interpret the duty of disclosure and autonomy in the future. The first case to consider is that of *Middleton v Ipswich Hospital NHS Trust.*[142] There, in very similar circumstance to *Montgomery*, the claim lay in a failure to warn a pregnant mother of the dangers of shoulder dystocia. The matter of whether or not the additional information might have changed the decision of the mother was central to the case. While difficult to provide objective evidence to suggest the mother might have chosen a caesarean as a result of the relatively low risk of harm resulting from shoulder dystocia, HHJ McKenna took the opportunity, perhaps, to promote the more subjective sentiments propounded in *Montgomery*. It was suggested that it did not matter if it might objectively change the decision of any mother in her position, it mattered if it might have changed *her* decision. The judgment considered the claimant's previous child birth, for instance.

Conversely, in *A v East Kent Hospitals University NHS Foundation Trust*[143] an expectant mother claimed that she ought to have been informed of the potential their child was suffering from a chromosomal abnormality as a result of pre-natal consultations. She claimed that if she had been informed, she would have requested, ultimately, a termination. Dingemans J made clear that the risk of chromosomal abnormality, despite it materialising, was not considered material under *Montgomery*. Although a very serious harm, Dingemans J refused the claim that the mother might ultimately requested a termination.

I have primarily addressed the anti-paternalistic sentiment of *Montgomery*. While the case is primarily about disclosure, it has without doubt a wider agenda. This paper's purpose was to ensure that the sentiments the Supreme Court promoted, directly or indirectly, were properly grounded in ethical considerations. Those sentiments included the reduction of paternalism, the promotion of more information and the promotion of a patient autonomy. In each respect, the decision is in need of refinement.

With regard to the duty of disclosure, the decision has not quantified how much information a doctor needs disclose. Its test for materiality goes someway in describing the *type* of risk that must be disclosed but leaves doctors open to litigation if they cannot deduce specific, subjective attributes of a patient.

It has been argued in section 5 that more information can in fact hinder the choice of patients and causes additional stress. *Montgomery* promotes the disclosure of more information as it equates knowledge with autonomous decision making. Furthermore, most patients are simply not capable of understanding, in the same depth as a doctor, the huge variety of risks, benefits and alternatives some more complex procedures might present, and as such paternalistic care is necessary to fill that void.

The concept of autonomy was considered in section 6, in light of the work of Kant and Mill. It was asserted that autonomy is protean and when someone is seriously ill, they rely on others (particularly doctors) to care for them and to some degree act paternalistically. Furthermore, it was suggested an autonomous decision is a rational one. Through a malleable concept of capacity, it is the role of a doctor, as an advisor, to persuade persons who make irrational decisions to change their mind, particularly if their fallacious belief has been propagated by others such that it has effectively become a coercion.

I conclude that *Montgomery* has taken a big step in the right direction toward a healthcare system filled

[141] Mental Capacity Act 2005, s 4(6).
[142] [2015] EWHC 775 (QB).
[143] [2015] EWHC 1038 (QB), [2015] Med LR 262.

with dialogue and co-operation. The manner in which it has achieved this, however, will create winners and losers. Those who enjoy the ability to comprehend more information will indeed be able to act more independently. Those who are not affected by the pressure of serious illness might not require any level of paternalism making their own choices on the path of recovery. What the judgment fails to do is protect those who feel overwhelmed by medical information. It denies a patient the option of saying to their doctor 'do what you think is best.' The law must strive to protect a patient's right to choice and self-determination while ensuring that doctors are able to do everything in their power to aid recovery.

DISCLOSURE LAWS UNDER THE REHABILITATION OF OFFENDERS ACT 1974: DO THEY DISCRIMINATE AGAINST OFFENDERS

Kelly Atkinson[*]

1 INTRODUCTION

The Rehabilitation of Offenders Act 1974 (ROA) aims to give those with convictions or cautions the chance to 'wipe the slate clean and start afresh.'[1] It has been reformed to 'remove the barriers' for ex-offender rehabilitation strategies.[2] Section 1 provides that at the end of the rehabilitation period a person shall be treated as a rehabilitated person in respect of a conviction and that it shall be treated as spent. The effect is that a person is no longer required to disclose their convictions.[3] However, prison sentences of four years or more are excluded from the scope of the ROA and can never be regarded as spent.[4] As such over 7,000 people a year who received sentences of four years or more (many of whom are genuinely reformed ex-offenders) can never benefit from the ROA.[5] Furthermore section 7(3) and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975[6] offer justifications for disclosure and exceptions where disclosure would be required. Non-disclosure, however, is not be a proper ground for dismissal or prejudice from any office, profession, occupation or employment.[7]

The disclosure laws under the ROA means 'the scope for unfair discrimination against ex-offenders is wide.'[8] This providing an additional 'illegitimate penalty […] on people who have already served the judicially ordered punishment for their crime.'[9] Over the years reviews and reforms of the ROA had suggested helpful changes, but have not been significant.[10]

Currently, almost half of all offenders are reconvicted within a year of release.[11] Indeed three-fifths of offenders leave without an identifiable employment, education or training outcome.[12] After leaving prison, offenders face a shortage of affordable housing, mistrust and discrimination from employers as well as a complex and inflexible benefits system.[13] As well as employers and educational establishments, offenders can be required to disclose previous convictions when applying for accommodation, banking facilities, insurance, pensions and loans.[14] Each of these a facility an ex-offender needs access to if they are 'to be resettled as a valuable and law-abiding member of the community.'[15] With work, education and housing being key areas that support rehabilitation, there have been reforms proposed to help increase skills on these areas prior to release.[16] Nevertheless, despite these types of support being introduced as early as 2002, there remains major issues

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[1] Jacqueline Beard and Sally Lipscombe, *The Rehabilitation of Offenders Act 1974* (House of Commons Library Briefing Paper No SN1841, November 2015) 3.
[2] Home Office, *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act* (Home Office 2002) 6 .
[3] Rehabilitation of Offenders Act 1974, s 4(2)(b).
[4] ROA, s 5(1)(b).
[5] HL Deb 27 Jan 2017, vol 778, col 935.
[6] Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 SI 1975/1023.
[7] ROA, s 4(3)(b).
[8] HL Deb 27 Jan 2017, vol 778, col 936.
[9] ibid.
[10] J Broadhend, 'More Effective or More of the Same?' (2006) 156 NLJ 293, 294.
[11] Ministry of Justice, *Prison Safety and Reform* (Cm 9350, 2016) 5.
[12] ibid 30.
[13] Stephen Whitehead, Point Me in the Right Direction: Making Advice Work for Former Prisoners (Centre for Justice Innovation 2016) 2.
[14] Home Office (n 2) 48.
[15] ibid 48.
[16] Ministry of Justice (n 11) 24–25.

for offenders upon release.[17] Despite this support, having a criminal record can seriously diminish opportunities thereby highlighting the need for reform of the ROA.[18]

2 DO DISCLOSURE LAWS DISCRIMINATE AGAINST OFFENDERS?

To discuss whether disclosure laws discriminate against offenders the definition of discrimination must firstly be addressed. The law attempts to define discrimination by combining the deliberations of a number of Acts:[19] (i) Sex Discrimination Act 1975;[20] (ii) Race Relations Act 1976;[21] (iii) Disability Discrimination Act 1995;[22] and (iv) Equality Act 2010.[23] Section 13(1) of the Equality Act 2010 defines direct discrimination as someone who is treated less favorably than others due to a protected characteristic. Under section 4 this includes age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Section 19, likewise, defines indirect discrimination as a person discriminating against another by applying a provision, criterion or practice that is discriminatory in relation to a relevant protected characteristic of that person. Although a claim can fail on the grounds of direct or indirect discrimination, it can succeed under the public sector equality duty contained within section 149.[24] This duty imposes on a public authority the need to have due regard to the elimination of discrimination.[25] They must also advance equality of opportunity and foster good relations between persons who share a relevant protected characteristic and persons who do not share it.[26] Though this duty is relevant to cases of discrimination by housing associations, local councils and approved premises, offenders do not fall under a class of certain protected characteristic. Therefore although they are treated unfavourably, they are not per se discriminated against.

The anti-discrimination laws contained within the Equality Act 2010 were created to protect people against discrimination at work, in education, as a consumer, when using public services, when buying or renting property or as a member or guest of a private club or association.[27] Nevertheless the definition of discrimination has been criticised as becoming too wide to the point of encompassing 'almost anything or anybody who, for whatever reason, has a grievance and feels they have been unfairly treated.'[28] Nonetheless the eradication of discrimination in this country remains a priority for the Government and a narrower definition runs the risk of excluding those who ought to be protected.[29] Therefore the priority has to be on public bodies to 'defend the rights of all citizens to play a full part in an increasingly global society.'[30] Even though the Equality Act 2010 does not apply directly to offenders, the aim of eradicating discrimination is still relevant.

The eradication of discrimination is also an aim of the European Convention on Human Rights. Article 14 of the Convention states that persons should enjoy the rights and freedoms set forth in the Convention without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Nevertheless the framers of the Convention did not wish the prohibition of discrimination to 'extend beyond the four corners of the other articles.'[31] Therefore a link needs to be established with one or more of the other articles.[32] It could be suggested that discrimination against employment and housing could violate the right to respect for private and family life

[17] Home Office (n 2) 6.
[18] ibid 11.
[19] HL Deb 27 Nov 2014, vol 757, col 376.
[20] Sex Discrimination Act 197.
[21] Race Relations Act 1976.
[22] Disability Discrimination Act 1995.
[23] Equality Act 2010.
[24] See e.g. *R (Griffiths & Coll) v Secretary of State for Justice* [2013] EWHC 4077 (Admin).
[25] Equality Act 2010, s 149(1)(a).
[26] ibid ss 149(1)(b) and 149(1)(c).
[27] HL Deb 27 Nov 2014, vol 757, col 378.
[28] ibid col 376.
[29] ibid col 381.
[30] ibid col 383.
[31] *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 [16] (Lord Wilson JSC).
[32] ibid [17] (Lord Wilson JSC).

under article 8 and that ex-offenders could be classed as other status. However exceptions contained within article 8(2) include the interests of public safety and the prevention of disorder or crime. *Burnip v Birmingham City Council*[33] disputed that where a group recognised as being in the need of protection against discrimination is significantly disadvantaged by 'ostensibly neutral criteria'[34] discrimination is established, subject to justification. The test for justification includes '(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.'[35]

Despite the ability to justify it, the scope for discrimination against ex-offenders is wide due in part to decisions to employ or refuse people jobs 'are not made at the top of companies; they are made by a large number of individual managers and personnel staff who usually have had no specific training in how to deal with applications from people with criminal records.'[36] Therefore it is difficult for offenders to obtain employment, despite it having nothing to do with their abilities. This is recognised by offenders and they are less likely to appeal against discriminatory treatment. Journalists have gone as far as to compare ex-offenders seeking employment as the 'equivalent of HIV-Aids sufferers in the 1980s.'[37] Despite this extreme comparison, it reiterates that the discrimination ex-offenders face is illogical and misconceived.[38]

2.1 Disclosure and Housing

Those released from prison often will not qualify for social housing, will find accessing the private rented sector difficult and, once housed, may face further discrimination.[39] Former offenders who do not have caring responsibilities or special vulnerabilities are unlikely to qualify for local authority accommodation, indeed, some may be categorised as becoming intentionally homeless.[40] Alongside these barriers, the Localism Act 2011[41] offered local authorities greater discretion in excluding applicants from housing registers, especially those with histories of anti-social behaviour or criminal convictions.[42] The exclusion and discrimination available through the Localism Act 2011 was evidenced in the case of *YA v London Borough of Hammersmith and Fulham*.[43] YA, who was a childhad been put in the care of his local authority, was not entered onto the housing register due to the disclosure of his spent convictions which were classed as 'bad' behaviour.[44] The Localism Act 2011 allowed the local authority to regard persons who would not normally qualify for registration as those who had unspent convictions of housing or welfare benefit related fraud or applicants guilty of unacceptable behaviour making them unsuitable to be at tenant.[45] The case questioned whether it was lawful for the local authority to take into account the convictions and whether there was indirect discrimination in the local authority's housing allocation scheme.[46] The Administrative Court held that the disclosure of the spent convictions breached section 4(1) of the ROA and that the case was not within the justifications available under section 7(3).[47] With regards to indirect discrimination under article 14, the court confirmed the 'parasitic'[48] nature of the right in having no independent existence. The court

[33] [2012] EWCA Civ 629, [2013] PTSR 117.
[34] ibid [13] (Maurice Kay LJ).
[35] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 [20] (Lord Sumption JSC).
[36] HL Deb 27 Jan 2017, vol 778, col 936.
[37] J Hillman, 'Why Employers Shouldn't Discriminate Against Ex-Offenders' *The Guardian* (London, 13 August 2013) <https://www.theguardian.com/voluntary-sector-network/2013/aug/13/employers-discriminate-exoffenders-charities> accessed 8 January 2018.
[38] ibid.
[39] Whitehead (n 13) 2.
[40] ibid 9.
[41] Localism Act 2011.
[42] Whitehead (n 13) 9.
[43] [2016] EWHC 1850 (Admin).
[44] ibid [37] (Peter Marquand DHCJ).
[45] ibid [4].
[46] ibid [1].
[47] ibid [31-34].
[48] ibid [53].

held that the Claimant had to show that the process under the local authority's scheme did come within the scope of article 8, that 'care leavers' (i.e. 'a person, who as a child was "looked after" by a local authority and is now leaving that care')[49] were a group classed as 'other status' under article 14 and that there was potential for discrimination and whether that could be justified by the local authority.[50] The court concluded that it did come within the ambit of article 8, even though '[t]here is no enshrined right to a physical home; the right is to the enjoyment of a family life. However, this can, in reality, only be enjoyed in settled accommodation.'[51] As 'care leavers' were more likely to have a higher level of criminal convictions they were disproportionately affected by it, thereby establishing indirect discrimination.[52] Nevertheless the court considered that there was scope for a wide margin of appreciation for any justification.[53] The defendant, however, justified the discrimination in that by stating that their legitimate aim was the least intrusive measure given that other housing opportunities were available to care leavers.[54] This sets a dangerous precedent for offenders, particularly care leavers applying for social housing.

Ex-offenders are more likely to reoffend when they have had a problem with both employment and housing.[55] For example, figures show that offenders who are homeless upon entering prison have a much higher reconviction rate within one year of release[56] and there is evidence that offenders who have accommodation arranged on release are four times more likely to have employment, education or training arranged once they leave prison than those who do not have accommodation in place.[57] Nevertheless on release 'finding a home may be the biggest problem facing ex-offenders'[58] with fewer social homes available to meet the demands. Offenders face complex challenges, including 'reluctance by local authorities to assess prisoners prior to release, and clients facing significant housing debt where they remain nominal tenants while in prison.'[59] Once in accommodation, offenders often face further disadvantages due to their criminal history and a lack of awareness of their rights, especially in the private sector.[60] As housing is such a core factor in offenders rehabilitation reform is necessary to prevent breaches of the ROA so that local authorities and private landlords are unable to discriminate.

2.2 Disclosure and Employment

Initial case law regarding disclosure in employment held the importance of remoteness, i.e. 'the more remote in time a previous conviction has been, the less significant it must be when an employer is weighing its implications.'[61] Nonetheless, in *Torr v British Railways Board* the Board were still able to dismiss the employee for dishonesty regarding an unspent conviction despite working 'satisfactorily'[62] as a guard for approximately 18 months. Yet cases as early as 1982 showed the positive impact of the ROA with courts concluding that there was no obligation to disclose matters under a contract that would require a person to disclose a spent conviction or the circumstances relating to it.[63] However as rehabilitation periods remain long, when employment is needed the most (i.e. following release) it can be seen that the rehabilitation periods actually accelerate discrimination.[64]

In *Adamson v Waveney District Council* the justifications within section 7(3) of the ROA regarding

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[49] ibid [7].
[50] ibid [54].
[51] ibid [57] citing *R (HA) v Ealing London Borough Council* [2015] EWHC 2375 (Admin), [29] (Goss J).
[52] ibid [74].
[53] ibid [75].
[54] ibid [84].
[55] HL Deb 5 Dec 2013, vol 750, col 80.
[56] ibid col 80.
[57] ibid.
[58] ibid col 79.
[59] Whitehead (n 13) 9.
[60] ibid 10.
[61] *Torr v British Railiways Board* [1977] ICR 785, 789 (Cumming-Bruce J).
[62] ibid 790 (Cumming-Bruce J).
[63] *Property Guards Ltd v Taylor & Kershaw* [1982] IRLR 175 (EAT).
[64] HM Government, 'Guidance on the Rehabilitation of Offenders Act 1974' (10 March 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf> accessed 27 April 2017, 5.

employment were considered.[65] The court considered that the justifications, wrongly used, allowed the Defendant authority to be influenced by convictions that were capable of being entirely irrelevant to any issue that they had to determine and thereby depriving the ROA of any purpose.[66] The Defendant authority must identify the issue to which any spent convictions will relate, consider the real relevance that the spent conviction has to the issue and, before final determination, the Applicant is entitled to be heard upon the spent conviction in order to persuade the authority that they should not jeopardise their application.[67] Sedley J affirmed himself in *R v Hastings Magistrates' Court, ex p McSpirit* in which it was held that the purpose of section 7(3) was to ensure that spent convictions stay spent, unless there is no other way of doing justice.[68] Indeed, it was not 'within either the letter or the spirit'[69] of section 7(3) that judicial authority should have knowledge of all spent convictions before deciding whether or not they should be admitted. Section 7(3) was to offer 'simple natural justice.'[70]

Disclosure has subsequently been held by the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* to be an interference with the right to respect for private life under article 8.[71] It was argued by the Equality & Human Rights Commission that an indiscriminate policy of disclosure cannot be justified under article 8(2) in that it is the 'antithesis of proportionate.'[72] The Supreme Court concluded that the obligation imposed to disclose to a potential employer in a chosen career for the remainder of a person's life (or otherwise lose the opportunity of being employed) involves an interference with the right to private life which is unjustifiable under article 8(2).[73] Samuels considered that the virtually automatic disclosure of spent convictions was excessive and irrational.[74] Therefore, according to Jackson, *T* provided a 'salient reminder of the importance of article 8 in respect of information gathered, stored and disclosed for criminal justice purposes.'[75] Case law such as this acts as a reminder that discrimination by employers still exists towards employees with spent convictions.

The Government is concerned at the difficulty many ex-offenders have in gaining work and resettlement, especially when many ex-offenders are considered 'not to represent a threat of further offending.'[76] Research shows that during the first two years following release from custody the risk of reoffending is highest and, illogically, during that period the chances of obtaining employment are the lowest.[77] Employment is undoubtedly one of the most effective factors in reducing re-offending rates.[78] Offenders do not wish to be penalised by being prevented access to a profession or employment, everybody should have the right to be rehabilitated.[79] Nevertheless the spent conviction principle does not apply to many sensitive offices and employments.[80] The ROA does little to protect ex-offenders when it comes to obtaining employment.[81] Many employers are reluctant to take on a person who is known to have a criminal record regardless of the relevance the offence has to the role.[82] This is despite evidence that ex-offenders generally work more, not less, as the result of constantly feeling they have to prove people

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[65] [1997] 2 All ER 898 (QB).
[66] ibid 902 (Sedley J).
[67] ibid 904 (Sedley J).
[68] (1998) 162 JP 44 (QB).
[69] *Morton v City of Dundee District Council* [1992] SLT (Sh Ct) 2, 3 (A.L. Stewart, Sheriff).
[70] *Adamson v Waveney District Council* (n 65) 904 (Sedley J).
[71] [2014] UKSC 35, [2015] AC 49.
[72] ibid 59.
[73] *R (T) v Chief Constable of Greater Manchester Police* (n 71) [127] (Lord Reed JSC).
[74] A Samuels, 'Right to be Forgotten' (2014) 178 Criminal Law & Justice Weekley 684, 684.
[75] A Jackson, 'Case Comment: Criminal Records, Enhanced Criminal Records Certificates and Disclosure of Spent Convictions: Impact of ECHR, Article 8' (2014) 78 JCL 463, 466.
[76] A Samuels, 'Rehabilitation of Offenders Act 1974' (2002) 166 CL&J 685, 686.
[77] ibid 686.
[78] J Broadhend, 'Denying the Past' (2001) 151 NLJ 1566, 1567.
[79] A Samuels (n 74) 684.
[80] ibid.
[81] F Brady, 'Ex-offenders Deserve a Chance in the Workplace' *The Guardian* (London, 30 January 2013) <https://www.theguardian.com/commentisfree/2013/jan/30/ex-offenders-chance-in-workplace> accessed 8 January 2018.
[82] Broadhend (n 78) 1567.

wrong.[83] A reduction in the need to disclose old convictions, would therefore give reformed offenders a chance to live down their past, without being tempted to lie about it.[84] This notion is something the Government needs to consider to ensure the current recruitment process strengthens the safeguards against discrimination.[85]

3 CALL FOR REFORM?

When the ROA was first implemented it was regarded as breaking new ground by creating rehabilitation periods for certain sentences.[86] Since then however it has been criticised as ill-conceived, over-complex, cumbersome and anachronistic.[87] It is considered too limited to encourage rehabilitation and as a result many people are prevented from obtaining employment.[88] Consequently it is ineffective in its primary aim to enable ex-offenders who have 'gone straight' to put the past behind them.[89] In a recent debate on an amendment bill Baroness Bakewell of Hardington Mandeville considered that:

> The existing Rehabilitation of Offenders Act provides no opportunity for an ex-offender's sentence to be spent if a custodial sentence of four years or more is imposed.[90]

The discrimination offenders face through disclosure regarding housing and employment continues to act as a barrier to rehabilitation. Although it is widely accepted that custodial sentences are reserved for more serious crimes, it remains the case that many offenders in this category are left with little options when any hope of gaining employment is taken away from them.[91] The disclosure periods are too long and not based on any real evidence, yet still force individuals to live in the shadow of their convictions without the prospect of review.[92] For those with a sentence of more than four years, it remains a 'sad indictment on our criminal justice system that it believes it cannot rehabilitate these individuals.'[93] It makes individuals face a future of indefinite disclosure, alienated from opportunities in education, employment and housing,[94] alongside sending out the message that they are incapable of change.[95]

Some Members of Parliament believe the ROA strikes a proportionate balance between protecting the public and helping ex-offenders to put their criminal pasts behind them.[96] Indeed it remains the only real piece of legislation that provides some form of legal protection to people with convictions.[97] There does need to be a 'two-sided coin' that requires a balance between rehabilitation and public safety, meaning that in some cases employers and local authorities do need to know past convictions to protect the public.[98] Professions in medicine, criminal justice, the armed forces, teachers and proceedings of adoption and care are included in the 1975 Exception Order as a matter of public safety.[99] For professions such as these the Disclosure and Barring Service (DBS) seeks to assure people that registered bodies are compliant with the existing code of practice.[100] DBS checks and rehabilitation periods protect landlords and employers from persistant offenders,[101] yet from 2013 old and minor convictions, cautions, reprimands and warnings have been filtered so they do not automatically appear

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[83] Brady (n 81).
[84] Broadhend (n 78) 1567.
[85] Brady (n 81).
[86] Broadhend (n 78) 1566.
[87] ibid 1566.
[88] ibid 1567.
[89] ibid 1566.
[90] HL Deb 27 Jan 2017, vol 778, col 937.
[91] ibid col 937.
[92] ibid col 939.
[93] C Stacey, 'Are the Changes to the Rehabilitation of Offenders Act Enough?' *The Record* (5 March 2014) <http://www.the-record.org.uk/unlock-people-with-convictions/are-the-changes-to-the-rehabilitation-of-offenders-act-enough/> accessed 28 April 2017.
[94] HL Deb 27 Jan 2017, vol 778, col 939.
[95] Stacey (n 93) 2.
[96] HL Deb 27 Jan 2017, vol 778, col 941 (Lord Keen of Elie, Advocate-General for Scotland).
[97] Stacey (n 93) 1.
[98] HL Deb 27 Jan 2017, vol 778, col 942 (Lord Keen of Elie).
[99] Broadhend (n 78) 1566.
[100] HL Deb 27 Jan 2017, vol 778, col 941 ((Lord Keen of Elie).
[101] Home Office (n 2) 12.

on criminal records.[102] Despite the positives of the ROA and DBS protection, many ex-offenders do not understand;k the conditions or have access to explanations such as the DBS website.[103] Also, despite what DBS states, registered bodies are not being prosecuted when checks are used incorrectly, resulting in a continuation of the negative stigma against ex-offenders.[104]

Successive governments have nevertheless acknowledged the 'influence of imperfections' in the ROA on any attempt to improve rehabilitation (for example the Rehabilitation of Offenders (Amendment) Bill). British rehabilitation period provisions are notably less generous than rules that apply in many European nations.[105] Generally most European countries only apply rehabilitation periods to sentences longer than four years and are often significantly shorter than that in the United Kingdom.[106] Norway, for example, avoids imprisonment wherever possible and its emphasis on creative rehabilitation has led to only a 20% rate of reoffending, compared to a 60% for short-term prison sentences in the United Kingdom.[107] It is therefore 'common sense to seek to foster a more redemptive criminal justice system'[108] to provide offenders with the knowledge that, at some point, they will no longer have to identify themselves as a criminal. Broadhend suggests the way forward is community punishment in the form of 'visible unpaid work'[109] in which the humiliation will act as a deterrent whilst allowing the public to see punishment.[110] Nevertheless Broadhend questions if this method would have human rights implications as it seems to go much further than that of Norway.[111]

Disclosure is 'profoundly unsatisfactory.'[112] The law has become a 'complicated morass'[113] consisting of a poorly drafted 40-year-old statute and accompanying regulations, subsequent statues, Supreme Court decisions and a European Court of Justice decision.[114] In regards to employment the current process is archaic and leaves too many people excluded at an early stage in the recruitment process.[115] Everyone should be fairly considered based on merit prior to all checks and risk assessments.[116] Reform requires balance: the non-offending ex-offender needs to be rehabilitated with emphasis on housing and employment and society must be protected with victims of crime being indemnified against loss.[117] Clearly disclosure must continue to apply in the excepted categories such as children and vulnerable adults[118] therefore the social welfare needs of ex-offenders would require a more far-reaching programme of reform.[119]

To continue in essence with the current law of spent convictions (but with exceptions) a new simple clear statute is required which incorporates the principle values and avoids the need for regulation so far as possible.[120] Alongside this a voluntary code of practice should be developed for employers to govern the use of disclosures with sanctions available if an applicant or employee loses their job on the grounds of a previous conviction that they were not required to disclose.[121] Another possible measure would be to amend the ROA so it was an offence to ask about

[102] HL Deb 27 Jan 2017, vol 778, col 941.
[103] ibid col 944.
[104] ibid.
[105] ibid col 935.
[106] ibid.
[107] ibid col 936.
[108] ibid col 937.
[109] J Broadhend, 'More Effective or More of the Same?' (2006) 156 NLJ 293, 293.
[110] ibid.
[111] ibid.
[112] Samuels (n 74) 684.
[113] ibid 684.
[114] ibid 684.
[115] A Forrest, 'Exclude Criminal Records from Job Applications Companies Urged' *The Guardian* (London, 15 October 2015) <https://www.theguardian.com/sustainable-business/2015/oct/15/exclude-criminal-records-from-job-applications-companies-urged> accessed 8 January 2018.
[116] ibid.
[117] Samuels (n 76) 686.
[118] ibid 686.
[119] Whitehead (n 13) 21.
[120] Samuels (n 74) 684.
[121] Home Office (n 2) iii.

criminal convictions beyond a limited form specific to unspent convictions, rather than a duty to ignore spent convictions.[122] For offenders with sentences of over four years there could be an opportunity to apply to a court for their conviction to become spent after a minimum amount of time in the community conviction-free.[123] This scheme would offer an incentive to achieve rehabilitated status so the 'stigma of the "ex-offender" label could be effectively removed'[124] as though the conviction had become spent from time. Such a proposal does have cost implications, but they would be outweighed by the savings to the State in not having to maintain unemployed ex-offenders on benefits, as well as the cost of re-offending.[125]

In establishing new rehabilitation periods (currently only the length of sentence is considered)[126] Broadhend has suggested that the type of offence should also come into consideration, given the emphasis on calculating risk elements for the protection of the public.[127] Otherwise, there seems to be a case for either 'abolishing the periods requiring disclosure or alternatively for removing or reducing them in individual cases of low risk of reoffending, at the discretion of the Probation service or application to the Judge.'[128] Samuels noted that this possible reform could express concerns for employers with a possible Government guarantee (or insurance) for employers against any loss arising from employing an ex-offender in such circumstances.[129] Samuels later suggested that a fundamental reform was still called for.[130] He claims 'society should "grow up" and be expected to take a more rational, balanced and fair view of previous offences, especially the old and comparatively minor offence.'[131] Additionally he states statutory guidance should be given on how previous convictions should be considered and assessed by prospective employers, that disclosure influence refusals should be given in writing and that decisions should be challengeable at or by the Employment Tribunal.[132]

4 CONCLUSION

The ROA set out to give offenders the opportunity to start afresh through their conviction being classed as spent at the end of a rehabilitation period. It meant that in terms of employment, ex-offenders could not be dismissed or denied employment due to a spent conviction. Nevertheless section 7(3) of the ROA and the 1975 Exception Order offered justifications and professions where disclosure is still required. These exemptions and justifications have resulted in breaches of article 8(2) of the Convention in *R(T) v Chief Constable of Manchester*[133] and of section 4(1) in *YA v London Borough of Fulham*.[134] These cases highlight that disclosure laws do discriminate against offenders who apply for housing and employment opportunities. The cases in this field underline that discrimination still happens under the current state of the ROA. The ROA is also flawed for excluding prison sentences of over four years from ever being regarded as spent, which implies that these people are incapable of becoming rehabilitated. Employment, education and housing are key factors in the rehabilitation of an offender but they remain the elements that are most affected by disclosure laws under the ROA. As such, reform is necessary.

The Rehabilitation of Offenders (Amendment) Bill sought to amend section 5 of the ROA with necessary changes to the periods of rehabilitation that are required before convictions and sentences become spent.[135] The Bill aimed to introduce rehabilitation periods for sentences exceeding four years by allowing them to become spent over a period that comprises of the full sentence-length plus a 'buffer period' of four years. It also sought to simplify some categories of sentences shorter than four years into a single category with a new 'buffer period' of two years.[136]

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[122] Stacey (n 93) 2.
[123] ibid 2.
[124] ibid 2.
[125] Broadhend (n 78) 1567.
[126] ibid 1567.
[127] ibid 1567.
[128] Samuels (n 76) 686.
[129] ibid 686.
[130] Samuels (n 74) 684.
[131] ibid 684.
[132] ibid 684.
[133] *R(T)* (n 71).
[134] *YA* (n 43).
[135] Rehabilitation of Offenders (Amendment) HL Bill (2016–17) 20, cl 1(3)(c).
[136] ibid.

Nevertheless there are calls for a new and clear statute on the law of spent convictions, including a code of practice for employers and an opportunity for offenders to apply for their conviction to become spent after a certain period. However this does have cost and time implications with the danger of any new statute becoming as complicated as the original ROA. To which the answer may be the abolishment of rehabilitation periods altogether so that offenders can gain employment and housing without discrimination and thereby allowing them to become rehabilitated.

THE INTRINSIC MORAL WORTH OF ANTI-DISCRIMINATION LAW

Rhys Peri Stephens[*]

1 INTRODUCTION

Anti-discrimination law in England and Wales has seen a swift expansion in recent years with the Equality Act 2010 ('the Act') and resulting cases.[1] The main aim of anti-discrimination legislation appears to be preventing harm, and it is suggested that the law attempts to do so by enforcing a level of formal equality.[2] That said, there are some exceptions to this.[3] However, there are difficulties in attempting to create equality, and it is important to note from the outset that discriminatory treatment is only unlawful if the discrimination is based on one of the 'protected characteristics.'[4] This may lead to unfairness, as equal treatment does not guarantee freedom from disadvantage.[5] However, it is suggested that the protected characteristics are demonstrative of an intrinsic moral worth that is the true subject of the law's protection. This approach is not without some disadvantages. There is difficulty when a clash between two characteristics occurs. However, it is submitted that it provides a workable, and relatively unproblematic, solution to the question of who to protect.

2 WHY PROTECT AGAINST DISCRIMINATION?

The desirability of protecting anyone from discrimination has been challenged.[6] Portillo and Block argue that an employer has the right to pick and choose candidates, based on any criteria they wish.[7] Their business is their property, they say, and they should be entitled to deal with how they wish.[8] This assumes an equality of power between the employer and employee, as it operates on the principle that the employer would not want to discriminate against the 'right' employee for economic reasons.[9] This appears to be incorrect. With the exception of (very) highly skilled job roles, most employers benefit from a large enough pool to absorb the inherent economic costs of discrimination.[10] An employer could discriminate against women without suffering a loss in efficiency as there are likely to be equally capable men available.[11] The loss (or denial) of a job can have serious consequences for individuals and their families, as can being denied opportunities within employment. Such harm is present regardless of the form discrimination takes.[12] Thus, discriminating against a particular group can be seen as causing harm which is especially clear in the employment context. The overall aim of discrimination law is, therefore, to minimise unnecessary harm; the difficulty is determining when the harm is caused and thus who to protect from it.

There are many that suggest that regulation against discrimination seeks to 'level the playing field' by

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[1] Equality Act 2010 (EA). See, for example, *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704; *Lee v McArthur* [2016] NICA 55. A useful discussion is found in Sue Ashtiany, 'The Equality Act 2010: Main Concepts' (2011) 11 IJDL 29.

[2] Colin Bourn and John Whitmore, *Anti-Discrimination Law in Britain* (Sweet & Maxwell 1996) 1–13.

[3] Ashtiany (n 1) 36.

[4] EA, ss 13 and 19.

[5] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16, 17.

[6] Javier Portillo and Walter E Block, 'Anti-Discrimination Laws: Undermining Our Rights' (2012) 109 Journal of Business Ethics 209.

[7] ibid.

[8] ibid 210.

[9] ibid. See also Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press 1995) 42–3.

[10] Cass Sunstein, 'Why Markets Don't Stop Discrimination' (1991) 8 Social Philosophy & Policy 22, 24.

[11] John Gardner, 'Liberals and Unfair Discrimination' (1989) 9 OJLS 1; Michael Connolly, *Discrimination Law* (2nd edn, Sweet and Maxwell 2011) paras 1-001 – 1-003.

[12] Jessica L Roberts, 'Rethinking Employment Law Harms' (2016) 91 ILJ 393.

seeking to enforce some notion of equality.[13] Thus, harm is caused when people are not treated equally. Formal equality involves ensuring equal treatment, whereas substantive equality seeks to establish equality of results by taking into account the fact that some requirements may disadvantage a particular group disproportionately.[14] Absolute equality however, is not the practice; any disadvantage based on characteristics not specified in the Act is not unlawful.[15] Indeed, no-one is truly alike and so it seems impossible to base discrimination law on a conception of absolute formal equality; some similarity must be sufficient.[16] The only realistic way of applying this principle is to suggest that it must refer to people who are 'morally alike'.[17] Thus when two people are alike in such a way, and one is discriminated against, harm is caused and the law should seek to prevent this. The law, however, does not simply seek to guard against formal inequalities, it also requires a form of substantive equality.[18] The difficulty here is that the two are naturally in conflict with each other.[19] An employer who applies the same rules to all their employees may exclude some groups which are disproportionately affected. The opposite is also true, since by levelling the playing field the employer benefits some groups and not others, thus being directly discriminatory.[20] It is not clear who the law seeks to protect in this situation as harm is caused in both cases; unfocused notions of equality alone cannot provide an answer.

3 MORAL WORTH

The foegoing discussion suggests, perhaps, that the focus on economic harm is misguided. It is suggested that much of the debate surrounding discrimination law focuses too heavily on the individual as an economic actor, overlooking the intrinsic moral worth held by each individual.[21] It is submitted that harm should continue to play a role in the law, but that it should not focus on the harm of losing a job or missing out on a promotion. The focus should instead be on an individual's moral worth. Dworkin suggests that everyone has an 'intrinsic value' which forms the basis of human dignity.[22] Each human has equal moral worth regardless of their physical and mental differences and it is contended that this value is what discrimination law seeks to protect.[23] The focus is clear in other jurisdictions. For example, Germany grants employees the 'right to be regarded as a human being.'[24] Thus there is a formal equality model at the heart of anti-discrimination law; anything which recognises an individual's core value as being less worthy than another's is unlawful.[25] A focus on equality of moral worth creates a unifying principle throughout the law which strikes a balance between employers' freedom and employees' protection. The question therefore is not *who* to protect, as everyone's value is protected; instead the question is *how* to protect them. It is not immediately clear what actually constitutes moral harm and it is not enough simply to suggest moral worth must be protected without considering what constitutes this worth.

It is suggested that a characteristics based model, such as that found in the Act, can be useful in determining the constituent parts of a person's moral value.[26] The notion of protected characteristics being the only ones upon which it is unlawful to discriminate

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[13] See e.g. *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704 [17]; *Connolly* (n 11) para 1–004; Bob Hepple, *Equality: The Legal Framework* (2nd edn, Hart 2011) 1; Simon Honeyball, *Great Debates in Employment Law* (Palgrave 2015) 93–8.
[14] Sandra Fredman, 'The Reason Why: Unravelling Indirect Discrimination' (2016) 45 ILJ 231, 231. See also Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59 CLJ 562, 562–5; Sandra Fredman, 'The Age of Equality' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue* (Hart 2003) 337–9; Collins (n 5) 16–7.
[15] See e.g. Hepple (n 13) 35; James Hand, 'Outside the Equality Act: Non-Standard Protection from Discrimination in British Law' (2015) 15 IJDL 205, 206; Fredman (n 14).
[16] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harv L Rev 537, 543; Elizabeth Anderson, 'What is the Point of Equality?' (1999) 109 Ethics 287, 290.
[17] Westen (n 16) 544.
[18] EA, s 19; Barnard and Hepple (n 14) 565; Baroness Hale of Richmond, 'The Quest for Equal Treatment' [2005] PL 571.
[19] Collins (n 5).
[20] *Homer* (n 13) [17].
[21] Matthew Finkin, 'Menschenbild: The Conception of the Employee as a Person in Western Law' (2002) 23 Comp Lab L & Pol'y J 577.
[22] Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press 2006) 9.
[23] ibid.
[24] Finkin (n 21) 585.
[25] Bourn and Whitmore (n 2) para 1–13.
[26] Iyiola Solanke, 'Infusing the Silos in the Equality Act 2010 with Synergy' (2011) 40 IJL 336.

has seen acceptance in many different legal systems.[27] The Act establishes that these include, among others, race, gender, sex and sexual orientation.[28] These characteristics form grounds which are so fundamental to an individual's self-worth it is 'forbidden' to consider one as more important than another.[29] Yet this itself does not help determine what these characteristics actually are, it merely provides a justification for the retention of a characteristics based model.

Given that the underlying aim of discrimination law is to recognise the inherent moral worth of individuals, the characteristics that constitute it must be significant. Clearly it would reduce the concept of inherent worth if *everything* could be said to make up part of it. It has been argued that the protected characteristics are designed to address historical mistreatment.[30] This, however, does not reflect the reality of the law, as it is not *just* those groups that are provided with protection. This explanation also hinders the future development of the law; basing the characteristics purely on historical discrimination effectively guarantees that some groups will suffer, for an indeterminate period of time, before they can receive protection from the law.

Thus, it has been suggested that the law should seek to protect those characteristics which are 'immutable', or cannot be changed.[31] It cannot be said, for example, that qualifications are part of what it means to be human since not everyone has them. Accordingly it is legitimate to select someone because of their qualifications. However, everyone has a race or a religion (if atheism and agnosticism are included). There are, however, problems with this analysis. Whereas everyone can be said to possess a gender or a race, not everyone can be said to have a disability. It is the very existence of the characteristic, not the form it takes, that is the basis of discriminatory treatment.[32] Disability is not immutable in the strict sense, as it may, for example, be the result of an accident and may not be permanent.[33] It could be that disability is not an attribute that is designed to be protected by discrimination law. However, the same could be said of religion and belief or sexual orientation. Both of these characteristics can change through an individual's lifetime, yet are clearly important parts of a person's individuality. Indeed, with advances in technology, even previously unchangeable characteristics such as sex can now be changed.[34] It seems that, while everyone's moral worth is equal, their constituent characterisitics are fluid and may change over time. In order to respect this the law cannot base protectable characteristics on strictly immutable attributes.

4 A NEW APPROACH TO IMMUTABILITY

Accordingly, a new approach to immutability has been posited by scholars and judges, such that immutable characteristics would extend to include those in respect of which requiring change would be 'abhorrent'.[35] These characteristics can be characterised as relating to 'personhood' because they are central to individual identity. Thus are thus constituent parts of everyone's individual moral value.[36] Such a definition would easily include characteristics such as sexual orientation, religion and disability, without expanding the law to protect so many characteristics as would be unworkable.[37] It can be suggested fairly easily that to require someone to change something that constitutes their individuality would be 'abhorrent'.[38] Requiring change to meet employment needs would seem to

[27] See e.g. John Donohue, 'Employment Discrimination Law in Perspective: Three Concepts of Equality' (1993) 92 Mich L Rev 2583; Hepple (n 13) 35; Peter Corbin and John Duvall, 'Employment Discrimination' (2013) 63 Mercer L Rev 891.
[28] EA, s 4.
[29] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 [128]. See also *Eweida v British Airways* [2009] ICR 303 (EAT).
[30] *United States v Carolene Products* (1938) 304 US 144, 153. See also Trina Jones, 'Shades of Brown: The Law of Skin Colour' (2000) 49 Duke LJ 1487, 1537; Michael Selmi, 'The Evolution of Employment Discrimination Law' [2014] Wis L Rev 937.
[31] *Elias* (n 29) [101]. See also *Frontiero v Richardson* (1973) 411 US 677.
[32] Honeyball (n 13) 92–3.
[33] EA, sch 1.
[34] See Abigail Clough, 'The Illusion of Protection: Transsexual Employment Discrimination' (2000) 3 Georgetown Journal of Gender and the Law 849.
[35] See Sharona Hoffmann, 'The Importance of Immutability in Employment Discrimination Law' (2011) 52 Wm & Mary L Rev 1483, 1509. See also *Watkins v US Army* (1989) 875 F 2d 699.
[36] Janet Halley, 'Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability' (1994) 46 Stan L Rev 503, 519.
[37] Jessica Clark, 'Against Immutability' (2015) 125 Yale LJ 2, 46.
[38] See *Watkins* (n 35).

suggest that economic considerations were more important than an individual's moral worth. This is harmful and should be prevented by the law. The current characteristics model strikes a good balance; protecting important moral characteristics without being too broad.

A difficulty arises however, when a choice is required between two core values. The most contentious, perhaps, is that between religion and sexual orientation.[39] From the outset it would appear that the law is slanted in favour of religion, allowing for exceptions to anti-discrimination laws if the relevant employer is a religious one.[40] However, the cases do not necessarily 'rank' the characteristics in this way.[41] If both sexual orientation and religion form an element of 'personhood', then to discriminate against either will cause harm to an individual's moral worth. Thus, the law is left in a situation where some characteristics may be 'more equal than others.'[42] It is suggested that this is the only real situation where the law has to decide who to protect. In other cases, the decision will be a choice between causing and preventing moral harm. In such cases the law must protect the individual at risk of such harm. In a case where there is a conflict between protectable values, however, the law's response is not as clear cut; harm is likely to be the outcome in both cases. It is suggested that in these cases, the law should mitigate the effects of choosing between the two competing characteristics. One method of doing so would be to require the employer to make 'reasonable accommodation' for both parties, in a similar way as it already does in relation to disability.[43] This would allow for the accommodation of competing interests as far as possible, but it must be careful not to permit direct discrimination of others. The wearing of religious symbols for example, can be reasonably accommodated in most workplaces.[44] However, refusing to provide a service cannot.[45] The latter is likely to cause significantly more harm to the party being refused the service than performance of the service will cause to the belief holder. As Finkin suggests, we surrender some aspects of 'privacy and autonomy' when we enter the workplace; this is simply the give and take of the workplace environment. It is not problematic until it begins to impact on an individual's self worth.[46]

5 CONCLUSION

It seems therefore, that in the vast majority of cases, the question of *who* to protect is not particularly problematic. Once individuals are considered as humans and not merely economic actors, it is clear that everyone deserves to have their intrinsic moral worth upheld. The difficulty appears to be reaching a decision as to what constitutes this moral value, and what to do if these constituent elements conflict. The law should be primarily concerned with avoiding or reducing harm to this intrinsic value as far as possible; everyone at risk of harm deserves the protection of discrimination law. The current model does not go as far as to explicitly identify this intrinsic worth, but does so implicitly by recognising the characteristics that constitute it; by doing so it strikes the right balance between protection and workability

[39] See e.g. *Ladele v Islington LBC* [2009] EWCA Civ, [2010] 1 WLR 955; *Lee* (n 1); BBC News, '"Gay Cake" Appeal: Christian Bakers Ashers Lose Appeal' *BBC News* (London, 24 October 2016) <http://www.bbc.co.uk/news/uk-northern-ireland-37748681> accessed 16 March 2017.
[40] EA, sch 9. See Russell Sandberg and Norman Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 CLJ 302.
[41] See e.g. *Eweida* (n 29); *Lee* (n 1).
[42] See Matthew Gibson, 'The God "Dilution" Religion, Discrimination and the case for Reasonable Accommodation' (2013) 72 CLJ 578, 588.
[43] See e.g. Emmanuelle Bribosia and Isabelle Rorive, *Reasonable Accommodation Beyond Disability in Europe?* (European Commission September 2013); Elisabeth Griffiths, 'The 'Reasonable Accommodation' of Religion: Is this a Better Way of Advancing Equality in Cases of Religious Discrimination?' (2016) 16 IJDL 161.
[44] See e.g. *Ladele* (n 39).
[45] See e.g. *Eweida* (n 29); *McClintock v Department of Constitutional Affairs* [2008] IRLR 29 (EAT); Lee (n 1).
[46] Finkin (n 21) 633.

A WORD OF WARNING FOR QUEEN ELIZABETH OR A QUESTION FOR THE PUBLIC? SHAKESPEARE CONSIDERS WHAT MAKES A GOOD MAGISTRATE IN 'RICHARD II'

Ama Williams[*]

1 INTRODUCTION

Across many of Shakespeare's plays, magistracy is presented as being congruous to the ability to perform and act as a good monarch. In *Richard II*, Shakespeare invites the audience to question the failure of Richard to perform his duties as king and, more pressingly, his inability to *appear* to be a good king to his subjects. Shakespeare uses common law within a constitutional framework to illustrate that good magistracy depends on a good relationship with the law – pivotal to this is the ability to perform.

Raffield views the relationship between the law and the monarch as being interlinked – the 'royal portrait' which is subject to the 'law's authority'.[1] Burke professed that writers have great influence on the public mind.[2] This is evident in Shakespeare's work as much of it takes the form of 'mirror literature'. Magistracy is not only questioned within the play itself, but Shakespeare invites the audience and the ruling class itself to reflect upon the role of the monarch and how reliant this is on performance.

The central themes to be explored in this paper will be: Richard's misuse of his royal prerogative and the constraining effect of the common law; Richard's vanity and disillusionment with his duties as a monarch; and finally, the comparative performative abilities of Bolingbroke and Richard. In each case we see that Richard is a flawed character whose magistracy is destabilised not only due to his being an instrumentally incompetent monarch, but more importantly his inability to *perform* and *act* as an effective king.

2 RICHARD'S MISUSE OF THE ROYAL PREROGATIVE

Throughout the play it becomes clear that Richard's misuse of his prerogative powers becomes constrained by the effect of common law. The increasingly restrictive effect of the common law is congruous to his weakening grasp on power. His inability to adhere to the law is exacerbated by his inability to act and appear like he is acting legitimately. Since this failure leads to his downfall, performance is presented as being inherent to good magistracy.

The most notable instance of Richard misusing his prerogative is when he interrupts the opening trial by combat between Bolingbroke and Mowbray, and uses his royal prerogative to exile them both from England. The very act of interrupting the duel implies an interruption of the natural process of achieving justice. This sets the tone for his disruptions to the course of the law throughout the play, and the detrimental consequences of this on his kingship. Ultimately Richard is held to account for his illegal actions; his deposition by Bolingbroke being synonymous with a trial:

> Give me the crown. Here, cousin, seize the crown;
> Here cousin:
> On this side my hand, and on that side yours.
> Now is this golden crown like a deep well
> That owes two buckets, filling one another,
> The emptier ever dancing in the air,
> The other down, unseen and full of water.[3]

The use of the word 'seize' is a proprietary term often associated with the allocation of property by wills. The imagery of a will could imply the death of Richard's kingship and perhaps even foreshadow the death of Richard himself. '[S]eize' in law also connotes having taken property by force; the law is being enforced in respect of Richard being held to account for his actions. This further reinforces his deposition as a metaphor for a trial. There is an element of circularity

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[1] Paul Raffield, *Shakespeare's Imaginary Consitution* (Hart 2010) 2.
[2] See Edmund Burke, 'Reflections' in Ian Ward (ed), *Shakespeare and the Legal Imagination* (Butterworths 1999) 213.
[3] William Shakespeare, *Richard II* (first published 1595, Wordsworth 2013) 4.1.2169–2175.

reminiscent of Richard's illegal possession of Bolingbroke's estate. The circular structure may allude to the circular nature of justice and that Richard's deposition is a result of his own actions.

The image of one bucket filling another with water is suggestive of the scales of justice. Within this metaphor we find a comparison of Richard to Bolingbroke. The bucket which is 'ever dancing in the air' could allude to a monarch's performative role as an actor. Richard is perhaps now aware that Bolingbroke's capability to act and perform means that the scales of justice have not come down on him. '[U]nseen and full of water', Richard here is referencing himself and his failure to perform. '[U]nseen' could suggest he was disconnected from the common people, leading to his eventual downfall. It could also suggest that he was not 'seen' to fulfil his role as King due to his inability to act. The imagery here could also imply that justice has come down upon Richard; indeed, at the end of his deposition he has been held to account by the law. By presenting the deposition of Richard as a metaphor for a trial, Shakespeare is emphasizing the constraining effect the law has on abuses of power.

Shakespeare here invites the audience to question Richard's abuse of power and even absolutism itself. Robertson has suggested that the fear of tyranny was prevalent in the 16th century.[4] Few would dispute the Tudor tendency towards absolutism.[5] Knight however viewed Shakespeare as a political realist and that it would be a mistake to link his literature too much to constitutional debate.[6] Although Knight has a point, Shakespeare almost certainly invited the audience here to question absolutism. However, in the context of Elizabethan England and largely due to the censorship of writers, Richard's character will have been used to highlight how good Elizabeth was as Queen, in comparison to his character's incompetence. Richard's blatant contravention of the law is made even more apparent by his inability to act or appear like he has justification for his actions. Shakespeare highlights the importance of the law within a constitution; if Richard had managed to act as though his actions were legal, he may have kept the support of his subjects. Thus Shakespeare is suggesting that the ability to act is central to magistracy.

3 RICHARD'S OBSESSION

An emerging theme in the play is Richard's obsession with his divine status as king. Richard's obsession with self leads to disillusionment with his acting capabilities. This eventually leads to his downfall. The less he acts as an able king, the more support he loses, further highlighting that performance was essential to good magistracy.

Richard's obsession with his divine ordained right to rule is evident upon his return to England and the realisation that he faces imminent rebellion from Bolingbroke who has gained vast support. Faced with crisis, Richard's language becomes poetic and heavily linked to divine imagery:

> But self-affrighted tremble at his sin.
> Not all the water in the rough rude sea
> Can wash the balm off from an anointed King;
> The breath of worldly men cannot depose
> The deputy elected by the Lord.[7]

Even in the wake of imminent rebellion by Bolingbroke and with his grasp on his right to the throne significantly weakened, Richard retreats to poetic and fanciful language to escape reality. The metaphors here escape and fantasy primarily reflect his evasiveness and inability to make critical decisions. Regarding his own kingship, however, his reluctance to face the reality that he is constrained by the common law reflects, not only his incompetence as a king, but his ability to appear and act as one.

A closer evaluation of this extract reveals the extent to which Richard relies on his own divine status. The juxtaposition between 'anointed' and 'worldly men' suggests that Richard believes that his status as an anointed king by birth will prevail over anything worldly. This is ambiguous as it could represent both Richard's naivety when relating to ordinary people and his attitude to the common law; he believes he is above both.

By suggesting that nothing '[c]an wash the balm from an anointed King', Richard is almost displaying a blind belief that his anointed status means God will protect him. '[B]alm' is suggestive of calm weather, contrasted with the 'rough' storm he describes, suggesting Richard believes his holy status will protect

[4] Geoffrey Robertson QC, interview with Anne McElvoy (London, 1 August 2016).
[5] Ian Ward, *Law and Literature* (CUP 1995) 63.
[6] Cited in Ward (n 5) 80.
[7] Shakespeare (n 3) 3.2.1461–1464.

him from the harsh reality he actually faces. '[B]alm' also has connotations of healing, and continues the metaphors for Richard's avoidance of reality and the solace he seeks in his divine belief. '[E]lected' and 'right' ironically show Richard trying to justify his divine status with legal language. This could be an allusion to the dichotomy between his divine belief in his right to rule and his compromised legal one. It is clear here that Richard's fanciful and evasive behaviour is weakening his grasp on power; instead of facing the threat directly, Richard is again resorting to his status to save him. This inability to act and perform as a good king in the situation of crisis demonstrates the flaw in Richard's character. The flaw Shakespeare was inviting the audience to reflect upon is his failure to act as a good king.

During his deposition Richard exhibits a realisation that his godly status has not protected him, and that he has lost the right to rule England:

> With mine own tears I wash away my balm,
> With mine own hands I give away my crown,
> With mine own tongue deny my sacred state,
> With mine own breath release all duty's rites:
> All pomp and majesty I do forswear …[8]

Richard is on the surface relinquishing his title, however repetition of 'mine own' could also imply that underneath this dramatic display, Richard still believes he has the right to the Crown. Shakespeare's use of the word 'forswear' carries particular potency. Forswear is an obvious reference to Richard giving up his title. The archaic meaning of forswear, however, is to commit perjury. This could suggest a dichotomy within Richard's words. He is both dramatizing his deposition in formerly recognising Bolingbroke as King, while holding onto the fact that he believes it is perjury and should not be happening. Perhaps this shows us that Richard *does* have the ability to act, but was unable to act and appear to be a good King as he was blinded by the belief in his own god-like status. This ability has only come to the fore when he has been stripped of his divine status, further reinforcing the idea that his divine obsession obscured his ability to perform as a good king. The imagery of his 'balm' being washed alludes to the fact that his metaphorical retreat into fantasy is transformed into an awareness of reality. The irony that as a mortal being Richard can act, but as a divine king he could not, reinforces Richard as a flawed character. His inability to act in his role of monarch is thus magnified to the audience; further illustrating that the ability to perform was pivotal to good magistracy.

Somerville has argued that the divine right to rule was aimed at instilling obedience so that subjects were morally and religiously obliged to obey their government.[9] Hattaway states that the idea of the divine right to rule was becoming increasingly popular with the English monarchy at the time of the play's composition.[10] Indeed the Elizabethan contemporaries who wrote Holinshed's chronicles described the Reformation as having 'authorized the King's highnesse to be supreme head of the church of England.'[11] It is obvious that the belief in the divine right of the monarch was prevalent at this time, and Shakespeare may be to some extent dramatizing this with Richard's character. From Richard's proclamation that the balm cannot be washed from an anointed King, to the scene of his deposition, we see that Richard has begun to understand the reality of his mortal status. Hamilton states that Richard has in effect become a slave.[12] Raffield, however, sees the portrayal of Richard as a flawed human as dangerous.[13] These both seem extreme**,** by stripping down Richard's divine status Shakespeare reminds the audience that even an anointed monarch is subject to the law. Richard was hindered by his divine belief and could not disguise this. Thus, we see that Shakespeare was reinforcing that it was essential for a performing monarch not only to be capable of being a good ruler, but of *appearing* to be a good ruler.

4 BOLINGBROKE'S RISE

Shakespeare's presentation of the relationship between Richard and Bolingbroke is notable, as Bolingbroke seems to be better equipped to be King across the play. Unlike Richard, Bolingbroke's character is presented

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[8] Shakespeare (n 3) 5.4.2195–2199.
[9] Johann Somerville, 'The Divine Right of Kings' (University of Wisconsin-Madison, 2016) <https://faculty.history.wisc.edu/sommerville/367/367-04.html> accessed 14 December 2017.
[10] Michael Hattaway, *William Shakespeare: 'Richard II'* (Humanities-Ebooks, 2007) 63.
[11] Raphael Holinshed, *The Chronicles of England, Scotland, and Ireland Volume II* (first published 1587, Nabu Press 2011) 1562–3.
[12] Donna Hamilton, 'The State of Law in Richard II' (1983) Shakespeare Quarterly 34, 11.
[13] Raffield (n 1) 116.

as not only being popular with his supporters, but having the ability to act and appear to be a strong leader. This ensures that, even as a usurper, he can ascend to the throne. Shakespeare thus is again demonstrating to the audience that an ability to perform is central to the art of magistracy.

Having being banished, Bolingbroke expresses his dismay at having to leave his beloved country.

> Then, England's ground, farewell; sweet soil, adieu;
> My mother, and my nurse, that bears me yet!
> Where'er I wander, boast of this I can,
> Though banish'd, yet a trueborn Englishman.[14]

'[G]round' and 'soil' are obvious references to England itself. However, Shakespeare is also directly associating Bolingbroke with the ground, emphasising his awareness of how the country operates. This greatly contrasts with Richard, who is disconnected from England and thus the ability to rule effectively. The use of earthly imagery also creates a sense that Bolingbroke himself is a metaphor for natural law, creating a sense that his actions are justified and legitimate. Raffield states that in the 16th century the rationality of natural law was based upon the sovereignty of common law.[15] Ward however, asserts that to Shakespeare's contemporaries the idea of godly commonwealth enjoyed considerable intellectual and theological currency.[16] As it is Bolingbroke who triumphs, Shakespeare could be implying that a successful monarch should be constrained by the natural law. However, it is clear to the audience that Bolingbroke himself, as a usurper, did not act within the confines of the law. The difference between himself and Richard was the fact that he could act and; by performing, his actions seemed legitimate. Bolingbroke's success at acting to increase his legitimacy reinforces the idea that being able to perform is key to being a successful monarch.

> I count myself in nothing else so happy
> As in a soul remembering my good friends;
> And as my fortune ripens with thy love,
> It shall be still thy true love's recompense:
> My heart this covenant makes, my hand thus seals it.[17]

Bolingbroke is suggesting that he values the loyalty of his companions and will reward them upon his return. '[C]ovenant' suggests that he is bound by his own promise; he knows that gaining the support of the people of England is important, and even implies that he owes a duty them. The idea of being bound could also imply a social contract between Bolingbroke and his supporters. Unlike Richard, his awareness of this social contract suggests that Bolingbroke is aware of the performative aspect to magistracy. The continuance of Bolingbroke as a metaphor for natural law incrementally increases the idea of a need for legitimacy within his actions. Bolingbroke's increasing awareness of the need to appear legitimate reaffirms the idea that successful magistracy coincides with the ability to act.

In contrast to this, Richard appears to be unaware of his performative role. At a time when he is losing support he decides to leave for Ireland, leading to the desertion of his Welsh supporters:

> These signs forerun the death or fall of Kings.
> Farewell: our countrymen are gone and fled,
> As well assured Richard their King is dead.[18]

These lines show just how invisible Richard has become to his people and his supporters, with the Captain even insinuating that he is dead. Shakespeare saw a direct link between harmonious governance and the classical principle of *pactum.*[19] The disparity between the two characters and their awareness of the obligations placed upon them by social contract with their people is marked. However, as much as his indebtedness to his supporters may on the surface seem genuine, Bolingbroke does have an underlying motive for himself to become the King of England which is never made explicit. This further illustrates his capability as an actor; he hides his true intentions under the premise that he is holding Richard to account for his illegal conduct. His performative role is, again,

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[14] Shakespeare (n 3) 1.3607–610.
[15] Raffield (n 1) 5.
[16] Ian Ward, *Shakespeare and the Legal Imagination* (Butterworths 1999) 51.
[17] Shakespeare (n 3) 2.3.1200–1204.
[18] ibid 2.4.1345–1347.
[19] Raffield (n 1) 9.

central to his success. This is made more evident at the scene of Richard's deposition:

> Fetch hither Richard, that in common view
> He may surrender; so we shall proceed
> Without suspicion.[20]

Here Bolingbroke is not concerned whether the deposition is legitimate, but that it appears to be legitimate to the witnesses at court. This self-awareness of the need to appear to be acting in accordance with the law again shows Bolingbroke's ability to act and perform in his role, something which Richard himself clearly lacks. Gurr suggests that whilst Richard has no *moral* right to office, Bolingbroke has no *legal* right.[21] It is Bolingbroke's ability to act and appear as a good leader that separates the two and gives him supposed legitimacy. Shakespeare presents magistracy as being dependent on the ability to perform and appear to be legitimate.

5 CONCLUSION

The three themes explored in this paper have showed that Shakespeare viewed magistracy as being dependant on the ability to perform. Within the context of Elizabethan England, the play has been linked to the failed Essex rebellion, leading commentators such as Greenblatt to draw the inference that Shakespeare's play was a warning to Elizabeth.[22] Posner suggests that writers of imaginary literature are likely to incorporate real persons into their work due to the reflective nature of literature.[23] Warren argues, however, that *Richard II* was revived as a spur to the exercise of historical deliberation rather than a template for usurpation.[24] Warren's view is in line with the play being a piece of mirror literature. Shakespeare is asking the audience and monarchs alike to question the role they have within the constitution. Although there is an implicit sub-theme of an aversion to absolutist tendencies, Shakespeare's focus would have been on the ability of a monarch to perform. This is where similarities to Elizabeth would have been drawn. Rather than being an apologist or a subversive radical, it seems that Shakespeare was carefully balancing the idea of an aspirational actor-monarch, while highlighting the dangers of absolutism. The performative role of a monarch was thus essential to successful magistracy.

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[20] Shakespeare (n 3) 5.1.2139–2141.
[21] Andrew Gurr, *King Richard II* (CUP 2003) 23.
[22] Stephen Greenblatt, *The Power of Forms in the English Renaissance* (Pilgrim Books 1982) 4.
[23] Richard Posner, *Law and Literature* (Harvard University Press 2009) 545.
[24] Jason Scott-Warren, 'Was Elizabeth I Richard II? The Authenticity of Lambarde's "Conversation"' (2013) 264 Review of English Studies 64, 66.

CUNNINGHAM RECKLESSNESS: THE QUINTESSENCE OF THE HISTORIC ENGLISH CRIMINAL LAW?

Jennifer Lio[*]

1 INTRODUCTION

A feature of criminal law generally is the presence of both subjective and objective tests. In the case *of R v G*, Lord Rodger stated how 'there is ... no reason to treat the concept of recklessness expounded in Cunningham either as being the quintessence of the historic English criminal law on the point or as necessarily providing the best solution in all circumstances'.[1] Thus, we will consider the apparent historical primacy of the subjective approach in recklessness, and criticise it in the light of case law and the Sexual Offences Act 2003, (hereafter 'the 2003 Act'), which effectively brought inadvertence back into criminal law. On this basis, we will establish that *R v Cunningham*[2] is not the only approach which has historical significance in recklessness. Secondly, it will be argued that the subjective test as it is today cannot be regarded as being the best solution in determining culpable recklessness. To that end, we will analyse the defects of such approach, and how *R v Caldwell*[3] attempted to fix them, but failed to do so. Finally, we will advance an alternative solution, which focuses on the reasons behind the defendant's action.

2 THE HISTORY

Historically, different approaches have been applied by English courts in relation to the law of recklessness, and their judgments reveal more than one single line of reasoning.[4] For instance, the subjective approach can be found in case law at least ever since *Pembliton*.[5] Subsequently, the Law Commission supported this approach in drafting what became the Criminal Damage Act 1971.[6] However, after *Caldwell*, the subjective approach co-existed along with an objective test, with *Cunningham* being generally applied for offences against the person,[7] and *Caldwell* confined to criminal damage and dangerous driving offences.[8] This might be interpreted as a message from the courts that advertent recklessness had to be applied for major crimes, while *Caldwell* was destined for less serious offences. This was confirmed by the decision to disapply the *Caldwell* objective test in relation to manslaughter,[9] although such a test did determine the law for at least a decade.[10] Similarly, it cannot be ignored that, although in *R v G* the judges tried to confine the interpretation and understanding of recklessness to criminal damage only, on *A-G's Reference*,[11] the court held that 'general principles were laid down'.[12] This seems to suggest that the subjective definition of recklessness is now applied whenever recklessness is an element of the offence. But is it?

3 THE SHIFT TO OBJECTIVE RECKLESSNESS

Soon after *R v G* overruled *Caldwell* and effectively reiterated the predominance of *Cunningham*, the 2003 Act was passed, which introduced the reasonable test in relation to the defendant's belief in the victim's consent.[13] As Kimel points out, this effectively means that 'inadvertent recklessness has made a swift return into our criminal law, and ... in the context of a rather

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[1] [2003] UKHL 50, [2004] 1 AC 1034 [68] (Lord Rodger).
[2] [1957] 2 QB 396 (CA).
[3] [1982] AC 341 (HL).
[4] AW Norrie, *Crime, Reason and History* (2nd edn, Butterworths 2001) 76.
[5] *R v Pembliton* (1874) LR 2 CCR 119.
[6] Law Commission, *Criminal Law Report on Offences of Damage to Property* (Law Com No 29, 1970) paras 42–43.
[7] *W (a minor) v Dolbey* (1989) 88 Cr App R 1 (QB); *R v Spratt* (1990) 91 Cr App R 362 (CA).
[8] *R v Lawrence* [1982] AC 510 (HL); *R v Reid* [1992] 3 All ER 673 (HL).
[9] *R v Adomako* [1995] 1 AC 171 (HL).
[10] *R v Seymour (Edward John)* [1983] 2 AC 493 (HL).
[11] *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.
[12] ibid [12] (Pill LJ).
[13] Sexual Offences Act 2003, s 1(1)(c).

more serious offence than criminal damage to property.'[14] Therefore, it is still unclear whether the decision in *R v G* effectively represents the final say on the issue.[15] For this very reason, Horder maintains that the assumption that subjectivism has historical primacy is fundamentally erroneous.[16] Furthermore, if the 2003 Act brings the objective approach back into the law of recklessness, the criminal law more generally has never abandoned such an approach. In fact, the courts do apply the objective test to defences, such as mistake, duress, self-defence and necessity.[17] From this, it is inferred that *Cunningham* does not represent the 'quintessence' of English criminal law, as it is neither the only nor the main approach employed by the judges to establish culpable recklessness.

As Amirthalingam emphasises, judges must accept that there is indeed 'a residual objective element that is part of *mens rea* and it is that which determines whether the accused is morally blameworthy'.[18] Whilst the subjective test is necessary to assess culpability, it is also crucial to establish whether the 'mens was rea'.[19] In order to do this, the judges will have to engage in an objective evaluation, which incorporates inadvertence in the assessment of the culpable state of mind of the defendant.[20] This leads us to the second main issue, that is whether the current subjective approach to recklessness, as defined in *Cunningham*, represents the 'perfect solution' on this point.

4 IS SUBJECTIVE RECKLESSNESS THE 'PERFECT SOLUTION'?

Ever since *Parker*, the main issues with the subjective approach emerged.[21] In that case, the defendant argued that the thought that his action could cause damage never entered his mind, as he was blinded by rage. However, the court held that he was 'deliberately closing his mind to the obvious', or inevitable, risk of damage.[22] Therefore, the defendant was convicted. This interpretation, perhaps, goes beyond the standard set in *Cunningham*, which requires the defendant to have foreseen the risk and to have taken it, where it was unjustifiable to do so.[23] It does not mention any voluntary action to avoid the thought of such risk. However, Williams defended this extended meaning of subjective recklessness, suggesting that closing one's mind to a risk necessarily entails an initial awareness that such risk did in fact exist.[24] This principle was reiterated in *Stephenson*, where the defendant was not convicted as he was incapable of foresight, due to schizophrenia.[25] Following *Cunningham*, the court emphasised that it is necessary to prove that the risk had been foreseen. However, it also recognised that the subjective approach could cause problems, for example, on evidence of self-induced intoxication. Should one be able to escape liability if unable to foresee a risk in such instance?

Caldwell responded precisely to that issue. On the facts, the defendant was charged, *inter alia*, of 'recklessly endangering life',[26] and argued that as he was drunk, the thought that people could have been injured never occurred to him. But Lord Diplock held that drunkenness is no defence for a crime.[27] Now, this element was itself sufficient to convict the defendant. However, Lord Diplock went further, and held that a person is reckless even when there is lack of awareness on the part of the accused, effectively bringing the new element of inadvertence, and thus the objective test, into the law of recklessness.[28] It is crucial to understand the reasons underlying this departure from the subjective approach. Lord Diplock examined the issue of a person who was 'affected by rage or excitement or confused by drink, [that] he did not appreciate the seriousness of the risk', although aware

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[14] D Kimel, 'Inadvertent Recklessness in Criminal Law' (2004) 120 LQR 548, 553.
[15] C Crosby, 'Recklessness – the Continuing Search for a Definition' (2008) 72 JCL 313, 332.
[16] J Horder 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113 LQR 95, 96.
[17] K Amirthalingam, 'Caldwell Recklessness is Dead, Long Live *Mens Rea*'s Fecklessness' (2004) 67 MLR 491, 496.
[18] ibid 491.
[19] *DPP v Beard* [1920] AC 479 (HL) 504 (Lord Birkenhead).
[20] Amirthalingam (n 17) 495.
[21] [1977] 2 All ER 37 (CA).
[22] ibid [604] (Geoffrey Lane LJ).
[23] *Cunningham* (n 2).
[24] G Williams 'Recklessness Redefined' (1981) 40 CLJ 252.
[25] *R v Stephenson* [1979] QB 695 (CA).
[26] Criminal Damage Act 1971, s 1(2).
[27] *Caldwell* (n 3) 355 (Lord Diplock).
[28] ibid 355.

of it.[29] As Crosby notes,[30] in such case, he would be found guilty under a subjective test, as he had realised the risk, regardless of whether he was only partially aware.[31] But if, for the same reasons, he failed to realise such risk, he would not be guilty unless self-intoxicated.[32] This suggests that the subjective approach is too narrow, as a defendant who failed to realise a risk, although on policy grounds it could be argued that she should have done so, would easily escape liability. Moreover, the fact that the judges in *Parker* felt the need to expand the meaning and scope of the subjective approach, seems to suggest that *Cunningham* is not necessarily suitable to secure just and fair outcomes. Therefore, it is argued that the current criminal justice system, and in particular the law of recklessness, is in need of reform. Crucially, Lord Diplock regarded both instances, i.e. advertent and inadvertent conduct, as equally blameworthy.[33] Thus, the key issue becomes: should inadvertent recklessness be punishable?

Lord Rodger himself, despite allowing the appeal as he was concerned with the intention of Parliament,[34] expressed that *Caldwell* could be justified on policy grounds.[35] On this basis, this article suggests that intoxication should not be the only case where inadvertence is culpable. Failure to foresee a risk may indeed be blameworthy where one ought to have foreseen it. As Amirthalingam points out, '[t]reating as acting with an absent mental state [such] a person ... is like treating the failure to apply brakes while driving a motor vehicle as a pure omission rather than a dangerous act of driving.'[36] Similarly, Kimel[37] maintains that a failure to realise that the victim does not consent, cannot be simply justified because of lack of imagination, stupidity, or 'honest mistakes' as happened in *Morgan*,[38] and several subsequent cases.[39] This is the very reason why Parliament was urged to amend the offence of rape in the 2003 Act.

5 AN ALTERNATIVE APPROACH

This prompts us to consider alternative solutions that would possibly keep the boundaries of *mens rea* within the limits of responsibility for inadvertent risk-taking, and so avoiding cases such as *Elliot*[40] and others from reoccurring.[41] It is recognised that holding such defendants to standards that they simply cannot reach, through no fault of their own, is fundamentally unfair, and the *Stephenson's* result seemed a much more principled and just way of dealing with this. For these purposes, this paper advances a new solution, whereby the focus is on the reasons behind a defendant's actions. It is argued that in *R v G* the judges posed the wrong question, in relation to the modifications of *Caldwell* objective approach. As Glidewell J suggested in *Elliot*, in cases of inadvertent risk-taking, the question should not be whether the defendant would have realised the risk had he given thought to it; rather the issue is 'why such thought was not given.'[42] Horder maintains that looking at the reasons behind the *actus reus* would allow us to overcome what Metcalfe and Ashworth define as a crude 'subjective or objective' dichotomy,[43] and would also facilitate the courts in determining culpability in a more straightforward manner.[44] Following such a reformed approach, a moment of blind rage would be no excuse. But if, for instance, the defendant was distracted because a third party was injured, that failure to foresee the risk would not be blameworthy.[45] *Obiter dicta* from different judges in *Reid* indicate that such an

[29] *Caldwell* (n 3) 352 (Lord Diplock).
[30] Crosby (n 15) 318–319.
[31] *Parker* (n 21).
[32] *R v Majewski* [1977] AC 443 (HL).
[33] *Caldwell* (n 3) 352 (Lord Diplock).
[34] Criminal Damage Act 1971, s 1.
[35] *R v G* (n 1) [69-70] (Lord Rodger).
[36] Amirthalingam (n 17) 499–500.
[37] Kimel (n 14).
[38] *R v Morgan* [1976] AC 182 (HL).
[39] *R v Pigg* (1982) 74 Cr App R 352 (CA); *R v Thomas* (1983) 77 Cr App R 63 (CA); *R v Taylor* (1985) 80 Cr App R 327 (CA) ; *R v Haughian and Pearson* (1985) 80 Cr App R 335 (CA); *R v Gardiner* [1994] Crim LR 455 (CA); *R v Adkins* [2000] 2 All ER 69 (CA).
[40] *Elliot v C* [1983] 2 All ER 1005 (QB).
[41] *R v R (Stephen Malcolm)* (1984) 79 Cr App R 334 (CA); *R v Coles* [1994] Crim LR 820 (CA).
[42] *Elliot v C* (1983) 77 Cr App R 103 (QB) 119 (Glidewell J).
[43] NP Metcalfe and AJ Ashworth, 'Arson: *Mens Rea* – Recklessness Whether Property is Destroyed or Damaged' [2004] Crim LR 369.
[44] Horder (n 16) 114.
[45] Crosby (n 15) 333–334.

alternative has been considered favourably by the courts. Those judges suggest that a defendant cannot be deemed to be culpable if his failure to foresee a risk is due to 'some condition not involving fault on his part',[46] 'illness or shock',[47] or 'sudden disability'.[48] On the contrary, if a defendant could have avoided the misfortune by making a reasonable attempt 'to exercise discipline over his mind', he should, and would under this approach, be culpable.[49]

As Syrotha argues, there is a difference between 'mere inadvertence' and 'culpable inadvertence', and that is indifference.[50] A defendant is indifferent if he shows such 'lack of concern' to the prospect of there being a risk,[51] that awareness of such risk would not have changed his conduct at all,[52] as shown in relation to rape cases. Therefore, we can blame a defendant for failing to see such a risk if he was acting in his own interest, or due to impatience or frustration. But if they have a limited mental capacity, it is conceivably not their fault that they cannot see that risk, and it is thus unfair to hold them to the standard of the reasonable person when they simply cannot reach that standard.[53] This alternative approach, which focuses on the reasons behind the action, would help us to distinguish the defendant who 'deliberately closed his mind' to a risk from one who was simply unable to do so at that time.[54] Ultimately, this would reconcile a partly objective test with the traditional view of *mens rea*, which aims at punishing only those who have the capacity to act as they should.[55]

6 CONCLUSION

This paper shows how the *Cunningham* subjective approach appears to have historical predominance in relation to the law of recklessness. However, it cannot be ignored that *Caldwell* has been applied for many years, though generally confined to less serious offences. Moreover, it has been shown that the 2003 Act effectively brought the inadvertence element back into the law of recklessness, and in relation to even more serious crimes. On those grounds, this paper suggests that *Cunningham* cannot be regarded as being the 'quintessence' of English criminal law. In addition, we have discussed the concern of such approach being too narrow, in the sense that it would not extend culpability to those who ought to have foreseen a risk. For these purposes, an alternative solution is advanced, which focuses on identifying the reasons behind the defendant's action, so as to determine blameworthiness.

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[46] *R v Reid* [1992] 3 All ER 673 (HL) 796 (Lord Keith).
[47] ibid 813 (Lord Goff).
[48] ibid 819 (Lord Browne-Wilkinson).
[49] S Gardner, 'Recklessness Refined' (1993) 109 LQR 21, 23.
[50] G Syrota, 'A Radical Change in the Law of Recklessness' [1982] Crim LR 97.
[51] RA Duff, 'Recklessness' [1980] Crim LR 282, 289–292.
[52] Crosby (n 15) 324.
[53] S Field and M Lynn, 'The capacity for recklessness' (1992) 12 LS 74.
[54] *R v Kimber* (1983) 77 Cr App R 225 (CA).
[55] Williams (n 24).

A KING'S GUILT: CHARLES I, BLOOD GUILT AND THE SOCIAL CONTRACT

Shoshana Mitchell[*]

1 INTRODUCTION

Following defeat in the second civil war, Charles I was tried for 'treason and other high crimes.'[1] Two dynamics appeared in his trial: first, a desire to legally and constitutionally prosecute Charles that resulted in simultaneously dealing with the King as a person and the monarchy as an institution;[2] second, a religious drive for a show trial to achieve God's work by treating Charles as a 'man of blood.'[3] This article will demonstrate that Charles I was both blood guilty and guilty in the sense of breaking the social contract between himself and his people. Despite Charles' guilt, this article will highlight that his trial was unwarranted as it gave rise to double jeopardy. Moreover, the complexities surrounding whether Charles was guilty of treason will not be explored at great length due to the lack of precedent[4] and uncertainty[5] concerning whether a ruling king can commit treason. By establishing the fact that Charles' trial was unnecessary, this essay suggests that he should not have been charged with, let alone found guilty of, high treason.

2 A FUTILE QUEST FOR OBJECTIVITY?

Although Elton believes that accounts of history should be free from political and religious bias, this article does not aim to be objective.[6] The reason for a subjective rather than objective approach is that historical accounts are 'always necessarily selective.'[7] Historians inadvertently distort evidence to reflect their own internal prejudices, religious beliefs and political outlooks. The satire *1066 and All That* illustrates perfectly the tendency of historians to pursue either a Whig or Tory interpretation of histories. Sellar and Yeatman state that Whig historians are 'right but repulsive,'[8] highlighted by their inclination 'to pick historical winners while telling the story of nation, constitution and great men.'[9] Whiggish accounts 'look upon the past with the eyes of the present',[10] meaning that they see Charles' execution as a 'cruel necessity'[11] to ensure England's progression from an absolute monarchy to a constitutional one.[12] At the other end of the spectrum, Tory historians are described as 'wrong but romantic' with their accounts of Charles being full of hyperbole and packed with artistic and romantic flair.[13] This exaggeration and flair by Tory writers is highlighted by an extract from a poem: on the day of Charles' execution 'it did not rain at all, yet it was a very wet day … by reason of the abundance of affliction that fell from many eyes for the Death of the King.'[14] Moreover, Tory interpretations often view Charles' execution as an unjustified act by minorities. The collapse of the monarchy resulted in damning instability across England.[15] Despite supporting a Whiggish belief that Charles was guilty, this essay also

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[1] JG Muddiman, *Trial of King Charles the First* (1st edn, William Hodge & Company 1928) 79.

[2] CV Wedgwood, *A King Condemned: The Trial and Execution of Charles I* (2nd edn, Tauris Parke Paperback 2011).

[3] Patricia Crawford, 'Charles Stuart, That Man of Blood' (1977) 16 Journal of British Studies 41.

[4] John Cook, *King Charls, His Case: or, An Appeal to All Rational men, Concerning his Tryal at the High Court of Iustice* (Thomason 1649) 39.

[5] John William Allen, *English Political Thought, 1603–1660* (Archon Books 1967) 370.

[6] Geoffrey Elton, *The Practice of History* (2nd edn, Wiley 1991).

[7] EH Carr, *What Is History?* (Penguin 2008) 12.

[8] WC Sellar and RJ Yeatman, *1066 and All That* (Sutton 1993), 71.

[9] Peter Claus and John Marriot, *An Introduction to Theory, Method and Practice History* (Pearson Education Limited 2012) 159.

[10] EW Robertson, *Historical essays in Connexion with the Land and Church* (Edmonston and Douglas 1872) vii.

[11] Pauline Gregg, *King Charles I* (1st edn, University of California Press 1984) 445.

[12] TB Macaulay, *The History of England* (first published 1848, Penguin 1979).

[13] Sellar and Yeatman (n **Error! Bookmark not defined.**) 71.

[14] *Kingdomes Weekly Interlligencer 30 January–6 February 1648/9*, cited in Diane Purkiss, *Literature, Gender and Politics During the English Civil War* (1st edn, CUP 2005) 116.

[15] Wedgwood (n 2).

reflects Tory tendencies to view the execution of Charles as unwarranted.

3 SOCIAL CONTRACT THEORY

Hobbes' development of social contract theory provides a substantive framework to assess Charles' guilt.[16] Bradshaw, the President of the High Court of Justice, touched upon this idea by stating that there was a 'contract … made between the King and his people.'[17] This statement advanced a basic sort of contract theory by suggesting that Charles' conduct amounted to breaking the contract between himself and his people. The existence of a contract between the King and his people is evident in Charles' coronation oath. Charles himself admitted that 'breaking his coronation oath was literally "damnable".'[18] Hobbes built upon this idea believing that a contract between a ruler and his people existed to prevent the country entering a 'state of nature' in which life would be 'solitary, poor, nasty, brutish and short'[19] as 'every man [would be] against every man.'[20] To prevent entering this state of nature, individuals voluntarily surrendered their freedoms to a sovereign power. In return the ruler had a moral obligation to act in the interests of his people. Whilst this framework is important to establish Charles' guilt, Hobbes' beliefs are distorted by his negative and Tory outlook. Hobbes' pessimistic attitude is evident in both Locke's[21] and Rousseau's[22] theories of social contract, in which the state of nature is rather more pleasant and the social contract arises due to a desire for improvement.[23] The creation of private property destroyed the freedom and equality of the state of nature. This resulted in the need for a contract between governments and citizens to ensure liberty and equality. Hobbes' pessimism likely stems from watching first-hand the 'violent political turmoil' during the period of Cromwell's rule after Charles' execution.[24] Moreover, Hobbes' royalist outlook is illustrated through his belief that a sovereign's power must be practically unlimited. Anything less would not be strong enough to prevent chaos and anarchy. Observing the Cromwellian rule, Hobbes believed that this was as close to a state of nature as England would get, a consequence of abolishing the monarchy. As a result of Hobbes' Tory outlook, he believed that Charles did not break the social contract or, if the King did, it was preferable to accept the breach rather than risk anarchy.

However, by examining Locke's work, which built upon Hobbes' theory, it is argued that Charles was guilty of breaking the social contract.[25] Utilising Hobbes' framework, Locke suggests that individuals may overthrow or depose a ruler, whether that be a monarch or government, in limited circumstances.[26] Locke believed that such circumstances would arise if a ruler used their power arbitrarily without the justification of maintaining liberty, protecting property and preserving life.[27] Charles abused his power as a ruler, which broke the contract between himself and his people. In his coronation oath Charles promised to 'keep Peace … both to … the Holy Church, the Clergy, and the people.'[28] However, Charles broke his oath during his eleven years of personal rule by illegally raising taxes, imposing religious texts on Scotland and taking up arms against Parliament (resulting in two civil wars).[29] By breaking his oath, Charles simultaneously broke the social contract. He did not take up arms to quash rebellion, to preserve life and maintain liberty, but in order to supress his people.[30] Hinton correctly notes that Charles 'had abused persons … by putting them in prison without trial and had taken their goods without their consent.'[31] These

[16] Thomas Hobbes, *Leviathan* (first published 1651, CUP 1991).
[17] Ron Christenson, *Political Trials: Gordian Knots in the Law* (2nd edn, Transaction Publishers 2011) 265.
[18] Charles Charlton, *Charles I: The Personal Monarch* (2nd edn, Routledge 1995) 78.
[19] Hobbes (n 16) 89.
[20] ibid 88.
[21] John Locke, *Two Treatises on Government* (first published 1689, R Butler 1821).
[22] Jean-Jacques Rousseau, *A Discourse on the Origins of Inequality* (first published 1755, R & J Dodsley 1761).
[23] Locke (n 21) 189; Rousseau (n 22) 97–102.
[24] Jean Hampton, *Hobbes and Social Contract Tradition* (CUP 1986) 5.
[25] Locke (n 21).
[26] ibid.
[27] ibid.
[28] Elias Ashmole and Francis Sandford, The Entire Ceremonies of the Coronations of His Majesty King Charles II, and of her Majesty Queen Many, consort to James II (Learned Heralds 1761) 40.
[29] Christopher Daniels and John Morrill, *Charles I* (CUP 1988) 73–92.
[30] ibid 94.
[31] RWK Hinton, 'Was Charles I a Tyrant?' (1956) 18(1) The Review of Politics 69, 71.

actions meant that the powers granted to Charles in order to maintain liberty and preserve property were being used to do the exact opposite. This resulted in the breaking of the social contract. Therefore, Charles' abuse of power resulted in a loss of liberty, property and life, which strongly implies that he was guilty of breaking the social contract.

4 BLOOD GUILT

Charles' guilt for breaking the social contract was compounded by waging war without justification resulting in the shedding of innocent blood. As a result, Charles' guilt extended beyond simply breaking the social contract, thus highlighting that the king was blood guilty. Blood guilt is a label, mentioned in the bible, for individuals who 'shed innocent blood, and with whom the Lord would have no peace.'[32] Crawford notes that blood guilt 'swept aside the sacredness'[33] of a monarch's position. Charles's infliction of war on his people without justification rendered him blood guilty, and thus 'null[ified] the discharge of [his] sacred function.'[34]

Smith suggests that the significance of blood guilt has been over exaggerated. Only a minority of religious fanatics agreed with such a notion.[35] However, Dzelainis notes that Smith sympathised greatly with Charles, rendering his criticism questionable.[36] Whilst his Tory sympathies are not damning by themselves, when combined with his lack of evidence, his unsubstantiated account becomes weak.[37] Conversely, Crawford successfully deploys volumes of evidence to support her claim that blood guilt was an integral belief in 17th century England.[38] Bradshaw stated to Charles that the reason for the trial was 'to make inquisition for blood'[39] and Lilburne's pamphlet declared that 'it is but … a madnesse … to talk of peace until inquisition be made for Englands innocent blood, and Justice done upon the guilty.'[40] Moreover, Crawford notes that, at the Army's prayer meeting in 1648, it was stated that if Charles was blood guilty then God 'would vindicate his cause and give victory to the Army.'[41] Hutchinson, one of the regicides who signed Charles' death warrant, believed 'that if they did not execute justice upon him [Charles], God would require at their hands all the blood.'[42] Crawford's evidence illustrates that it was more than a few religious fanatics that believed in blood guilt. In addition, whilst royalists and supporters of the King may not have believed Charles was blood guilty, they used the notion many times in condemning the regicides for shedding innocent blood by executing Charles.[43] As blood guilt was a significant belief during the 1600s, it should not be dismissed as being invoked by fanatics to justify Charles's trial and execution.

Despite the notion of blood guilt in the 21st century appearing unfamiliar and questionable, it is important not to impose modern beliefs onto an assessment of Charles' guilt in the 1640s. Charles' unjustified waging of war resulted in the deaths of innocent individuals highlighting that Charles was blood guilty.

5 DOUBLE JEOPARDY

This article has illustrated that Charles was both blood guilty for shedding innocent blood, and guilty of breaking the social contract. However, it will now be argued that Charles' guilt did not warrant his execution due to the rule against double jeopardy. Double jeopardy is the idea that an individual cannot be tried twice for the same offence.[44] Moreover, this can encompass the idea that it is 'unjust … to be twice puni[s]hed for the [s]ame Crime.'[45] Charles' trial

[32] Crawford (n 3) 41.
[33] ibid 41.
[34] ibid 42.
[35] David Smith, 'Impact on Government' in John Morrill, *The Impact of the English Civil War* (Collins & Brown 1991) 44.
[36] Martin Dzelzainis, 'Incendiaries of the State' in Thomas Corns (ed), *The Royal Image Representations of Charles I* (CUP 199/9) 88–89.
[37] Smith (n 35) 44.
[38] Crawford (n 3).
[39] ibid 58.
[40] John Lilburne, *The Just Mans Justification* in Crawford (n 3) 52.
[41] Crawford (n 3) 54.
[42] ibid 58 (emphasis added).
[43] Henry Cary, *Memorials of the Great Civil War in England from 1646–1652* (Henry Colburn 1842); John Gauden (ed), *Eikon Basilike* (Chatto and Windus 1907).
[44] Ian Dennis, 'Quashing Acquittals: Applying the "New and Compelling Evidence" Exception to Double Jeopardy' (2014) Crim LR 247, 247.
[45] *The History of the Works of the Learned, or, An Impartial Account of Books Lately Printed in All Parts of Europe Volume 9* (1st edn, H Rhodes 1707) 439.

essentially resulted in punishing him twice for the same crime.

Charles was both deposed and killed, resulting in a breach of double jeopardy. This statement is supported by making an analogy between Charles and the clergy. Priests were tried for capital offences in the ecclesiastical courts, where the maximum punishment was defrocking the individual, which resulted in stripping away their sacred function.[46] To avoid double jeopardy clergymen were not subsequently tried and executed for the same crime in the King's court. This idea that it took 'two crimes to hang a priest'[47] applied only to clergymen. However, this sort of reasoning can be extended to Charles. There is a strong parallel between priests and monarchs. Charles' situation is analogous to that of priests, for both the defrocking of clergymen and the deposing of monarchs constituted a punishment. It removed the individual from an office supposedly given to them by God.[48] Given that executing priests would be seen as punishing them twice for the same crime, similarly it should be seen that executing Charles constituted a second punishment. Charles' unique situation is illustrated by the fact that Charles has been the only monarch to be tried and executed for high treason. The idea was so novel and unusual that the Rump Parliament had to establish a new court through an emergency Act in order to try the King.[49] Therefore, given the unusual nature of the trial, it is hardly surprising that double jeopardy was overlooked.

Whilst some may argue that Charles was not deposed, meaning that he was never punished twice for his guilt, this is not accurate. Wedgwood believes that Charles was not deposed, as the charge referred to him as 'King of England' and 'the executioner's last words [were] "your majesty".'[50] However, the label of 'king' does not automatically mean that Charles was not deposed. As Lord Justice Bingham correctly stated 'a cat does not become a dog because the parties have agreed to call it a dog',[51] similarly Charles was not a king just because individuals called him a king. Moreover, the fact that Charles was imprisoned with no control over Parliament nor the people of England strongly suggests that he was deposed.[52] The Rump Parliament effectively assumed the role as ruler of England. This is highlighted by their ability to pass an emergency Act in order to prevent individuals from acceding to the throne after Charles' execution.[53] Despite diverging opinions, evidence suggests that Charles was deposed.

The desire to deal with Charles through a trial resulted in the unforeseen consequence of breaching the rule against double jeopardy. This unique idea of breaching double jeopardy allows greater insight into Charles' trial. It explains how Charles can be both guilty in terms of blood guilt and of breaking the social contract, but innocent enough that he should not have been executed.

6 OBSCURING CHARLES' GUILT

Whilst this essay has established that Charles' trial was unwarranted as it breached the rule against double jeopardy, the repercussions of his trial also masked his guilt. The trial and execution of Charles resulted in the fueling of a cult of martyrdom surrounding the monarch. This led to obscuring Charles' guilt and incriminating the regicides. The aspiration of the Rump Parliament to deal with the monarchy as an institution and Charles as a person is evident from the trial's prosecutor Cook: the 'sentence [was] not only against one tyrant, but against tyranny itself.'[54] This desire to deal with both the person and the institution resulted in the presumed need for the trial and execution of Charles. However, negotiations leading up to the trial indicate that Charles' guilt did not necessarily have to result in execution.[55] Negotiations appear to have centered around Charles remaining a monarch in a 'largely formal role, [as] a "puppet king."'[56] If Charles continued to reject these

[46] CE Carrington, *A History of England* (3rd edn, CUP 1949) 97; Martin Friedland, *Double Jeopardy* (Clarendon 1969) 5.
[47] Martin Friedland, *Double Jeopardy* (Clarendon 1969) 5.
[48] Marc Bloch, *The Royal Touch* (Routledge & Kegan Paul Ltd 1973).
[49] Muddiman (n 1) 64–65.
[50] Wedgwood (n 2) 10.
[51] *Antoniades v Villiers*[1988] 3 WLR 139 (CA) 146 (Bingham LJ).
[52] Muddiman (n 1) 43–45.
[53] ibid 148.
[54] Wedgwood (n 2) 10.
[55] Samuel Rawson Gardiner, *History of the Great Civil War 1642–1649: vol 4* (Longmans, Green and Co 1901) 287; David Underdown, *Pride's Purge: Politics in the Puritan Revolution* (Clarendon 1971) 166–172; Sean Kelsey, 'The Trial of Charles I' (2003) 118 English Historical Review 584.
[56] Clive Holmes, 'The Trial and Execution of Charles I' (2010) 53 The Historical Journal 289, 291.

negotiations, other options were available besides a trial; for example, Charles could have been deposed formally. The Rump Parliament could have either negotiated with Charles' negotiated with Charles' son, the man who would become Charles II, to establish a constitutional monarchy with a 'puppet king'[57] or could have abolished the monarchy (as was done a week after Charles I's execution).[58] These alternatives would have acknowledged Charles' blood guilt and guilt for breaking the social contract, whilst ensuring that there was no breach of double jeopardy. This would have also reduced the potential for Charles to become a martyr.

The trial and execution allowed a cult of martyrdom to form,[59] which simultaneously cast guilt upon the regicides. The trial was utilised by Tory historians as a propaganda tool, which eroded Charles' guilt.[60] Klein compellingly argues that Charles' refusal to plead during the trial by rejecting the jurisdiction of the court was 'brilliantly engineered' to be analogous to Jesus' death.[61] Whilst Klein notes that 'this comparison may appear forced today,'[62] England in the 1600s was highly religious meaning that the parallels between Christ's trial and Charles' would have been evident even to uneducated individuals.[63] Both Jesus and Charles underwent trial for treason, with both denying the jurisdiction of the court.[64] Moreover, Kelsey highlights that the charges against Charles had been 'progressively softened',[65] giving Charles 'a perfect opportunity to clear his own name.'[66] By refusing to plead Charles gave up any 'realistic chance of survival',[67] with Charles himself acknowledging that pleading 'might have delayed an ugly sentence.'[68] Failing to plead meant that Bradshaw was compelled to find Charles guilty, again highlighting an affinity to Jesus' trial.[69] It is hardly surprising that the trial, with its likeness to Jesus' trial, was used to foster a cult of martyrdom, resulting in hiding Charles' guilt.

A comparison between two propaganda instruments following Charles' execution illustrates the obscuring of Charles' guilt at the expense of incriminating the regicides. Following the King's death a royalist book, *Eikon Basilike*,[70] 'erased the "man of blood" and rewrote Charles … as the suffering Christ.'[71] *Eikon Basilike* highlights the obscuring of Charles' guilt, whilst building upon the idea that Charles was a martyr. Moreover, by attempting to dispel Charles' guilt, *Eikon Basilike* suggested that the regicides were blood guilty for killing the King. The success of *Eikon Basilike* is evident due to the multitude of editions and its ability to have reached out to a variety of people from 'Catholics and nonconformists, Whigs, Tories and Jacobites, Stuarts and Orangists.'[72] As a response to *Eikon Basilike*, Milton wrote *Eikonoklastes* in an attempt to convince the nation that the execution of Charles was justified.[73] However, various scholars[74] note that *Eikonoklastes* 'failed, while *Eikon Basilike* retained its remarkable propagandistic appeal.'[75] Therefore, it appears that royalist propaganda successfully hid Charles' blood guilt and guilt for breaking the social contract. This is substantiated further as royalist propaganda, combined with the lack of clear leadership following Cromwell's death, resulted in Charles II acceding to the throne under a restored monarchy.[76] The following period,

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[57] ibid 291.
[58] Blair Worden, *The Rump Parliament 1648–53* (CUP 1977) 172.
[59] Andrew Lacey, *Cult of King Charles The Martyr* (Boydell Press 2003).
[60] Gauden (n 43); Diane Purkiss, *Literature, Gender and Politics During the English Civil War* (CUP 2005) 116.
[61] Daniel Klein, 'The Trial of Charles I' (1997) 18 JLH 1, 2.
[62] ibid 2.
[63] ibid 2–3.
[64] ibid 3.
[65] Sean Kelsey, 'The Death of Charles I' (2002) 45 Historical Journal 727, 740.
[66] Kelsey (n 55) 600.
[67] Klein (n 61) 11.
[68] Muddiman (n 1) 108.
[69] Klein (n 61) 12–13.
[70] Gauden (n 43).
[71] Kevin Sharpe, 'So Hard a Text? Images of Charles I, 1612–1700' (2000) 43 Historical Journal 383, 392.
[72] ibid 404.
[73] John Milton, *Eikonoklastes* (London Matthew Simmons 1649).
[74] David Ainsworth, *Milton and the Spiritual Reader: Reading and Religion in the Seventeenth-Century* (Routledge 2008); Thomas Corns (ed), *A New Companion to Milton* (John Wiley & Sons 2016).
[75] ibid 31.
[76] NH Keeble, *The Restoration* (Blackwell Publishers 2002), para 5–31.

known as the Restoration, resulted in many of the regicides being tried and executed for killing Charles I.[77] The Restoration brings into focus not only the successful obscuration of Charles' guilt, but also the transference of guilt onto the regicides.

Whilst Charles was guilty of breaking the social contract and for shedding innocent blood, his trial and execution were unwarranted. As a result of this unnecessary trial Charles was portrayed by royalist propaganda as a martyr. This cult of martyrdom that surrounded Charles not only expunged his guilt but also incriminated the regicides for killing him.

7 CONCLUSION

This paper has established that Charles was guilty. First, Charles was guilty of breaking the social contract which existed between himself and his people. The social contract was broken due to Charles' abuse of power resulting in a loss of liberty, property and life. Second, Charles was blood guilty by his unjustified waging of war resulting in the deaths of innocent individuals. Whilst blood guilt is an unusual concept in the 21st century, it is important to assess Charles' guilt from a 1600s perspective, as guilt by today's standard does not address whether Charles was guilty in 1649. This essay draws upon the parallels between clergymen and monarchs to highlight that the trial was unnecessary as it gave rise to double jeopardy. Whilst caution must be taken when making analogies, this view gives a unique perspective on why the trial and execution of Charles was unwarranted. Moreover, Charles' guilt was obscured by the cult of martyrdom resulting from his needless trial and execution. However, this masking of Charles' guilt does not mean that Charles was innocent, rather his guilt was simply hidden. Overall, Charles I was both blood guilty and guilty of breaking the social contract.

[77] ibid 74–75.

PROSTITUTION AND PROTECTION

Brandon Pizarro[*]

1 INTRODUCTION

In discussions of the ongoing existence of prostitution in modern society, we are inevitably met with an abundance of different positions on the issue, rooted in arguments such as personal autonomy, harm, and trafficking. The issue of the legal status, criminal or not, of prostitutes has invited academics from liberal feminist, radical feminist, and contractarianist disciplines to argue the case of the appropriate status which ought to apply to those involved in the functioning of prostitution within society. Yet to find the most effective way of protecting those who sell their bodies is to recognise that prostitution is a manifestation of the patriarchal society we live in and, far from protecting prostitutes, labour laws would ultimately legitimise further subordination of women. Finally, this paper will argue that, whilst some claim that decriminalisation and regulation through labour laws afford sex workers the necessary legal protection, current models in place in different states demonstrate that the most effective way to ensure protection is instead through the criminalisation of the sex-buyers.

2 RADICAL FEMINISM, LIBERAL FEMINISM & CONTRACTARIANISM

The two principal feminist camps at the fore of the discussion are the radical and liberal feminists. Whilst the latter favours the decriminalisation of prostitution, built around the core consideration of self-determination, the former propose that, given the patriarchal society in which we live, the decriminalisation of prostitution and its subsequent regulation through labour laws would indirectly support the view that women play a subordinate role in society.[1] Whilst it cannot be denied that self-determination and the freedom to realise one's own sexual desires are undoubtedly a key pillar of sexual liberation, the liberal argument ignores that prostitution was likely established through the economic imbalance between genders,[2] as well as its manifestation into a form of sexual oppression rather than liberation.[3] Furthermore, true sexual liberation would surely equate to the prostitute's freedom to do what she wants sexually, not to handing over control of her body for the fulfilment of a man's needs.[4] Schrage argues that such practices 'serve to legitimate women's social subordination',[5] which is indisputably to be found across other areas of law, for example, the doctrine established by Sir Matthew Hale (1736) and standing until the case of *R v R* in 1991, that a woman could not be raped by her husband.[6] Therefore, in line with Schrage, by decriminalising, or further, endorsing prostitution with labour laws, we run the risk of enshrining patriarchal norms and thus endangering women's social status.

Whilst liberal feminists champion personal autonomy in their support of decriminalisation, this does not consider instances wherein freedom of choice is victim to manipulation in a male-dominated world. Brookes-Corden makes reference to one's sexual life as the most intimate part of the right to a private life,[7] as protected by article 8 of the European Convention on Human Rights,[8] yet when we consider practices such as female genital mutilation (FGM), usually instrumented and consented to by the female community, it becomes clear that intervention is

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[1] Laurie Schrage, 'Should Feminists Oppose Prostitution?' (1989) 99 Ethics 347, 352; Tirath Kudhail, 'Should Prostitution be Legalised?' (1999) UCL Juris Rev 165.

[2] Schrage (n 1) 354.

[3] Kudhail (n 1) 165.

[4] Carole Pateman, 'Defending Prostitution: Charges Against Ericcson' (1983) 93 Ethics 561, 562.

[5] Schrage (n 1) 352.

[6] [1991] 3 WLR 767 (HL). See also Tom Rees and Andrew J Ashworth, 'Rape: Husband Convicted of Raping Wife before 1992 – whether an Offence' [2005] Crim LR 238, 239.

[7] Belinda Brooks-Gordon, 'Clients and Commercial Sex: Reflections on Paying the Price – A Consultation Paper on Prostitution' [2005] Crim LR 425, 428.

[8] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 8.

sometimes necessary.[9] Indeed, FGM has been banned in England, Wales and Northern Ireland under the Female Genital Mutilation Act 2003, and is a practice which the United Nations has set out to end.[10] It can therefore be claimed that limitations, rather than liberties, on prostitution are necessary to help combat its exploitation under the patriarchal society which still exists, and can also prevent the harms associated with said practice.

Contractarianists, like liberal feminists, strongly favour the decriminalisation of prostitution, presenting arguments such as the inevitability of prostitution, and even necessity, to satisfy men's sex drive as a biological sex difference.[11] In the same vein, Ericsson compared prostitution to food, assuming women's bodies to be a mere commodity required to quench the sex drives of men.[12] This claim is not only poisonous to the social status of women, but also a harmfully misguided assumption. In a survey conducted by the BBC consisting of 200,000 participants across 53 nations, it was observed that 'women were consistently more variable than men in sex drive', indicating that sex drive may be less influenced by biological factors than argued by contractarianists.[13] Moreover, in his observation of the Dani tribe in New Guinea, Karl Heider found that the tribe took a 'four-to-six year postpartum sexual abstinence', one that was neither explained nor strongly enforced.[14] The BBC and Heider's findings clearly show that sex drive is an attribute best described as a cultural phenomenon rather than a biological imperative, as argued by Schrage.[15] Hence, the arguments of those who accord the same importance to a man's right to sex as to nutrition, and thereby substantiating the subordination of women, are deeply flawed.

Aside from the moral considerations on protection of prostitutes, the consideration of the harm they are subjected to is surely key to the discussion of the potential regulation of prostitution through labour laws. Despite being trivialised by the likes of Wolfenden as an 'easier' and 'freer' choice of work,[16] or indeed as no different to any other form of 'unpleasant' work,[17] when we consider that 75% prostitutes are subjected to physical harm and more than 50% forced into having sex in the UK,[18] it surely becomes impossible to maintain such claims. Lisa Hung concedes that there is no difference between the harm associated with being a police officer and a prostitute.[19] Indeed, it is true that both 'occupations' incur exceedingly high death rates, with 68 deaths of members of the Metropolitan Police from 1990 to 2015 and 152 prostitute deaths in the UK for the same timeframe.[20] Yet, when we consider that a police officer risks their safety for the protection of citizens, it seems absurd that prostitutes risk losing their lives in the name of a customer's purchased sexual prerogative. Moreover, it cannot be overlooked that to legally regulate prostitution, a practice whose workers 'do not believe in the certainty of tomorrow',[21] would be to legitimise a practice which inevitably incurs, through the sale of the self as well as the body for sexual purposes, extreme psychological ramifications. Statistics showing that 68% of prostitutes suffer from PTSD, accompanied by a 'professional attitude' which requires a disconnection from oneself,[22] serve to prove, as sustained by Carole Pateman, that the body

[9] Henriette Dahan Kalev, 'Cultural Rights or Human Rights: The Case of Female Genital Mutilation' (2004) 51 Sex Roles 339, 341.
[10] United Nations, 'International Day of Zero Tolerance for Female Genital Mutilation, 6 Februray' <http://www.un.org/en/events/femalegenitalmutilationday/> accessed 23 December 2016.
[11] Schrage (n 1) 353.
[12] Pateman (n 4) 563.
[13] Richard A Lippa, 'Differences in Sex Drive, Sociosexuality and Height across 53 Nations: Testing Evolutionary and Social Structural Theories' (2009) 38 Archives of Sexual Behaviour 631, 631.
[14] Karl G Heider, 'Dani Sexuality: a Low Energy System' (1976) 11 Man 188, 190.
[15] Schrage (n 1) 354.
[16] M Madden Dempsey, 'Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm' [2005] Crim LR 444, 445.
[17] Melissa Farley, '"Bad for the Body, Bad for the Heart": Prostitution Harms Women Even if Legalised or Decriminalised' (2004) 10 Violence Against Women 1087, 1088.
[18] Home Office, *Tackling Demand for Prostitution: A Review* (2008) 129.
[19] Lisa Hung, 'A Radical Feminist View of Prostitution: Towards a Model of Regulation' (1999) UCL Juris Rev 123, 127.
[20] Home Affairs Committee, *Prostitution: Third Report of Session 2016–2017* (HC 2016–17, 26) para 3; Police Roll of Honour Trust, 'Metropolitan Police – Post 1946' (*Police Memorial*) <http://www.policememorial.org.uk/index.php?page=metropolitan-police> accessed 28 December 2016.
[21] Andrea Dworkin, 'Prostitution and Male Supremacy' (1993) 1 Michigan Journal of Gender and Law 1.
[22] Home Affairs Committee (n 20) para 3; Farley (n 17) 1107.

is an intrinsic part of oneself.[23] Therefore, to dismiss these inherent harms as just another part of work would be inhumane given the unquestionable harms that are accompanied with the practice of prostitution.

3 CRIMINALISE OR DECRIMINALISE?

In discussions of (de)criminalisation of prostitution, the question of sex-trafficking inevitably comes to the fore. Although the UK Home Affairs Committee maintains that voluntary prostitution and sex-trafficking ought to be considered mutually independent phenomena, the facts clearly exhibit a direct link between trafficking and prostitution. In order to combat this practice, we ought not focus on distinguishing between the types of prostitution, but rather consider the practice as a contributor to the 600,000 to 800,000 people that are trafficked globally every year.[24] Moreover, there exists a clear correlation between decriminalisation and increased trafficking with 94 people trafficked in Sweden in 2014, where the sex-buyer is criminalised, compared with 1,080 in the Netherlands in the same year.[25] The damning effect of decriminalisation on sex trafficking becomes yet clearer when we consider that 40,000 people were expected to be sex-trafficked into Germany during the Fifa World Cup of 2006.[26] In the case of the Netherlands, the Mayor of Amsterdam, Job Cohen, conceded that after five years 'we have to acknowledge that the aims of the law have not been reached' and that the abuse within prostitution continues.[27] Clearly, decriminalisation plays into the hands of the traffickers.

Accordingly, supporters of the introduction of labour laws argue that normalising the practice would end the unfounded moral condemnation of prostitutes. It is true that this form of harm, described by Melissa Farley as 'the primary harm of prostitution',[28] leads to prostitutes being seen as 'second class citizens', to their increased exposure to violence and to limitation of their future prospects.[29] Yet to disprove claims that this could be combatted through normalisation through labour laws, one need only look to the countries where labour laws govern prostitution. Job Cohen's confession to the continuation of abuse in the Netherlands and the continued 'contempt to those in prostitution' by police officers and health care workers in New Zealand's labour law governed system[30] shows that the promised loss of social stigma, despite the Prostitution Reform Act 2003, is yet to be seen. It is for the above reasons that this paper believes, as observed by Susan Kay Hunter, that cruelty inflicted by men (the blame for which is kept by women) would be best approached and removed by switching the blame onto the those creating the demand, the sex-buyers, and would best be ensured through the adoption of models similar to the Swedish sex-buyer law.[31]

4 LABOUR LAWS OR SEX-BUYER LAWS

The Nordic model provides a mechanism by which the blame can be passed on to those creating the demand for prostitution. By criminalising the use of prostitutes, rather than the prostitute herself, the industry is challenged as a whole without further damaging the position of the prostitute. This model, enforced in Sweden as of 1999, has succeeded in reducing the number of prostitutes from 2,500 in the year of enactment to 1,500 by 2004, whilst in Denmark (where prostitution is legal and whose population is almost half), the amount of street prostitutes alone in 2004 reached an estimated 7,800 women.[32] As for the problem of people going elsewhere to pay for prostitutes, where, for example, 62.6% of men living in the UK who had paid for sex before had also paid

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[23] Pateman (n 4) 562.
[24] Unites States Department of Justice, *Report to Congress from Attorney General John Ashcroft on U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2003* (Report number 20530, Washington D.C. May 1 2004) 3.
[25] United States Department of State, *2016 Trafficking in Persons Report* (2016) <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258870.htm> accessed 26 December 2016.
[26] Anne Marie Tavella, 'Sex Trafficking and the 2006 World Cup in Germany: Concerns, Actions and Implications for Future International Sporting Events' (2008) 6 Northwestern Journal of International Human Rights 1.
[27] Soroptimist International, 'Prostitution is not a Choice' (2007, revised October 2014) <https://www.soroptimist.org/whitepapers/whitepaperdocs/wpprostitution.pdf> accessed 30 December 2016.
[28] Farley (n 17) 1092.
[29] Corinne E Longworth, 'Male Violence Against Women in Prostitution: Weighing Feminist Legislative Responses to a Troubling Canadian Phenomenon' (2010) 15 Appeal 58, 66.
[30] Farley (n 17) 1093.
[31] Hung (n 19) 130.
[32] Gunilla Ekberg 'The Swedish Law that Prohibits the Purchase of Sexual Services' (2004) 10 Violence Against Women 1187, 1193–1194.

for sex outside of the UK,[33] the extraterritorial jurisdiction of Swedish laws provide a deterrent.[34] The benefits of the Nordic model over labour laws are clear, they address the demand for prostitutes, thus reducing trafficking, harm and the number of women in prostitution all at the same time without outlawing the prostitute.

The analysis presented within this paper demonstrates with clarity that labour laws cannot sufficiently address the harms associated with prostitution's ongoing existence. In fact, labour laws effectively endorse the patriarchal view that women play a subordinate role in our society, and provide little respite from the stigmatisation of prostitution whilst also endorsing one of the fastest growing practices of 'modern slavery': human trafficking.[35] Another consequence of the use of labour laws is the subsequent commercialisation of prostitution which, in turn, results in more women joining prostitution.[36] However, those in favour of criminalisation of the act of prostitution should note the unviability of this option, which would push prostitution underground into a more harmful environment, and further fix the blame for the market of prostitution to the prostitute.[37] Therefore, although labour laws do not adequately protect prostitutes from harm, neither does criminalising the act of prostitution. In order to find a legal method that adequately protects prostitution whilst combatting its existence, we must turn to the Nordic model (sex-buyer law) supplied by the Swedish legal system.

5 CONCLUSION

In conclusion, in the ongoing struggle for a situation wherein those selling their bodies are guaranteed protection from harm, a panacea seems unlikely, yet the practices of certain states have afforded us understanding. In states which have opted for decriminalisation and regulation through labour laws, the unfortunate result has been an increasing sex-trafficking market and persistent stigmatisation. Whilst arguments of self-determination and sexual liberation are tempting, it is important to remember that the introduction of labour laws for a practice which is essentially an enshrinement of female subordination is a grave statement on sexual inequality in the modern age. To truly break the circle and protect those selling their bodies from harm of all kinds, the best criminal model is that of the sex-buyer law, one which has shown success in Sweden, through the falling number of prostitutes and low trafficking numbers.

[33] Home Affairs Committee (n 20) 12.
[34] Ekberg (n 32) 1196.
[35] Soroptimist (n 27) 20.
[36] Hung (n 19) 135.
[37] ibid 126.

OPTING FOR ORGAN DONATION

Kerry McFarlane[*]

1 INTRODUCTION

The interplay between consequentialism and ethical considerations comes to the forefront in organ donation models. The English opt-in model is intertwined with the relevant historical background, which shall be explored to propound the argument that the stagnation of the Human Tissue Act (HTA 2004) is outdated; England should introduce opt-out, as Wales recently did.[1] The success of opt-out on organ donation rates shall be emphasised, before addressing issues of consent, as the key principle of autonomy appears confused in the opt-in model.[2] Increased knowledge of the need for organs, against the backdrop of an opt-out model, would serve as the optimum solution.

2 AN OPTIMUM MODEL?

Opt-in and opt-out models assume opposing default starting positions, and inaction can either lead to a false negative or a false positive.[3] However, whichever model a state chooses to implement, this assumption can be altered; in England opt-in may occur through the individual themselves,[4] a 'nominated representative'[5] or a person in a 'qualifying relationship'.[6] Thus, if the consequences are the same; one can choose whether to donate organs or not, is there an 'optimum model' at all? To present the situation so simplistically would of course be a fallacy. Kahneman used organ donation models to illustrate the importance of 'framing' choices.[7] A "soft" opt-out model, where families are still consulted, would serve as the optimum model as opposed to a "hard" opt-out system, where an individual's say is final. Donor rates still increase when using "soft" opt-out, and it is important to consider 'overall beneficence, to *all* potentially affected, *as well as* respect for autonomy' with regard to issues in bioethics.[8]

It is impossible to isolate the effect of an opt-out model from extraneous variables, such as improved healthcare infrastructure in Spain, and therefore the importance of effective communication alongside the implementation of the optimum model is highlighted.[9] Shepherd studied organ donation systems and transplant rates in 48 countries for thirteen years and concluded that 'overall opt-out consent is associated with greater deceased donor rates', but that consent should be 'seen as part of a causal change rather than a single casual factor', thus acknowledging other methods can further strengthen organ donation rates.[10]

A purely utilitarian viewpoint would state with ease that an opt-out model should be adopted by England. A shortage of transplantable organs remains a prevalent issue; approximately 6,500 people are on the active transplant list,[11] and 'evidence that supports the association between presumed consent and

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[1] Human Transplantation (Wales) Act 2013.

[2] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (7th edn, OUP 2013) 101.

[3] James McIntosh, 'Organ donation: is an Opt-in or Opt-out System Better?' (*Medical News Today*, 24 September 2014) <https://www.medicalnewstoday.com/articles/282905.php> accessed 9 November 2016.

[4] Human Tissue Act 2004 (HTA 2004), s 3(6)(a).

[5] HTA 2004, s 4.

[6] HTA 2004, s 3(6)(c).

[7] Daniel Kahneman, *Thinking, Fast and Slow* (Penguin 2012) 373.

[8] R Gillon, 'Ethics Needs Principles – Four can Encompass the Rest – and Respect for Autonomy Should be "First Among Equals"'(2003) 29 J Med Ethics 307, 310.

[9] John Fabre, 'Presumed Consent for Organ Donation: a Clinically Unnecessary and Corrupting Influence in Medicine and Politics' (2014) 14 Clin Med 567.

[10] Lee Shepherd, Ronan E O'Carroll & Eammon Ferguson, 'An International Comparison of Deceased and Living Organ Donation/Transplant Rates in Opt-in and Opt-out Systems: a Panel Study' (2014) 12 BMC Medicine 1.

[11] NHS Blood & Transplant, 'Organ Donation and Transplantation – Activity Figures for the UK as at 8 April 2016' (NHS Blood & Transplant 2016) <https://nhsbtdbe.blob.core.windows.net/umbraco-assets/1343/annual_stats.pdf> accessed 10 November 2016.

increased donation rates'.[12] However, 'ethics consultation must embrace moral engagement', often through engaging the law[13] as 'ethical norms are not pre-existing biological *laws* but are *rules* created by human social activity'.[14] Propounding the articulation that 'law does not exist in a vacuum' is of the utmost importance in this field of law.[15] However, it is contended that current rules are outdated and misrepresent society's attitude to organ donation in England.

3 THE HUMAN TISSUE ACT 2004

The impetus of such rules in the HTA 2004[16] which govern the opt-in model arose following the 'aftermath of the organ retention scandal'.[17] This led to a 'resurgence of … grief'[18] for parents whose children's organs had been retained by the hospital without their knowledge, and public outrage following widespread media coverage.[19] The response of the legislature to place an emphasis on consent was thus understandable, given that 'the reputation of Britain's medical profession [took] a serious battering'.[20] However, it appears that the 'knee-jerk' reaction which Ellis warned of materialised,[21] and Mason and Laurie's assertion that the legislation was 'born under the wrong star' has strong support.[22] Indeed, 'opinion polls consistently indicate that 70–90% of the population would want their organs to be used to save others … while only 33% of the population is registered on the organ donor register'.[23] Moreover, 'many parents indicated that, had they been asked, they would probably have been willing for their child's organs to be used for research.'[24] As the 'notion of consent constitutes the unifying theme of the legislation' it would have perhaps been inexpedient to introduce the unfamiliar opt-out model within the HTA 2004 given the tenuous climate regarding distrust of the medical profession.[25] The opt-in model was not the optimum model to address the need for organs, but rather the optimum short-term measure to somewhat stifle public outrage following the scandal.

Nonetheless, this 'knee-jerk' reaction has been defended more recently.[26] The Organ Donation Taskforce published a report in 2008 concerning the 'finely balanced question' and concluded that a 'change in the law [to an opt-out system is] unnecessary.'[27] However, it is proposed that the Taskforce has erred in its decision through weak reasoning. For example, the Taskforce stated that it would be 'complex in practical terms … to put in place an opt-out system' as 'there would need to be a significant and sustained communications programme to ensure that all members of society knew about the new system'.[28] A survey suggests the significance of this issue is overstated: in September 2016 between 86-89% Welsh citizens surveyed could correctly assert how the organ donation system in Wales had changed.[29] Moreover, the Taskforce subsequently acknowledges the overarching 'clear message' that

[12] Alejandra Zúñiga-Fajuri, 'Increasing Organ Donation by Presumed Consent and Allocation Priority: Chile' (2015) 93 Bull World Health Organ 199, 199.
[13] Michael DA Freeman, 'Law and Bioethics: Constructing the Inter-Discipline' in Michael DA Freeman (ed), *Law and Bioethics: Current Legal Issues*, vol 11 (OUP 2008) 11.
[14] Eric Racine, Pragmatic Neuroethics: Improving Treatment and Understanding of the Mind-brain (MIT Press 2010) 68.
[15] Larry D Barnett, *Legal Construct, Social Concept: A Macrosociological Perspective On Law* (Transaction Publishers 1993) 2.
[16] HTA 2004, s 2.
[17] Ann McGauran, 'Regulation of Human Tissue in the UK' (2016) 388 The Lancet <http://dx.doi.org/10.1016/> accessed 10 November 2016.
[18] Magi Sque and others, 'The UK Postmortem Organ Retention Crisis: a Qualitative Study of its Impact on Parents' (2008) 101 J R Soc Med 71, 74.
[19] *A & B v Leeds Teaching Hospitals NHS Trust; Cardiff and Vale NHS Trust* [2004] EWHC 644 (QB), [2005] QB 506.
[20] Ian Ellis, 'Beyond Organ Retention: The New Human Tissue Bill' (2004) 364 The Lancet 42, 42.
[21] ibid 43.
[22] J Mason and G Laurie, *Law and Medical Ethics* (7th edn, OUP 2005) 493.
[23] Emily Jackson, *Medical Law: Text, Cases & Materials* (4th edn, OUP 2016) 590.
[24] David Hall, 'Reflecting on Redfern: What can we Learn from the Alder Hey Story?' (2001) 84 Arch Dis Child 455, 455.
[25] David Price, 'The Human Tissue Act 2004' (2005) 68 MLR 798, 805.
[26] Ian Ellis, 'Beyond Organ Retention: The New Human Tissue Bill' (2004) 364 The Lancet 42, 42.
[27] Organ Donation Taskforce, 'The Potential Impact of an Opt out System for Organ Donation in the UK' (*NHS Blood & Transplant*, 2008).
<http://www.nhsbt.nhs.uk/to2020/resources/ThepotentialimpactofanoptoutsystemfororgandonationintheUK.pdf> accessed 10 November 2016, 4.
[28] ibid.
[29] Welsh Government, 'Survey of Public Attitudes to Organ Donation: Waves 10, 11 and 12' (Welsh Government 2016) <http://gov.wales/docs/caecd/research/2016/160905-survey-public-attitudes-organ-donation-waves-10-11-12-en.pdf> accessed 10 November 2016, ch 3.

there is a 'need to address the extremely low awareness of the organ donation register'.[30] Therefore, it seems that an effective communications scheme is required whether England has an opt-out or opt-in system.

4 A QUESTION OF CONSENT

A commonly promulgated argument against introducing an opt-out system of organ donation is that 'the only ethically … defensible … strategy … is to rely on informed and highly specific consent'; a presumption of consent is not sufficient.[31] In this vein, it is argued that introducing an opt-out model could infringe upon the principle derived from *Yearworth v North Bristol NHS Trust*, where it was acknowledged that claimants had 'ownership' of their sperm samples, even though they were being stored by the hospital.[32] If we are to have ownership of our bodies, then, it is argued, the default position should not be that our organs may become the property of somebody else after our death. However, 'inaction can be a sign of consent in appropriate conditions'.[33] Saunders agrees that 'it is absurd to "presume" that people have given consent'; he convincingly criticises the terminology of 'presumed consent' and argues that the opt-out model 'need not … be identified with presumed consent'.[34] The example of a restaurant guest eating a meal without explicitly consenting to pay for it illustrates how 'given our social conventions, it is clear how her actions would be understood.'[35]

A change to the opt-out model, paired with the aforementioned communications system, would thus not necessarily require any 'presumptions' to be made. Further, Rieu comments that 'there is presently no way of ensuring one's organs are not donated', as the family may decide to donate the deceased's organs even if they have not given consent.[36] By contrast, an opt-out system would allow the minority of the public who are strongly adverse to organ donation to record this on a register.[37] Therefore, an opt-out system would be the optimum model in portraying consent (or refusal) effectively. This would be reinforced if medico-legal language steered clear of talk of "presumed consent", as this unnecessarily confuses our understanding of consent as a mental attitude, which of course should not be presumed, rather than an action.[38]

The state has strongly criticised the medical profession, and 'the autonomy of the latter is increasingly under scrutiny.'[39] English and Sommerville state that 'patient autonomy is the centrepiece of medical ethics', and acknowledged that it may appear 'a retrograde step' to consider an opt-out model.[40] However, they then go on to conclude that 'presumed consent with safeguards is the fairest system for ensuring that an individual's wishes about donation are respected and the needs of those with organ failure are brought more into focus'.[41] Rieu further develops the argument that the current opt-in system does not adequately reflect autonomy. She suggests that the Taskforce's conclusions imply that 'it is worse for an individual who does not want to donate their organs to then donate, than for an individual who was happy to donate not to. Is one type of loss of autonomy better than the other?'[42] Gill reinforces this assertion, proposing that we should use the 'respect-for-wishes model of autonomy', where 'each type of mistake is on a moral par.'[43] Due to the 'conspicuous' nature of objections to organ donation, it is more likely that an opt-out model will lead to 'fewer mistakes', and thus it can be considered the optimum model.[44]

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[30] Organ Donation Taskforce, 'The Potential Impact of an Opt out System for Organ Donation in the UK' (n 27) 5.
[31] MDD Bell, 'The UK Human Tissue Act and Consent: Surrendering a Fundamental Principle to Transplantation Needs?' (2006) 32 J Med Ethics 283, 285.
[32] [2009] EWCA Civ 37, [2009] 3 WLR 118.
[33] Ben Saunders, 'Opt out Organ Donation without Presumptions' (2012) 38 J Med Ethics 69, 70.
[34] ibid 71.
[35] ibid.
[36] Romelie Rieu, 'The Potential Impact of an Opt-out System for Organ Donation in the UK' (2010) 36 J Med Ethics 534, 536.
[37] ibid.
[38] Saunders, 'Opt out Organ Donation without Presumptions' (n 33) 69.
[39] Valerie M Sheach Leith, 'Consent and Nothing but Consent? The Organ Retention Scandal' (2007) 29 Sociology of Health & Illness 1023, 1025; see also B Salter, *The New Politics of Medicine* (Palgrave Macmillan 2004).
[40] V English and A Sommerville, 'Presumed Consent for Transplantation: A Dead Issue after Alder Hey?' (2003) 29 J Med Ethics 147, 147.
[41] ibid 151.
[42] Rieu, 'The Potential Impact of an Opt-out System for Organ Donation in the UK' (n 36) 535.
[43] Michael B Gill, 'Presumed Consent, Autonomy and Organ Donation' (2004) 29 J Med Philos 37, 45.
[44] ibid 41.

Approximately 10% of families oppose a registered donor's organs being used for transplantation.[45] Although a family has no legal right to override the decision of an individual who has opted-in, 'their views are often given precedence over the autonomy of the donor.'[46] As the majority of the population do not opt-in before their death, many families are faced with the decision of whether to donate their loved one's organs. Approximately 60% of families consent to donation in such a case.[47] It is argued the opt-in model, which requires the families to make a rushed decision so soon after their loss, is flawed as it may incite 'nasal reasoning', which is 'notoriously unreliable'.[48] The emotive nature of organ donation cannot be ignored; a family's 'holistic view of the body in which body and self are closely related' may be heightened in the initial aftermath of death.[49] However, a soft opt-out model would serve as the optimum model, as the change in default position would alter what is considered the norm. This would then diminish the impact of the 'yuck factor' as organ donation would no longer be something that only a minority of the population do.[50]

The 'complimentary approaches' to improve organ donation rates involve 'shifting public attitudes' and 'modification of how donation is presented to a family in a way that positively influences the outcome.'[51] It is proposed that for the most part, the shift in public attitudes has occurred naturally, as evidenced through public opinion polls, however some issues do remain which infringe upon autonomy.[52] One study showed that '60% of Muslim participants believed organ donation to be impermissible in Islam', however there is no such definitive teaching.[53] Conversely, 'internationally most Islamic scholars endorse organ donation',[54] and a representative for the Muslim Council of Britain has emphasised that it 'is a very personal choice.'[55] Thus, one is not making an autonomous decision if they are basing this on a non-existent religious teaching. Introducing an opt-out model would encourage religious individuals to seek accurate guidance as to whether they 'should' opt-out, as it would raise the profile of the issue.

5 AN ALTERNATIVE APPROACH

An alternative proposal is to introduce 'mandated choice', where individuals are required to specify their wishes with regard to organ donation and no default position exists. However, it is 'not clear *a priori* whether mandated choice yields more registered donors than the prevailing systems of donation',[56] whereas multiple studies suggest that an opt-out system increases the number of potential donors. One cannot propose mandated choice as the optimum model when it may not positively influence the need for organs for transplant. Furthermore, the Taskforce validly argues that 'mandated choice on organ donation would be a significant departure from established UK norms', in that UK citizens have the 'right not to make choices.'[57] The crucial argument throughout this article is that law should reflect society as best it can, and thus infringing upon an 'established UK norm' through introducing mandated choice would not be a welcome development in this area.[58]

Llewelyn's theoretical argument that as 'the conception of society [is] in flux typically faster than

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[45] Organ Donation Taskforce (n 27) 5.
[46] Rieu (n 36) 534.
[47] Organ Donation Taskforce (n 27) 5.
[48] John Harris, *Enhancing Evolution: The Ethical Case for Making Better People* (Princeton University Press 2010) 130.
[49] Leith (n 39) 1025; G Haddow, 'The Phenomenology of Death, Embodiment and Organ Transplantation' (2005) 27 Sociology of Health & Illness 92.
[50] Charles W Schmidt, 'The Yuck Factor: when Disgust meets Discovery' (2008) 116 Environ Health Perspect 524.
[51] W Hulme and others, 'Factors Influencing the Family Consent Rate for Organ Donation in the UK' (2016) 71 Anaesthesia 1053, 1059.
[52] Jackson (n 23) 590.
[53] S Razaq and M Sajad, 'A Cross Sectional Study to Investigate Reasons for Low Organ Donor Rates amongst Muslims in Birmingham' (2006) 4 The Internet Journal of Law, Healthcare and Ethics <http://print.ispub.com/api/0/ispub-article/13225> accessed 10 November 2016.
[54] Michael Oliver, Alexander Woywodt, Aimun Ahmed and Imran Saif, 'Organ Donation, Transplantation and Religion' (2011) 26 Nephrol Dial Transplant 437, 438.
[55] Mufti Mohammed Zubair Butt, 'Islam, Organ Donation' (*NHS Blood & Transplant*, 2010) <https://www.organdonation.nhs.uk/about-donation/what-does-my-religion-say/islam/> accessed 10 November 2016.
[56] Hendrik P van Dalena and Kène Henkensa, 'Comparing the Effects of Defaults in Organ Donation Systems' (2014) 106 Social Science & Medicine 137, 138.
[57] Organ Donation Taskforce (n 27) 13.
[58] ibid.

the law … law needs re-examination to determine how far it fits the society it purports to serve' is applicable in this context.[59] As reiterated throughout this paper, the concept of 'donat[ing] organs … is acceptable to most of the public'; hence the opt-out model is the optimum model in manifesting the common belief that law should reflect society.[60] Aristotle stated 'lawgivers make men good by habituating them to good works'; and an opt-out model would lead to positive implications for humankind.[61] Therefore, alongside an informative campaign, this model should be adopted in England.

[59] Karl N Llewellyn 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harv L Rev 1222, 1236.
[60] Leith (n 39) 1036.
[61] Aristotle, *Nicomachean Ethics* (Terence Irvin tr, 2nd edn, Hackett Publishing 2000).

SOFT SOVEREIGNTY: A POSSIBLE BASIS FOR THE LEGALITY OF HUMANITARIAN INTERVENTION

Adam Rowe[*]

1 INTRODUCTION

Humanitarian intervention is a topic of considerable controversy within international law scholarship. For the purposes of this article it will be defined as a use of force, not authorised by the Security Council, undertaken by a state or a coalition of states, with the intention of preventing or halting humanitarian atrocities being committed in another state.[1]

To provide a brief history of the doctrine, humanitarian intervention was treated as legally acceptable in the 19th Century. However, after suffering the paroxysms of two world wars, the international community founded the United Nations. The UN Charter prohibited the use of force in interstate relations, save for in two carefully controlled circumstances:[2] a state may employ force for reasons of self-defence,[3] or pursuant to the authorisation of the Security Council, the body tasked with primary responsibility for the maintenance of international peace and security.[4] Within such a restrictive framework, and enjoying no explicit exemption, humanitarian intervention appeared to have been outlawed as an illegal use of force.[5]

However, the factional and antagonistic behaviours of the permanent Security Council members, particularly over the course of the Cold War, have frequently reduced the body to a state of paralysis in the face of international crises and humanitarian disasters.[6] Confronted by such inertia, and recognising the moral imperative of action, states have occasionally taken it upon themselves to intervene and halt a government that is committing atrocities. Examples of such conflicts include: the Indian intervention into East Pakistan; the NATO intervention into Kosovo; and the establishment of 'no fly-zones' over Iraq.[7] A contemporary example of humanitarian intervention is the recent US attacks against the forces of the Assad regime in Syria, who are engaged in releasing chemical weapons against the Syrian people.[8]

It is not the purpose of this article to evaluate the desirability of humanitarian intervention. That has been discussed at length elsewhere.[9] This article will limit itself to assessing the potential legality of humanitarian intervention. The various arguments surrounding this issue are many and diverse, including the discussion of customary international law,[10] novel readings of the UN Charter,[11] and so forth. This article will not focus upon these issues with any particular detail, but will instead centre upon the heated debate surrounding state sovereignty.

State sovereignty is considered one of, if not the, foundational principle of modern international law,

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[1] Ryan Goodman, 'Humanitarian Intervention and Pretexts for War' (2006) 100 AJIL 107, 108.

[2] Francis Kofi Abiew, The Evolution of the Doctrine and Practice of Humanitarian Intervention (Kluwer Law International 1999) 65.

[3] UN Charter, art 54.

[4] ibid ch VII.

[5] Abiew (n 2) 66.

[6] Thomas Weiss, 'The Illusion of Security Council Reform' (2003) 26 The Washington Quarterly 147, 148.

[7] Carrie Booth Walling, 'Human Rights Norms, State Sovereignty, and Humanitarian Intervention' (2015) 37 Hum Rts Q 383, 384.

[8] Chiara Palazzo and Peter Foster, '"Assad Bears Full Responsibility": How the World Reacted to Donald Trump's Missile Strike on Syria' *The Telegraph* (London, 7 April 2017) <www.telegraph.co.uk/news/2017/04/07/us-air-strike-syria-world-reacted-donald-trumps-decision-intervene> accessed 21 August 2017.

[9] Jennifer Welsh, 'Taking Consequences Seriously: Objections to Humanitarian Intervention' in Jennifer Welsh (ed), *Humanitarian Intervention and International Relations* (OUP 2004) 52.

[10] Milena Sterio, 'Humanitarian Intervention Post-Syria: A Grotian Moment' (2014) 20 ILSA J Int'l L 343.

[11] Adam Roberts 'The United Nationa and Humanitarian Intervention' (n 9) 71.

emanating from the Peace of Westphalia.[12] It leaves each state the undisputed sovereign of its own territory and domestic affairs, insulated from interference by external powers, so long as it too refrains from intruding in the internal government of other states.[13] The doctrine, in this formulation, has been rigorously assaulted, as its invocation is seen as a ploy to permit a government absolute freedom to commit whatever atrocities it can imagine against its own people. Scholars, infuriated by this perceived failing of international law, argue that sovereignty is not absolute or impermeable, but is conditional upon certain rights of the people being respected, and may be lost.[14] This debate is of such interest because state sovereignty is, essentially, the fabric of international law. It represents its core organising idea. To discuss state sovereignty is to discuss the heart of international law.[15]

In the course of this article, it shall be demonstrated that sovereignty cannot provide a useful conceptual tool in the evaluation of humanitarian intervention, with it being susceptible to criticisms of subjectivity and incoherence.

In making this argument, this article will begin by outlining the various political philosophical approaches to sovereignty. Adopting the arguments of the social contract theory and cosmopolitanism, humanitarian intervention may be justified. However, such philosophical approaches will be seen to render sovereignty unworkably subjective, making the determination of humanitarian intervention's legality dangerously conditional upon individual choice. Advancing from this, we will consider attempts to escape this criticism by connecting conditional sovereignty with current trends in state practice. Focusing upon the normative developments of international human rights law and the Responsibility to Protect doctrine, it shall be argued that state practice does not at present accord with conditional sovereignty. More importantly, relying upon the work of Koskenniemi, it will be seen that justifying a normative position on the grounds of state practice is fundamentally incoherent, rendering sovereignty incapable of raising humanitarian intervention to a condition of lawfulness.[16]

With the discussion of sovereignty thus caught between unworkable subjectivity and incoherence, it is submitted that the doctrine must be reconceptualised if it is to provide a useful contribution to the assessment of humanitarian intervention. Accordingly, what this paper proposes is a revised understanding of sovereignty, which I shall term 'soft sovereignty'.

Under this model, the nature of sovereignty is seen to derive from, and be representative of, the political culture that characterises and structures international relations. Sovereignty is, therefore, recognised as an inherently political doctrine, rather than a strictly legalistic one. To avoid the objections of subjectivity and incoherence, our formulation of sovereignty will be understood as a guiding political principle, and thus incapable of directly determining questions of legality. It becomes, in effect, a standard of appropriateness.

Soft sovereignty can, therefore, only suggest that humanitarian intervention be considered lawful or unlawful. Ultimately, I will argue that the international community is still based upon the traditional principles of non-intervention and the maintenance of global stability. Since sovereignty is representative of this political culture it must, accordingly, recommend that humanitarian intervention remain unlawful.

2 SOVEREIGNTY, LIBERAL PHILOSOPHY, AND HUMANITARIAN INTERVENTION

Sovereignty is described as the principal normative code of the international legal system. Traditionally understood, the concept provides that each state is at liberty to manage its internal affairs without the intrusion of foreign powers. This has the necessary corollary that each state must not intervene, absent permission, in the domestic affairs of another sovereign state.[17]

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[12] Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law' in Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 115−116.
[13] ibid 117.
[14] Henry Shue, 'Limiting Sovereignty' in Jennifer Welsh (ed), *Humanitarian Intervention and International Relations* (OUP 2004) 11.
[15] Martin Loughlin, 'Ten Tenets of Sovereignty' Neil Walker (ed), *Sovereignty in Transition* (Hart 2003) 55–56.
[16] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company 1989).
[17] Malcolm Shaw, *International Law* (7th edn, CUP 2014) 15.

Taking this traditional formulation of sovereignty, one might wonder as to how it can provide a justification for humanitarian intervention. It is, in essence, an invasion of another state, and thus constitutes a coercive interference in the domestic affairs of that state.[18] An indicative example of this interpretation are the statements made by the Foreign Minister of the former Yugoslavia, Zivadin Jovonvic, in response to the self-styled humanitarian intervention of NATO forces in Kosovo, condemning the intervention, stating that it 'undermines the sovereignty and territorial integrity of the FRY'.[19]

This interpretation of sovereignty, however, has been subject to rigorous criticism and revision by liberal philosophical thought. A prominent modern proponent of this trend is the former UN Secretary-General Kofi Annan. He contends that the focus upon states as abstract entities is misplaced. Such things are theoretical constructs, and one must pierce through the artifice and recognise that it is 'the human being that is the centre of everything.'[20] Progressing with this line of thought, Annan suggests that 'the concept of national sovereignty was itself conceived to protect the individual'.[21] Teson adamantly supports these propositions. Sovereignty, he comments, should not be understood as enjoying some inherent value. A more probing analysis would see that it can only have an instrumental value, to the extent that it is conducive to supporting and furthering 'valuable human ends'.[22] What these authors strive for is an appreciation of sovereignty that sees it only as a tool to protect a state's citizen body. The true source of this sovereignty must, therefore, rest with the people.

The style of reasoning commentators such as Annan and Teson utilise can be collectively labelled as the 'social contract theory' of human relations.[23] The school of thought enjoys a rich pedigree in the Western philosophical tradition, being encapsulated and handed down to posterity in the works of the great Enlightenment authors, epitomised in Rousseau's *The Social Contract.*[24] Indeed, such ideology has heavily informed great epochs of Western history, including such events as the American and French Revolutions.[25] In the latter, Napoleon, in a denunciation of royalism, commented that the 'domination of European kings was usurpation of society's sovereignty'.[26]

With such an interpretative gloss placed upon the concept of sovereignty, humanitarian intervention ceases to pose a difficulty, and may in fact be conceived as an instrument to uphold sovereignty. Reisman, in elaborating upon this, argues that if sovereignty 'can be violated as effectively by an indigenous force as an outside one', then the restitution of that sovereignty can be achieved as effectively by an internal or external force.[27] A government exercises its claim to sovereignty derivatively, and if it engages in mass atrocities against its people then its claim to sovereignty is forfeited.[28] A third state employing force to frustrate or halt such abuses is not a violation of national sovereignty, but rather, an attempt to uphold it.[29]

However, if this social contract understanding of sovereignty is adopted, its capacity to allow for humanitarian intervention may be more restricted than might be supposed. A government can only be said to have breached the 'contract' if it no longer represents the interests of the majority of its people.[30] Accordingly, if a government, supported by the majority of the population, engaged in atrocities against a minority group, it would not forfeit its claim

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[18] Andrew Field, 'The Legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority' (2000) 26 Mon LR 339, 340.
[19] ibid.
[20] Kofi Annan, 'Peacekeeping, Military Intervention, and National Sovereignty in Internal Armed Conflict' in Jonathan Moore (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Rowman & Littlefield 1999) 57.
[21] ibid 68.
[22] Fernando Teson, 'The Liberal Case for Humanitarian Intervention' in JL Hozgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 97.
[23] Stephen Garrett, *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (Praeger 1999) 182.
[24] Jean-Jacques Rousseau, *Of the Social Contract and Other Political Writings* (first published 1762,Penguin 2012).
[25] David Andress, *The Terror: Civil War in the French Revolution* (Abacus 2006).
[26] Stephen Englund, *Napoleon: A Political Life* (Harvard University Press 2004) 64.
[27] Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 866, 872.
[28] ibid 873.
[29] ibid 867−72.
[30] Adam Roberts, 'The So-Called 'Right' of Humanitarian Intervention' (2000) 3 YIHL 3, 21.

to sovereignty.[31] Therefore, appalling humanitarian disasters such as the genocide in Rwanda would fall outside the ambit of intervention.

To avoid this alarming conclusion, commentators have supplemented the social contract theory with recourse to 'cosmopolitanism'. This philosophical tradition has a longer history than that of the social contract, locating its roots in Ancient Greece and boasting such practitioners as Tulius Cicero.[32] According to Pierik and Werner, cosmopolitanism can be described as a commitment to a common humanity.[33] As they put it: '[t]his cosmopolitan notion of common humanity translates normatively into the idea that we have moral duties towards all human beings'.[34] This duty is justified on the grounds that each and every individual is the 'ultimate unit of moral concern'.[35] Allott concurs with this assessment, concluding that the international legal system is one for 'disaggregating the common interest of all humanity, rather than merely a system for aggregating the self-determined interests of states'.[36]

Taking this philosophical doctrine into consideration, humanitarian intervention would be normatively justified in instances such as that of Rwanda. Cosmopolitanism, to borrow from Teson, 'rejects attempts at locating political morality in overlapping consensus, or other forms of majority validation.'[37] Our common humanity creates a moral obligation to assist the persecuted minority, regardless of the majority's acquiescence or support for the discrimination.

3 SOVEREIGNTY AND SUBJECTIVITY

Philosophical approaches to sovereignty are, however, problematic. It will be demonstrated in the proceeding section that sovereignty, viewed from such a perspective, is deeply subjective, and, therefore, is ill suited to determinations of legality. This subjectivity can be seen in a narrow sense of whether Western cultural values should be given universal application, but also in a wider ideological struggle between humanitarianism and stability. It is not our purpose here to engage in a philosophical analysis of which position is to be preferred. That is beyond the scope of this paper. It will suffice for the present to simply demonstrate the internal conflicts of sovereignty, and its inherent subjectivity.

3.1 The Universality of Western Doctrine

Turning to our first point of contention, the raising of Western cultural traditions to universal status can be questioned. Koskenniemi is very cognisant of the potential inappropriateness of claims to universality. He cautions that 'claims to humanity are always infected by the particularity of the speaker, the world of his or her experience, culture and profession'.[38] Moral truths and values are therefore, at least to some extent, 'the product of socialisation' and related to 'the society that produced them'.[39] In appreciation of this, Western values should only be considered applicable to the West. To insist on their acceptance outside of that sphere is to forcibly impose a subjective standard of moral 'good' on others whose culture may have produced an equally valid, but contrasting, conception of morality.

This aggrandising of one subjective moral doctrine carries with it a potential danger. Distancing ourselves from the moralistic rhetoric and professions of pure intent, such arguments might appear as little more than sinister camouflage for once more equating Western values with the standard of civilisation, and requiring the various states of the world to conform or face military coercion.[40] Indeed, such misgivings have promoted retrospective comparison with the 'civilising' mission of 19th Century imperialism.

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[31] ibid 22.
[32] Jonathan Gilmore, 'Protecting the Other: Considering the Process and Practice of Cosmopolitanism' (2014) 20(3) European Journal of International Relations 694, 696.
[33] Roland Pierik and Wouter Werner, 'Cosmopolitanism in Context' in Roland Peirik and Wouter Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 1−2.
[34] ibid 3.
[35] Thomas Pogge, *World Poverty and Human Rights* (Polity Press 2002) 169.
[36] Philip Allott, 'The Concept of International Law' (1999) 10 EJIL 31, 42.
[37] Teson, 'The Liberal Case for Humanitarian Intervention' (n 22) 101.
[38] Martti Koskenniemi, 'Projects of World Community' in Antonio Cassesse (ed), *Realising Utopia: The Future of International Law* (OUP 2012) 3.
[39] Michael Freeman, 'Universalism of Human Rights and Cultural Relativism' in Scott Sheeran and Sir Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge 2013) 51.
[40] BS Chimni, 'Sovereignty, Rights, and Armed Intervention: A Dialectical Perspective' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (CUP 2010) 311.

Scholars such as Todorov[41] and Ayoob[42] are very impressed by this lurking danger, and offer a powerful critique. They characterise Western professions of universality as 'might making right',[43] and a flimsy excuse for the powerful states to impose their will and culture on the weak.[44] It is a practice that reduces developing states to the condition of 'feeble-minded children' who, for their own good, need to be placed under the supervision of the strong and mature Western states, and 'punished for infringements of the rules'.[45]

Such arguments have a particular resonance in our contemporary society, which displays a keen sensitivity for cultural diversity and acceptance. To insist on the West's moral superiority would likely invite criticisms of ignorance and hubris. Notwithstanding this, the subjectivity of cultural morality has been subjected to doubts that must be addressed.

On a preliminary note, the supposed connection between imperialism and liberal doctrine might be questioned.[46] The writings of Freeman are useful in this regard. He comments that 'the idea of human rights, precisely because it is egalitarian and universalistic, far from being imperialistic, provides a basis for criticising imperialism.'[47] Indeed, the aggressive acquisition of territory would, amongst other things, violate the right of self-determination, which is located not only in the Universal Declaration of Human Rights,[48] but in both the Civil[49] and Social Human Rights Covenants.[50] Perhaps, from a certain perspective, it might be said that it is cultural relativism that poses the least protection from the imperialistic desires of states. Its logic would require us to be accepting of those cultures that are aggressive and warlike, providing no grounds by which to condemn them.[51]

However, while Freeman's rebuttal of the relationship between liberalism and imperialism might appear convincing in the abstract, the situation in reality tells against it. It should be recalled that humanitarian intervention, and the liberal philosophy that underpins it, has been abused in the past.[52] It was employed as a salutary justification for the notorious invasion of Iraq in 2003, and the Russian incursion into Georgia in 2008.[53] Glanville has argued that the wrongful application of a practice should not be confused with its moral validity, but such fine distinctions are of little consolation for the invaded territories.[54]

Of more fundamental importance for our purposes are those arguments that reject notions of morality as being subjective and relative to culture. Indeed, it has been submitted that the universal application of a doctrine can be justified on an objective basis. In this vein, Teson adroitly argues that the Western origins of the liberal position cannot sensibly be construed as determinative of its validity.[55] This assessment can only be achieved through objective rationalisation of how, and to what extent, liberal principles benefit a given society or peoples.[56] Accordingly, '[t]he liberal can concede that the views he defends are Western,

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[41] Tzvetan Todorov, 'The Responsibility to Protect and the War in Libya' in Don E Scheid (ed), *The Ethics of Armed Humanitarian Intervention* (CUP 2014) 46.
[42] Mohammed Ayoob, 'Humanitarian Intervention and State Sovereignty' (2002) 6(1) International Journal of Human Rights 81, 85.
[43] Todorov (n 41) 50.
[44] ibid.
[45] ibid 51.
[46] Fernando Teson, 'The Moral Basis of Armed Humanitarian Intervention Revisited' in Don E Scheid (ed), *The Ethics of Armed Humanitarian Intervention* (CUP 2014) 63.
[47] Freeman (n 39) 53.
[48] Universal Declaration of Human Rights 1948, art 1.
[49] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1.
[50] International Covenant on Social, Economic and Cultural Rights (ICSECR) (adopted and opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 1.
[51] Freeman (n 39) 52.
[52] Luke Glanville, 'Armed Intervention and the Problem of Abuse After Libya' in Scheid (ed), *The Ethics of Armed Humanitarian Intervention* (n 41) 157.
[53] Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 51−53.
[54] Glanville (n 52) 158.
[55] Teson, 'The Liberal Case for Humanitarian Intervention' (n 22) 100.
[56] ibid.

and still maintain that they are the better views.'[57] In support of this, one can propose several means by which liberal doctrines could bring benefits to the peoples of developing and non-Western countries. The freedom from torture,[58] arbitrary arrest and punishment,[59] but also the rights to an adequate standard of living,[60] and to receive an education,[61] cannot sensibly be construed as detrimental. In something of a final snub, it has been suggested that 'the appeal to cultural relativism by non-Westerners is sometimes less an objection to human rights than to western hegemony'.[62] 'Cultural assertiveness',[63] from this perspective, is more a question of pride.

While these criticisms do have merit, there are aspects which might be taken issue with. The latter point regarding 'pride' may be worth dwelling upon. For a start, one has to recollect that humanitarian intervention, and the liberal ideology that informs it, is an instrument that is visited upon weaker states, not against the powerful who wield it.[64] It is, therefore, unnecessarily derogatory to accuse these developing states of 'pride' when resisting such a development in international law. If anything, exercising caution before acquiescing to the strong possessing a right to humanitarian intervention is eminently sensible.[65]

Finally, the ability to objectively argue for a culture's moral superiority may be deeply misguided. It is submitted that to defend such a position is to ignore the intense emotional significance of cultural norms and their role in constituting national identity.[66] One might take Sharia law in the Middle-East as a topical example. Its tenets, especially those regarding the place of women in society, utterly contravene the liberal position, and would likely be rejected under Teson's detached assessment. However, this is the legal regime that has been used in the region for over a thousand years, and Islam's faithful believe it to be the will of God. To denounce Sharia law and demand the adoption of liberal philosophy would be to outrage the populace's deepest emotional sensibilities.[67] These are not issues that are entirely suited for detached, clinical evaluation of their efficiency or desirability.

Perhaps instead of perceiving toleration as 'cultural relativism', we should instead consider it 'cultural empathy'. We can attempt to understand why another culture holds conflicting values to our own, and, in light of that, refrain from insisting their beliefs fail on a cold, rational assessment. However, empathy does not entail blindly accepting whatever that another state does, making reaction against aggression or egregious conduct permissible. Of course, this proposition requires further expansion, which is, unfortunately, beyond the scope of this paper. Notwithstanding this, it suffices for our purposes to note that the objective, clinical assessment of morality proposed is tenuous.

3.2 A Wider Struggle: Stability against Humanitarianism

Leaving this debate aside, the discussion of sovereignty is not simply confined to a dialectic between Western liberalism and cultural relativism. This is merely a small sub-conflict, so to speak, and the expansion of our focus allows us to identify a broader struggle between the moral content of the liberal position and that encompassed in the traditional understanding of sovereignty. The recognition of this, and the absence of any resolution or reconciliation, leads to the observation that sovereignty, as a normative concept, is inherently subjective.

Far from being a neutral doctrine, the traditional understanding of sovereignty has a prominent moral agenda for securing stability and peaceful relations among states.[68] The chronic warfare which has afflicted Europe for most of its history, with its

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[57] ibid 100.
[58] United Nations Convention Against Torture (adopted and opened for signature 10 Dec 1984, entered into force 26 June 1987) 1465 UNTS 85.
[59] ICCPR, art 9.
[60] ICSECR, art 11.
[61] ibid art 13.
[62] Freeman (n 39) 53.
[63] ibid 54.
[64] Chimni (n 40) 311.
[65] ibid 312.
[66] Peter Katzenstein, The Culture of National Security: Norms and Identity in World Politics (Columbia Univeristy Press 1996) 57−60.
[67] Michael Radu, 'Putting National Interest Last: The Utopianism of Intervention' (2005) 7 Global Dialogue 76, 82−84.
[68] Anthea Roberts, 'Legality Versus Legitimacy: Can Uses of Force be Illegal but Justified?' in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 185.

ineluctable products of destruction and loss of life, underscores the moral and practical requirement of such a doctrine.[69] In recognition of this, Weil has described the facilitating of states to coexist side by side, and to conduct peaceful relations, as the primary goal of international law.[70] The abandonment of a stabilising model of sovereignty in favour of one characterised by a very particular ideology, that provides normative space for conflict, would threaten the stability of the international community, occasion friction and animosity between states, and 'grease the wheels of intervention'.[71]

This is not to say that Weil rejects the moral concerns underpinning conditional sovereignty and cosmopolitanism. To some extent he shares in them, commenting that the 'shifting of the axis of international law away from the state and towards the international community would undoubtedly represent a decisive step forward'.[72] However, with respect to the present condition of that community, he dismisses such ideas as dangerously utopian. Advances in interstate relations do not as yet correspond to the world envisaged by the normative doctrine of cosmopolitanism as the present structures of international society are not ready to accommodate it.[73] To insist on its adoption would be 'naively altruistic', and would be akin to crafting a key that is incapable of opening the door it was intended for.[74]

Of course, commentators aligned with the conditional sovereignty school strenuously reject the importance of the moral good achieved by the orthodoxy. On a simple note, some scholars, accustomed to decades of peace between the world's leading powers, dismiss the fears of warfare and global instability as being outdated.[75] Representative of this trend, Abiew argues that while a desire to prevent a repetition of conflict was legitimate in the aftermath of the Second World War, today 'the danger of world war has receded, while egregious violations of human rights have become a routine feature of international politics.'[76]

In support of Abiew, Kok-Chan Tan suggests that in keeping the paradigm of sovereignty purportedly neutral and separate from moralistic values, that in itself can occasion conflict.[77] In instances where the pacifism of sovereignty conflicts with a perceived moral imperative, 'parties will feel entitled to act on morality alone since the law seems inappropriate or silent'.[78] Watts affirms such a perspective by commenting that international law that is contradictory or in opposition to community values will be 'viewed as unimportant'.[79]

More controversial authors have laid aside generalised remarks regarding the possibility of warfare and challenged the very moral relevancy of maintaining stability in the international community. Caney presents us with an ideal example of this. He comments that the creation of instability should not in itself be perceived as morally wrong.[80] One could only reach such a conclusion if they 'attached supreme importance to preserving the international status quo'.[81] In light of this, 'the value of stability (including international stability) is a function of the value of the current arrangements.'[82] Teson expands upon this by arguing that the stability position 'privileges the jurisdiction of political regimes over the protection of human rights'.[83] The human cost of ignoring such rights and the plight of human suffering outweighs the

[69] Antonio Franceshet, 'Kant, International Law, and the Problem of Humanitarian Intervention' (2010) 6 Journal of International Political Theory 1, 2.
[70] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 413, 418.
[71] Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 21, 29.
[72] Weil (n 70) 441.
[73] ibid 442.
[74] ibid.
[75] Welsh (n 9) 63.
[76] Abiew (n 2) 73.
[77] Kok-Chan Tan, 'Enforcing Cosmopolitan Justice: The Problem of Intervention' in Roland Peirik and Wouter Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP 2010) 164.
[78] ibid 165.
[79] Arthur Watts, 'The Importance of International Law' in Michael Byres (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 12.
[80] Simon Caney, 'Humanitarian Intervention and State Sovereignty' in Andrew Valls (ed), *Ethics In International Affairs: Theories and Cases* (Rowman & Littlefield Publishers 2000) 124.
[81] ibid 125.
[82] Ibid 124.
[83] Teson, 'The Liberal Case for Humanitarian Intervention' (n 22) 109.

desirability of preserving the world order that allows for such tragedies to occur.[84]

It is not our purpose to forward a conclusion to this moral debate, if such a thing were possible. The issue may be reminiscent of what Mullender characterised as 'uncombinability' and 'incommensurability'.[85] The former relates to where two goals have a clear moral desirability, but the pursuit of one necessarily precludes the other.[86] The latter is where the desired good of the competing objectives cannot be measured on the same scale. The decision in favour of one requires a subjective policy decision.[87] In the realm of tort, Mullender identified this tension between the pursuit of flexibility and that of certainty.[88] The application of uncombinability and incommensurability would appear equally applicable to the present issue. The maintenance of stability arguably frustrates humanitarian protection, and vice versa. Further, an objective analysis to determine which goal is morally superior would appear impossible. To the contrary, the assessment of which position to prefer is likely to be heavily subjective, and it suffices for this paper to demonstrate that reasonable people may reach reasonably diverging conclusions.

To illustrate this, this paper rejects claims of the universality of Western values, or the supplanting of international stability with the pursuit of cosmopolitan humanitarianism. History is replete with examples of states attempting to 'enlighten' a developing country with their culture, only to be met with aggression and escalated violence. Napoleon's attempt to bring revolutionary ideology to Egypt was met with rebellion and a jihad being declared against the French.[89] In contemporary times, Western interference in the Middle-East has occasioned enormous instability and the rise of extremist groups.[90] Further, claims that warfare between developed states is a feature of the past is dangerously complacent. The rising tensions between the West and Russia,[91] together with the dominance of the US being economically and militarily challenged by China, underscore the necessity of an international legal regime that defuses tensions, rather than inflaming them.[92] Finally, the latter comments by Teson are particularly tenuous. Destroying the prevailing international order on the altar of humanitarianism, and, in so doing, plunging the international community into a vicious, internecine conflict is hardly going to be an action that will be received warmly by many.

However, this is a personal assessment, and many would disagree with it. The overall point that is being stressed is that it is doubtful whether sovereignty, whose content appears amorphous and contextual on the opinions of the observer, can be considered a reliable or convincing ground to argue for an activity's legality or illegality. It would appear to be unworkably subjective.

4 SOVEREIGNTY AND STATE PRACTICE: AN ESCAPE FROM SUBJECTIVITY?

To escape accusations of subjectivity, scholars have attempted to align the conditional interpretation of sovereignty with state practice. Commentators stress that law, if it is to be considered relevant by the international community, must be consonant with the factual realities of that community.[93] Progressing from this, such scholars contend that developments in international law and international relations have rendered the traditional conception of sovereignty obsolete, and the adoption of the conditional model as

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[84] ibid 128.
[85] Richard Mullender, 'Negligence, the Personal Equation of Defendants and Distributive Justice' (2000) 8 Tort L Rev 211, 219.
[86] ibid.
[87] ibid 219.
[88] ibid.
[89] Paul Strathern, *Napoleon in Eqypt: The Greatest Glory* (Jonathan Cape 2007).
[90] Richard Bordeaux, *The Politics of Miscalculation in the Middle-East* (Indiana University Press 1993); Joseph Lowry, 'The Fall and Rise of the Islamic State' (2011) 18(1) IL & S 124.
[91] Jose Ensor and Roland Oliphant, 'Tensions Rise as Russia Reinforces Syrian Air Defences and Warns of "Considerable Damage" to Ties with US After Missile Strike' *The Telegraph* (London, 7 April 2017) <www.telegraph.co.uk/news/2017/04/07/russia-halts-air-safety-deal-us-syria-warns-considerable-damage accessed > accessed 22 August 2017.
[92] Alex Spillius and Peter Foster, 'Analysis: The Worsening Relationship between America and China' *The Telegraph* (London, 1 February 2010) <www.telegraph.co.uk/news/worldnews/asia/china/7130310/Analysis-the-worsening-relationship-between-America-and-China.html> accessed 21 August 2017.
[93] Bryan Hekir, 'Military Intervention and National Sovereignty: Recasting the Relationship' in Jonathan Moore (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Rowman & Littlefield Publishers 1999) 40.

unavoidable.[94] Indeed, Anthony D'Amato has exuberantly hailed this development, and claimed that the 'jargon of statism' is already anachronistic.[95]

D'Amato makes similar arguments elsewhere, characterising sovereignty as being akin to a scientific paradigm.[96] To explain this, the particularities and shape of a given scientific field are organised by an overarching paradigm. Within astronomy, for example, that paradigm would be the 'Big Bang' theory. When experimental results conflict with the paradigm they can, if in small quantities, be dismissed as anomalies.[97] However, upon the accumulation of such anomalous data, 'there is a crisis in the field which is resolvable only by the substitution of an entirely new paradigm.'[98] From this perspective, the anomalous data, represented by developments in international law, is building up and the paradigm of traditional sovereignty, if it is to avoid crisis, must be revised.

Alternatively, Reus-Smit argues that 'sovereignty is a social norm, subject to the same constitutive processes as all other norms'.[99] This constitutive process requires that the norm be reflective of the social context in which it is situated. Ashley, in appreciation of such thought, stresses that the content of sovereignty is 'not fixed' but must 'evolve in a way reflecting the consensus among statesmen.'[100] Accordingly, if the behaviour of the international community has strayed away from strict notions of non-intervention, then such transitions must be reflected in the constitution and understanding of state sovereignty.

We will return to discuss the appropriateness of these theoretical devices in the subsequent section. For the present, we will assess whether state practice reflects the concept of conditional sovereignty as the above authors claim. The various developments to which commentators have drawn attention are many and varied.[101] An analysis of the entire spectrum is beyond the scope of this paper. So as not to unnecessarily dilute the depth of our examination, our attention will centre upon the two most prominent and debated areas within the academic literature, namely the establishment of international human rights law, and the 'Responsibility to Protect' doctrine. We will ultimately find that international law and society remain very distant from the cosmopolitan notions that characterise conditional sovereignty.

4.1 International Human Rights

The principal development within international law that might be employed to justify conditional sovereignty is the advent of International Human Rights Law (IHRL).[102] Much of the scholarship surrounding this area displays a prominent confidence, or hubris depending upon one's view, in its ability to reshape international law. IHRL has been likened to a genie being released from a bottle,[103] and seen as becoming infused into the very roots of the law.[104] This assurance is aptly demonstrated by the unambiguous remark by O'Meare:

> [T]he effect of the human rights movement is that the fulcrum of international law has shifted from the protection of sovereigns to people.[105]

It has to be conceded that there is considerable supporting evidence to condone the confidence of such scholars. IHRL has established a regime whereby a state's treatment of its citizens is subjected to various layers of standards and rules, ranging from the

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[94] Andreas Paulus, 'International Law and International Community' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 48.
[95] Anthony D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny' (1990) 84 AJIL 516, 519.
[96] Tony D'Amato, 'The Significance and Determination of Customary International Human Rights Law: Human Rights as Part of Customary International Law: A Plea For A Change of Paradigms' (1996) 25 Ga J Int'l & Comp L 47, 54.
[97] ibid 55.
[98] ibid 56.
[99] Christain Reus-Smit, 'Human Rights and the Social Construction of Sovereignty' (2001) 27 Rev Int'l Stud 519, 527.
[100] Richard Ashley, 'The Poverty of Neorealism' (1984) 38 Int'l Org 271, 286.
[101] Luke Glanville, 'The Myth of Traditional Sovereignty' (2013) 57 International Studies Quarterly 79, 92.
[102] David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002) 8 LEG 1, 9.
[103] Brunno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 EJIL 483, 492.
[104] Scott Sheeran, 'The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint, or Pushing the Boundaries?' in Scott Sheeran and Sir Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* (Routledge 2013) 108.
[105] Chris O'Meara, 'Should International Law Recognise a Right of Humanitarian Intervention?' (2017) 66 ICLQ 441, 446.

assurance of a fair trial[106] to the provision of primary education for children.[107] The manner in which a state fulfils these obligations is not simply left to its own discretion. Rather, the veil that once cloaked such domestic arrangements from external influence is torn.[108] Various monitoring bodies have been established to evaluate compliance, issuing reports and recommendations that are universally available for inspection.[109] Of noteworthy attention is the creation of the 'Universal Periodic Review' mechanism, by which the various state parties of the UN human rights treaties are invited to review and critique a fellow state's human rights record.[110] Finally, in a few admittedly exceptional cases, a human rights treaty establishes a judicial arm, invested with the capacity to hear claims by individuals of purported treaty violations.[111] In light of these developments, it would, at least on an initial inspection, appear to be a logical conclusion that traditional notions of sovereignty have been decisively challenged, and the dynamic between citizen and state transformed.[112]

Besides these unprecedented developments, what is even more remarkable still is the transformative influence IHRL appears to be exerting upon the secondary rules of international law. These represent the very bones and framework of the law, and are supposedly insulated from the development of primary norms. However, contrary to this, IHRL may have provoked a possible evolution.[113] Customary international law provides us with the most prominent and discussed example of this phenomenon.[114]

For the establishment of new customary law, two elements are traditionally required. The first of which is state practice and the second is what is referred to as *opinio juris* – the belief that a given behaviour is required by law.[115] IHRL has seemingly distinguished itself by dispensing with the strict duality of these components.[116] Several soft-law human rights treaties, including no less of an example than the foundational Universal Declaration of Human Rights, have mutated into binding custom. This was in spite of considerable state practice running directly to the contrary. Indeed, it is far from a closeted secret that states frequently undertake routine violations of the relevant rights.[117] To escape this shortcoming, the second element of *opinio juris* has been heavily relied upon, with several General Assembly resolutions and state proclamations affirming their commitment to human rights being cited as formidable evidence of this requirement.[118] The seemingly strong *opinio juris* was deemed to outweigh the contradicting state practice, and allow for the crystallisation of the soft-law treaty into a binding legal rule.[119] This, according to Sheeran, represented an abandonment of strict positivism, with the formulation of custom being directed and informed by normativity.[120] To stress the extent of the transformation of custom, Jennings was moved to comment that the developments being hailed as customary law did not, in fact, 'faintly resemble custom'.[121]

However, the influence of IHRL should not be exaggerated, for it exhibits distinct limitations. To begin, one must observe that the contents of human rights treaties, like any other legal instrument, are

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[106] ICCPR, art 9.
[107] International Covenant on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 15777 UNTS 3, art 28(a).
[108] Walling (n 7) 386.
[109] Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (CUP 2000) 124.
[110] Olivier de Schutter, *International Human Rights Law* (2nd edn, CUP 2014) 251.
[111] Dan Saxon, 'The Prosecution of Human Rights Abuses' in Thomas Cushman (ed), *Routledge Handbook of Human Rights* (Routledge 2012) 602.
[112] Anne-Marie Slaughter and Jose Alvarez, 'A Liberal Theory of International Law' (2000) 94 ASIL 240, 242.
[113] Sheeran (n 104) 101.
[114] Anthony D'Amato, 'New Approaches to Customary International Law' (2011) 105 AJIL 163.
[115] Michael Akehurst, 'Custom as a Source of International Law' (1974–5) 47 BYIL 1, 31.
[116] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1992) 12 Aust YBIL 82, 88.
[117] ibid 89.
[118] Frederic Kirgis, 'Custom on a Sliding Scale' (1987) 81 AJIL 146, 147.
[119] John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 OJLS 85, 96–97.
[120] Sheeran (n 104) 102.
[121] Robert Jennings, 'The Identification of International Law' in Bin Cheng (ed), *International Law, Teaching and Practice* (Stevens 1982) 5.

designed and shaped by states.[122] The various rights and monitoring mechanisms have not been imposed by an ulterior agent or higher normative power, but by a state's own consent. Consequently, far from being perceived as a detraction of state power and authority, IHRL would appear to be an emanation of it.[123] Human rights scholars acknowledge this, but contend that the resulting human rights treaties are not constrained to the statist paradigm that produced them. The content of such rights 'go beyond the proper scope and boundaries of states'.[124] They are 'transformative changes'.[125]

While the progression displayed in the primary norms is indeed extraordinary, human rights treaties suffer from prominent weaknesses that may render the supposed transformation more apparent than real. As Donnelly informs us, the enforcement powers of the IHRL regime are notoriously ineffective.[126] The Human Rights Council may issue reports and recommendations, but they carry no coercive force beyond a form of peer pressure.[127] Even if a treaty enjoys a judicial component to hear claims, as is the case with the Eurpoean Convention on Human Rights, its jurisdiction is based entirely upon the consent of the state parties, and one must remember that a state may simply ignore its verdict due to the court lacking any capacity to impose sanctions or reprisals.[128] This has prompted considerations of human rights treaties as 'softened' or 'defused' law.[129] Further, such instruments are typically encumbered by a quantity of reservations that exceed most other treaty regimes.[130] In appreciation of the above, the enjoyment of human rights would appear to be 'largely at the mercy of individual states.'[131]

Additionally, one can criticise the purportedly strong *opinio juris* human rights is claimed to enjoy. In this regard, Fabri has denounced the usage of IHRL in international relations as little more than political rhetoric.[132] She comments that human rights are 'almost never the direct and exclusive basis for international action, nor even the principal one.'[133] In reality, 'they are merely one diplomatic strategy amongst others'.[134] States employ the rhetoric or tool of human rights to undermine other states, enhance their own prestige or a host of other goals. Recognising this dynamic of human rights, Rieff questions whether 'the moral revolution has kept a single jackboot out of a single human face.'[135] On this appraisal, it becomes doubtful whether IHRL has influenced the meaning of sovereignty or the role of the state in any meaningful way. It might even be said that those who argue to the contrary are placing rhetorical style over substance.

Besides these somewhat Machiavellian considerations, a more fundamental critique can be proposed. As previously outlined, human rights are constituted through the same state-centred process as the rest of the corpus of international law. No positive legal authority is invested in the IHRL regime to exercise the alleged transformative influence over other conflicting legal rules and norms. Proponents of human rights are cognisant of this fact, but still reject accusations of displaying a 'human rights triumphalism'.[136] Sheeran locates the superior status of human rights in the 'inherent dignity of the human being as reflected in the views of legal theorists.'[137] Equally, Higgins suggests that human rights treaties 'reflect rights inherent in human beings, and are not dependent upon grant by the state.'[138] These comments would appear to connect back to the concepts of liberal

[122] Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1989) 12 Aust YBIL 22, 23.
[123] ibid 24.
[124] Held (n 102) 11.
[125] ibid 13.
[126] Jack Donelly, 'International Human Rights: A Regime Analysis' (1986) 40 Int'l Org 599, 933−936.
[127] Yvonne Dutton, 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms' (2012) 34 University of Pennsylvania Journal of International Law 1, 8.
[128] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, OUP 2014) 14.
[129] Simma and Alston (n 116) 89.
[130] DW Hill, 'Avoiding Obligation: Reservations to Human Rights Treaties' (2016) 60 J Conflict Resol 1129, 1136.
[131] Helene Ruiz Fabri, 'Human Rights and State Sovereignty: Have the Boundaries been Significantly Redrawn?' in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 72.
[132] ibid 75.
[133] ibid 76.
[134] ibid 75.
[135] David Reiff, A Bed for the Night: Humanitarianism in Crisis (Simon & Schuster 2002) 11.
[136]Alain Pellet, 'Human Rightism and International Law' (2000) 10 Ital Yrbk Intl L 1, 12.
[137] Sheeran (n 104) 107.
[138] Rosalyn Higgins, 'Human Rights: Some Questions of Integrity' (1989) 15 CLB 598, 607.

philosophy and cosmopolitanism, which identify human beings as being the *raison d'etre* of the state and law's 'fundamental unit'. This is supported by the writings of Megret. He identifies IHRL as marking 'the resurgence of a sort of denaturalised natural law that is an implicit rejection of positivism's scientific theory of sources.'[139] Therefore, a new norm or rule might be declared to be in existence, notwithstanding its failure to be justified in the strict doctrine of positivism, because they are believed to be 'morally and philosophically justified'.[140] The position, therefore, may be reduced to the following: human rights are interpreted as enjoying a transcendent position due to the higher moral and normative authority scholars believe they possess. Such an argument, however, betrays a central incoherence. How can IHRL be utilised as evidence for a normative position when it is reliance upon that very normative ideology that is informing the interpretation of human rights? The argument is entirely circular.

4.2 Responsibility to Protect

Besides the meteoric rise of IHRL, the other related development scholars typically draw upon to evidence conditional sovereignty is the emergence of the so-called "Responsibility to Protect" doctrine (R2P). To briefly describe the concept, R2P, as formulated by the 2005 World Summit Declaration, has three distinct pillars.[141] The first of which requires a state to protect the human rights of its citizens. The second provides that third party states have an obligation to provide assistance if a state is struggling in upholding pillar one. Finally, under the third pillar, if a state grossly fails to protect the human rights of its citizens, or is incapable of doing so, the Security Council may authorise forceful interventions in accordance with its Chapter VII powers to ensure compliance.[142]

Once again, this concept is accompanied by a similar insistence of its revolutionary potential. Rodin, in an illustrative example, has confidently asserted that 'the doctrine of R2P has successfully entrenched a conditional understanding of sovereignty that makes human rights the touchstone of sovereignty.'[143] There would appear to be some merit in this statement. Simply put, R2P represents the very essence of what proponents of conditional sovereignty have being striving towards. It couches a state's claim to sovereignty and non-intervention in terms of it respecting the rights of its citizens.[144] Sovereignty, as Orford states, 'becomes conditional'.[145] IHRL, in contrast, does not explicitly declare sovereignty to be conditional, but merely leans towards this interpretation. Such is the perceived extent of the break-through that R2P has been hailed, by some, as 'the most important normative development since the conclusion of the UN Charter.'[146]

However, such commentary may be precipitous, with R2P arguably not being the progressive doctrine one might suppose. The most immediate objection to its influence is that it is not considered binding law.[147] The 2005 Declaration is a soft-law instrument and establishes no legally binding obligations. This deliberate decision to frame R2P in non-legally binding terms could be taken as evidence for a lack of support for the doctrine, and that states are not prepared to commit to it.[148] Falling back on the traditional recourse of ostensibly non-binding human rights instruments, it has been suggested that R2P can obtain legal force by evolving into customary law.[149] There are some grounds for guarded optimism on this point. The 2005 World Summit Declaration was signed by a preponderance of the international community. Additionally, the doctrine was invoked by the Security Council in its Resolution authorising intervention into Libya to protect civilians. The ensuing military operation, conducted by NATO, was

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[139] Frederic Megret, 'International Human Rights Law Theory' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 221.
[140] ibid.
[141] Spencer Zifcak, 'The Responsibility to Protect' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014) 115.
[142] ibid 116.
[143] David Rodin, 'Rethinking Responsibility to Protect: The Case for Human Sovereignty' in Don E Scheid (ed), *The Ethics of Armed Humanitarian Intervention* (CUP 2014) 248.
[144] Richard Barnes and Vassilis Tzevelokas, *Beyond Responsibility to Protect: Generating Change in International Law* (Intersentia 2016) 10.
[145] Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 146.
[146] Jan Klabbers, *International Law* (2nd edn, CUP 2017) 215.
[147] O'Meara (n 105) 446.
[148] David Chandler, 'The Responsibility to Protect? Imposing the Liberal Peace' (2004) 11 IP 58, 62.
[149] Monica Hakimi, 'Towards a Legal Theory on the Responsibility to Protect' (2014) 39 Yale J Int'l L 247, 249.

hailed, at least by some, as an enormous success.[150] Given the incantatory power of human rights related instruments to shed the inconveniencing requirements of traditional custom, one might expect R2P, on the strength of this evidence alone, to effect a similar transformation.

However, this has not occurred, with the weight against R2P's legality proving too much for the magic of human rights to surmount. Even Peters, a staunch proponent of R2P, has been forced to concede that the 'crystallisation of R2P into hard law is incomplete and remains precarious'.[151] The reasoning behind this is twofold. Firstly, the ostensible success of the Libya action was not unmitigated. The Security Council Resolution authorising the intervention limited military action to the protection of civilians.[152] NATO, however, appeared to expand its operations beyond this remit, and proceeded to destroy the Gaddafi regime in its entirety.[153] The influential BRIC states certainly saw events this way, and united to condemn what they perceived as scarcely veiled regime change and Western attempts at global hegemony.[154] This backlash, in conjunction with R2P's failure to exert any influence in halting the murderous atrocities being committed by the Assad regime in Syria, has led to the belief that the R2P experiment has stalled, if not failed.[155]

Notwithstanding the legal enforceability of the doctrine, one might postulate that R2P can still exercise an informal, qualitive influence on the international community. It could be argued that the doctrine injects ideas of conditional sovereignty into the international dialogue, whereby the legitimacy of states and governments is increasingly appraised in the light of their respect for human rights.[156] This might be dismissed on the grounds that it is impossible to empirically assess, but one can also return to the criticisms that were directed against IHRL as constituting political rhetoric. If states do decide to employ ideas of R2P in their interactions with other states one can doubt their sincerity. States, being aware of the doctrine's legal impotency, may feel safe to utilise it in their dealings and proclamations *precisely* because of that fact.[157] If such 'law' came to prejudice their own interests in the future, a state can quickly abandon it. The conflict in Syria and the failure of R2P provides a melancholy example of this limitation. Russia and China have blocked any motions in favour of forceful intervention to halt the egregious violations being perpetrated by the Assad regime. Millions have been displaced as refugees, and the crisis has been recognised as the humanitarian disaster of this generation.[158] Contrary to Anthony D'Amato, it is the jargon of conditional sovereignty that would appear anachronistic in appreciation of such an awful event being allowed to occur.

To conclude this section, it is submitted that the transformative effects of IHRL and R2P are much overstated. It is true that, to meet a moment of particular exigency, customary law has been amended or warped. However, this cannot be inflated to herald a new epoch of international law. A slight change in the operation of customary law does not reflect the notions of a 'common humanity' that characterise cosmopolitan thought. Of course, one might say that the developments of IHRL and R2P mark the beginning of a trend, and that the pendulum of progress will swing yet further towards law's 'humanisation'.[159] It is always tempting to identify trends or patterns in international legal development and then insist that the law must inexorably march in that direction.[160] Restraint, however, should be exercised. Much of the law's progression will be subject to the political

[150] Jonah Eaton, 'An Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect' (2011) 32 Mich J Intl L 765, 779−782.
[151] Anne Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 EJIL 513, 524.
[152] Security Council Resolution 1973 (17 March 2011) UN Doc S/RES/1973.
[153] Geir Ulpstein and Hege Christiansen, 'The Legality of Nato Bombing in Libya' (2013) 62 ICLQ 159, 163−168.
[154] Alex Bellamy, 'The Responsibility to Protect and the Problem of Regime Change' in Don E Scheid (ed), *The Ethics of Armed Humanitarian Intervention* (CUP 2014) 170.
[155] Justin Morris, 'Libya and Syria: R2P and the Spectre of the Swinging Pendulum' (2013) 89 Int'l Aff 1265, 1268.
[156] Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 AJIL 99, 116.
[157] Arthur Watts, 'The Importance of International Law' in Michael Byres (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 12.
[158] Jean-Marc Coicaud, 'International Law, The Responsibility to Protect and International Crises' in Ramesh Thakur and William Maley (eds), *Theorising the Responsibility to Protect* (CUP 2015) 163.
[159] Sheeran (n 104) 107.
[160] Benoit Mayer, 'Realising Whose Utopia? The Structure of Normative International Law Arguments' (2014) 27 LJIL 537, 543.

agreements and temperaments of states, making it unwise to speak of trends with a tone of finality.[161]

Convinced of the supposed transformation of the international community, Thakur was moved to declare that traditional sovereignty had 'gone with the wind'.[162] Such a comment would appear deeply premature, and it might be suspected that individual lex ferenda desires are fuelling it. Perhaps, in overall summary, Roberts and Kingsbury offer the most realistic and sagacious remark: 'international society has been modified but not transformed.'[163]

5 THE INCOHERENCY OF CONDITIONAL SOVEREIGNTY

The criticism of allying conditional sovereignty to state practice is not, however, limited to a simple evaluation of that practice. The law is in a permanent condition of evolution, and the previous discussion of IHRL and R2P may become irrelevant in subsequent years. What is of more fundamental importance is the realisation that justifying a normative doctrine by state practice is entirely incoherent and self-defeating. In making this argument, the writings of Koskenniemi offer a vital insight.

He suggests that international law is inherently indeterminate,[164] and is caught between what he refers to as 'descending' and 'ascending' legal arguments.[165] The former relates to moral and normative codes that are deemed to be superior to, and independent of, state behaviour.[166] The latter refers to state practice itself being constitutive of what the law is.[167] The positions are irreconcilable, and accuse the other of subjectivity.[168] The descending branch perceives ascending arguments as overly compliant to the subjective political desires of states, making it an apology for law. Ascending arguments perceive normative and moral codes as inherently subjective, with their content being heavily dependent on what opinions an observer might hold.[169] Further, a moral code that is unduly divorced from the realities of state practice is open to accusations of being utopian.[170] International law has of yet proven incapable to decisively decide in favour of which position takes precedence, or to clarify the relationship between them.[171] To favour one approach is to invite the criticism of the other. Because of this, 'doctrine is forced to maintain itself in a constant movement from emphasising state practice to emphasising normativity'.[172] It results in 'incoherent arguments' that 'exist in happy confusion, unaware of their own internal contradictions.'[173] With such inherent indeterminacy, international law 'is singularly useless as a means of justifying or criticising international behaviour.'[174]

Conditional sovereignty as a means of justifying humanitarian intervention is exemplary of Koskennemi's criticisms. The philosophical approach to sovereignty, which sees social contract theory and cosmopolitanism informing its interpretation, is representative of descending style arguments, and can be criticised for being overly subjective. To escape such denunciations, scholars have been obliged to justify the normative position by reference to supporting state practice and legal developments. As Koskennimi prescribed, however, such a tactic is incoherent.

In tying the normative to state practice, the supposedly higher status of the norm is lost. Sovereignty would be little more than a 'collective or umbrella term, denoting the rights which, at a given time, a state is accorded by international law, and the

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[161] ibid 544.
[162] Ramesh Thakur, 'Global Norms and International Humanitarian Law: An Asian Perspective' (2001) 83 International Review of the Red Cross 35, 36.
[163] Adam Roberts and Benedict Kingsbury, 'The UN's Role in International Society Since 1945' in Adam Roberts and Benedict Kingsbury (eds), *United Nations: Divided World* (2nd edn, OUP 1993) 11.
[164] Koskenniemi (n 16) 8.
[165] ibid 40.
[166] ibid 41.
[167] ibid.
[168] ibid 46.
[169] ibid 42.
[170] ibid.
[171] ibid 45.
[172] ibid 46.
[173] ibid.
[174] ibid 48.

duties imposed on it by the same law.'[175] It is an admission of the contextual and political nature of the normative position. Sovereignty is reduced to a mere component of the political process of state behaviour, and is, therefore, incapable of judging or controlling state behaviour at all. As Kratochwil argues, the law is unable 'to shape the political process in a distinct way, as it constitutes more or less the political process itself.'[176] Accordingly, in allying conditional sovereignty to state practice it can no longer be employed to legally determine the status of humanitarian intervention.

One can see this in the paradigmatic transition approach proposed by Tony D'Amato. Sovereignty, under such a lens, can be described as an explanatory dynamic, intended to facilitate understanding of the various complexities of the field. However, as an explanation, it is incapable of determining whether a given activity is lawful or unlawful as the paradigm derives its shape and contours from state practice. If state practice sided against humanitarian intervention, D'Amato's conception of sovereignty could not insist on its lawfulness, or vice versa. The same critique is applicable to perceptions of sovereignty as a social norm. Sovereignty becomes little more than a qualitive description of the current trend of state practice. It has no separate identity from state practice. If state practice weighed heavily against humanitarian intervention, sovereignty would be obliged to deem it lawful by its own internal logic.

This, of course, begs the question of what the current condition of state practice is with respect to humanitarian intervention. This assessment does not propel us back into considerations of the developments that were used to evidence a possible transition towards conditional sovereignty. Humanitarian intervention is a notorious and contested issue whose practice deserves to be assessed on its own merits.

The preponderance of academic and state opinion would appear to weigh against humanitarian intervention.[177] Most obviously, we have the United Nations Charter, the primary legal instrument produced by states. Article 2(4) of the Charter prohibits the use of force by a state against the territorial integrity or political independence of another state. Limited exceptions are made for self-defence and force authorised by the Security Council in accordance with its Chapter VII powers. No exception is made for humanitarian intervention − a fact which makes it difficult 'to escape the conclusion that international law forbids the use of force to rescue victims of humanitarian catastrophe.'[178]

Not to be undone by such a seemingly emphatic prohibition, scholars have attempted a novel and imaginative reading of the provision. The argument has since become well-rehearsed and need not be expounded upon at length here. Simply put, commentators proposed that the prohibition of force only attached to those military actions that seek to violate the territorial integrity or political independence of another state.[179] Given that humanitarian intervention is undertaken not for territorial acquisition or to politically subjugate a people, it escapes the confines of the prohibition of force and is, therefore, legally justified.[180]

This position, however, largely fails to convince. The International Court of Justice in the *Corfu Channel* case explicitly rejected such a line of reasoning.[181] Moreover, as Brownlie has argued, if recourse is made to the *travaux preparatoires* of the Charter, one can see that the inclusion of the terms 'territorial integrity' and 'political independence' was intended to enhance the protection afforded to developing states, rather than to detract from it.[182] Finally, when one considers the overall purpose of the Charter is to prevent conflict and to achieve international stability, a reading of article 2(4) that gave increased space for military interventions would appear incongruous.[183]

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[175] Fassbender (n 12) 118.
[176] Freidrick Kratochwil, 'How Do Norms Matter?' in Michael Byres (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 42.
[177] Jutta Brunnée and Stephen Toope, 'The Use of Force: International Law After Iraq' (2004) 53 ICLQ 785, 786.
[178] Goodman (n 1) 111.
[179] Teson, 'The Liberal Case for Humanitarian Intervention' (n 22) 110.
[180] ibid 111.
[181] *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4.
[182] Ian Brownlie, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49 ICLQ 878, 885.
[183] ibid 886.

What is worth dwelling upon in this area of argument is the insistence by some commentators that treaty provisions must be interpreted in light of conditional sovereignty and human rights. Sheeran suggests that treaties are 'living instruments' and not bound within the limits descried by the parties' original intention. Instead, human rights allows for a dynamic and evolving interpretation.[184] Equally, Reisman asserts that 'human rights are constitutive' and that other norms of international law must be interpreted in accordance with them.[185]

Why this is so intriguing is that it provides a further example of the incoherence described by Koskenniemi. It blends descending arguments of morality and quasi-natural law with the ascending argument of state practice enshrined in the UN Charter. Consequently, we are presented with the same quandary facing conditional sovereignty but reversed. State practice, as a means of generating law, becomes subservient to a normative goal, and seemingly incapable of contradicting it. This normative objective, as discussed in this section, is then susceptible to accusations of subjectivity, prompting a repetition of the philosophical debate.

Leaving discussion of the UN Charter aside, the position in customary international law would equally appear to refute a right to humanitarian intervention. There were, as Greenwood argues, a number of what might be described as humanitarian interventions over the course of the latter half of the 20th Century.[186] India's incursion into East Pakistan to halt abuses being committed against the Bengalis provides the most noteworthy example. Be this as it may, it is important to recollect that none of these military activities were justified on the grounds of humanitarian intervention.[187] The element of state practice may have been present, but the all-important requirement of *opinio juris* was not. One could hardly postulate that states believed that humanitarian intervention was legally acceptable when they conspicuously declined to use it as a justification for their actions.

The intervention into Kosovo presents us with possibly the most propitious piece of evidence for an emerging right of humanitarian intervention. The UK, a member of the NATO coalition that conducted the attacks, explicitly justified its actions under the mantle of humanitarian intervention.[188] While this may have been a first for international law, prompting a furious debate as to humanitarian intervention's legality, one must remain sceptical.[189] Other prominent NATO allies, including the US and France, defended their actions on alternative grounds.[190] Interestingly, several of the allies displayed notable unease at what they had done. The German foreign minister stressed that the intervention should not set a precedent.[191] Equally, the Belgian minister, upon the resumption of Security Council control, welcomed the 'return to legality'.[192] With specific regard to the Security Council, its reaction was revealing. China and Russia rigorously denounced the intervention as unlawful. Only the US veto prevented an official condemnation.[193] Perhaps the situation we were presented with was, again, an instance of state practice, but with an insurmountable absence of *opinio juris*. This was very much the attitude adopted by scholars as eminent as Brownlie[194] and Cassese[195] who dismissed any claim that humanitarian intervention had found its way into binding law.

Finally, the doctrine's dilatory and insincere invocation to justify the invasion of Iraq in 2003,[196]

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[184] Sheeran (n 104) 102.
[185] Reisman (n 27) 873.
[186] Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' (2000) 49 ICLQ 926, 930.
[187] Christine Chinkin, 'The Legality of Nato's Action in the Former Republic of Yugoslavia (FRY) Under International Law' (2000) 49 ICLQ 910, 919.
[188] Vaughan Lowe, 'International Legal Issues Arising in the Kosovo Crisis' (2000) 49 ICLQ 934, 937.
[189] Sean Richmond, 'Why is Humanitarian Intervention so Divisive? Revisiting the Debate Over the 1999 Kosovo Intervention' (2016) 1 Journal on the Use of Force and International Law 1.
[190] Brownlie (n 182) 881.
[191] Brunno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 13.
[192] ibid 14.
[193] Antonio Cassese, '*Ex Incuria Oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Counter Measures In The World Community? (1999) 10 EJIL 23, 24.
[194] Brownlie (n 182).
[195] Simma (n 191).
[196] Vaughan Lowe, 'The Iraq Crisis: What Now?' (2003) 52 ICLQ 859, 865.

and Russia's intervention into Georgia in 2008,[197] produced an enormous amount of international scepticism of humanitarian intervention. The creation of R2P, with the drafters' strenuous insistence that the concept was distinct from humanitarian intervention, would appear to indicate the international community's rejection of humanitarian intervention.[198]

Thus, to summarise this section, allying sovereignty with state practice ultimately fails to render humanitarian intervention lawful. If the contention that conditional sovereignty can effect legal change is to remain coherent, it is ultimately obliged to return to arguments of liberal philosophy, which, as we have already seen, are weakened by criticisms of subjectivity and ambiguity.

6 SOFT SOVEREIGNTY AND HUMANITARIAN INTERVENTION

With the discussion of sovereignty and humanitarian intervention coming full circle, we would appear to have reached an impasse. If sovereignty remains a dialogue of political philosophy its ability to determine questions of legality will be subverted by accusations of subjectivity. Attempting to circumvent this issue by anchoring the conditional perspective of sovereignty to the firmer grounding of state practice is, however, incoherent and ultimately unable to legalise humanitarian intervention.

In response to this deadlock, it is submitted that sovereignty can provide a useful conceptual tool in the assessment of humanitarian intervention's legality if it is reconceived. As Kratochwil admonishes, we will find no solution to an issue if we 'accept the terms in which the dilemma is posed.'[199] In appreciation of this, instead of insisting that sovereignty is a legal rule and inviting criticisms of unworkable subjectivity, it is submitted that it can be perceived as a guiding political principle. What this paper proposes, therefore, is a revised understanding of the concept, which we shall term soft sovereignty.

To provide a general overview of our proposition, soft sovereignty has two fundamental aspects. The first of which addresses the nature and constitution of sovereignty. In this regard, the inherent political nature of sovereignty is recognised and given primacy. It is conceived as the common political understanding, or organising idea, that informs and structures interstate relations. Accordingly, its content is argued to be distilled from, and representative of, the prevailing political values and cultures that characterise the international community. In appreciation of this, the precise tenets of sovereignty are not frozen. Instead, soft sovereignty is seen as a fluid concept that evolves in consonance with the developments exhibited by international society. The second aspect of the doctrine clarifies sovereignty's relationship with international law. The assumption that sovereignty can determine disputes of legality is abandoned. Under soft sovereignty, the doctrine only enjoys the capacity to guide such assessments and suggest what should be considered lawful or unlawful. It becomes, in effect, a standard of appropriateness.

The appreciation of these two aspects lead to the understanding of sovereignty being 'soft'. As with a soft-law instrument, sovereignty is indicative of political agreement and a desired pattern of behaviour, but is ultimately incapable of promulgating binding obligations.

In what follows, we will examine the component parts of soft sovereignty in detail, arguing that the focus upon the doctrine's political nature, and the formulation of it as a guiding principle, provides a more accurate reflection of sovereignty's history and practice. Further, while previously being unworkably subjective or incoherent, it shall be argued that our reconceptualisation of sovereignty provides a useful contribution to the discussion of humanitarian intervention's legality and a principled explanation of state practice in this area.

6.1 The Nature of Sovereignty

Turning our attention to the first branch of soft sovereignty, it is submitted that the political aspect of sovereignty should be recognised and given primacy. In making this argument, the inherent political nature of the concept is brought starkly into focus when one examines the emergence of sovereignty and the development of the international community.

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[197] Glanville (n 52) 157.
[198] Chandler (n 148) 65.
[199] Kratochwil (n 176) 45.

The doctrine of state sovereignty, Allott informs us, resulted from the 'self-ordering' of states.[200] This refers to a process whereby the mutual political desires between states manifest themselves in an organising idea that structures and controls behaviour within the international community.[201] From the Peace of Westphalia, states began conducting their foreign policy with the common understanding that each nation was at liberty to manage its internal affairs as it saw fit. Thus was born the doctrine of state sovereignty.[202] The advent of conditional sovereignty, if it could be sufficiently corroborated by state practice, would represent the latest manifestation of this process. The idea of political self-ordering is echoed by Hekir, who identifies the various traditions of natural law and state sovereignty as 'corresponding to particular conceptions of interstate relations'.[203] The evolution and transition of these traditions are indicative of the 'the changing character of politics'.[204]

The understanding one can glean from such commentary is that the terms 'sovereignty' and 'natural law' are representative of a core political understanding between states that organise international relations and activities. The content of this central ideal develops in accordance with the changing international political culture, prompting the name that is ascribed to it to equally alter over time. Consequently, the appellation that attaches to this core can be characterised as an evolving political label.

This concept of a core organising idea can be supported by the writings of Dworkin. He describes the principle of 'salience' as forming the 'philosophy' of international law.[205] The concept of salience constitutes a shared ideal or practice held by the majority of states, that defines the nature and identity of the community and its law.[206] In the 15th century, this ideal was Christianity, which facilitated the development of rules such as the 'Just War' doctrine.[207] Dworkin argued that salience was lost when the international community expanded and Christianity ceased to exercise a significant function in interstate relations.[208] However, it is perhaps more accurate to argue that, with the advent of the Peace of Westphalia, the label of this ideological core transitioned to state sovereignty. Christianity may have been a more detailed and rigorous doctrine than the concept of state sovereignty, but this does not defeat the fact that sovereignty emerged to represent the core value and understanding that interstate relations were built upon.

In appreciation of this, one can suggest that sovereignty is naturally open to revaluation and revision as the political environment of the world changes. Our concept of soft sovereignty thus brings us close to the previous discussion of conditional sovereignty justifying itself by reference to state practice. One might recall the comments of D'Amato and Ashley, asserting that the content of sovereignty must be reflective of the trends displayed within the global community. However, these authors made the fundamental error of then insisting on sovereignty's ability to effect legal change. This brings our discussion to the second aspect of soft sovereignty.

6.2 Soft Sovereignty as a Guiding Principle

With sovereignty being recognised as an inherently political doctrine, it must be carefully detached from direct determinations of legality if it is to avoid criticisms of subjectivity and incoherence. Accordingly, soft sovereignty should be perceived as a principle, or an idea, that states would strive towards and be guided by, but would not be capable of determining legality in its own right. As Dupuy argues, law would have an 'orientation, a direction', 'a goal against which failures and setbacks, but also progress, could be measured.'[209]

In justifying this interpretation of sovereignty, the writings of D'Aspremont are instructive. He stresses that for law to operate effectively it requires common

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[200] Allott (n 36) 32.
[201] ibid.
[202] ibid 77−78.
[203] Hekir (n 93) 32.
[204] ibid.
[205] Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41(1) Phil & Pub Aff 2, 12.
[206] ibid 14.
[207] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2001) 48.
[208] Dworkin (n 205) 15.
[209] Pierre-Marie Dupuy, 'International Law: Torn between Coexistence, Cooperation and Globalization' (1998) 9 EJIL 278, 289.

standards and formalisation.[210] In the absence of such things, international law will become little more than 'a platform for political debate where concepts have no meaning but that given by their users.'[211] Law would be akin to a 'henhouse'[212] or a 'Tower of Babel'.[213] As outlined above, sovereignty is an assimilation of political values that are amorphous and contested. Therefore, its discussion can be characterised as a political dialogue. In appreciation of D'Aspremont's apprehensions, such a concept will inevitably generate confusion if we continue to insist on its capacity to affect legal change.

The prediction of the debate ultimately devolving into a 'henhouse' is aptly illustrated by a recurring trend in the academic literature of simultaneously declaring humanitarian intervention to be lawful and unlawful. Hurd, for example, contends that 'international law contains both positons at once';[214] Stahn argues that 'the stance on intervention is to some extent a question of choice'.[215] Roberts denies that the question of whether humanitarian intervention is lawful can be answered with a simple yes or no, and so on.[216] Such is the ambiguity of sovereignty when faced with questions of lawfulness that many commentators have despaired of it, declaring that 'we should abandon so protean a notion'.[217]

Besides the issue of indeterminacy and confusion, it is submitted that perceiving sovereignty as a guiding principle provides a more accurate reflection of state practice and the reality of international society. Academic literature has frequently drawn attention to the prolific violations of sovereignty over time, and expounded the accusation that the doctrine may never have existed in the first place.[218] To provide an ideal example, Piirimae has characterised sovereignty as the 'Westphalian myth'.[219] She comments that the majority of states throughout history have lacked the strength to enforce their claim to sovereignty, with the militarily and economically 'powerful states habitually intervening in the affairs of others'.[220] It is true enough that the annals of history are replete with examples of sovereignty being violated. The Spanish War of Succession, that saw the dynasties of Europe fight over the appropriate person to sit on the Spanish throne;[221] the French Revolutionary wars, in which the French sought to carry the principles of her Revolution to the rest of the world;[222] and the remapping of Europe at the Congress of Vienna following the abdication of Napoleon,[223] are to name but a few examples.

However, the inability of state sovereignty to consistently accord with the actualities of state practice is only problematic if we continue to believe that the norm is an absolute legal rule, rather than as a political guiding principle. This perspective is supported by the writings of Krasner. In reaction to the discrepancy between doctrine and historical practice, Krasner is moved to characterise sovereignty as 'the dominant logic of appropriateness for organising political life'.[224] Under this analysis, sovereignty provides an expected standard of behaviour between states that is recognised as mutually beneficial. However, as Krasner notes, the concept displays a flexibility to accommodate the occasional, and perhaps inevitable, transgression by a powerful state actor.[225] This

[210] Jean D'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato' (2009) 20 EJIL 911, 916.
[211] ibid 917.
[212] ibid 916.
[213] ibid.
[214] Ian Hurd, 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World' (2011) 25 Ethics & International Affairs 293, 308.
[215] Carsten Stahn, 'Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and What the Law Ought To Be' (2014) 19 JC & SL 25, 34.
[216] Roberts, 'The So-Called 'Right' of Humanitarian Intervention' (n 30) 3.
[217] Hent Kalmo and Quentin Skinner, 'Introduction: A Concept in Fragments' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of A Contested Concept* (CUP 2010) 1, 1.
[218] Ian Ward, 'The End of Sovereignty and the New Humanism' (2003) 55 Stan L Rev 2091, 2094.
[219] Partel Piirimae, 'The Westphalian Myth and the Idea of External Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of A Contested Concept* (CUP 2010) 64.
[220] ibid 65.
[221] James Falkner, *Spanish War of Succession 1701−1714* (Pen & Sword Military 2015).
[222] Christopher Hibbert, *The French Revolution* (Penguin 1982).
[223] Adam Zamoyski, *Rites of Peace: The Fall of Napoleon and the Congress of Vienna* (Harper Perennial 2008).
[224] Stephen Krasner, 'The Durability of Organised Hypocrisy' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of A Contested Concept* (CUP 2010) 96.
[225] ibid.

interpretation of sovereignty is shared by Hurd, who contends that the concept is akin to a 'political resource' that is utilised in interstate interactions.[226] Further, and more importantly, he argues that it should not be employed to 'distinguish between lawful and unlawful behaviour'.[227]

The formulation of soft sovereignty seeks to reflect such insights into international behaviour. Thus, in accordance with Krasner's notion of a 'logic of appropriateness, sovereignty can suggest that a given action is unlawful or should be denounced, but minus positive legal rules to the contrary, a state is not imperatively obliged to conform.

6.3 Soft Sovereignty and Humanitarian Intervention

Characterising sovereignty in the manner illustrated above provides an ideal explanation for state practice in the area of humanitarian intervention. As has been previously stated, there have been various interventions over the course of the 20th Century. However, these military engagements have not been meet by uniform denunciations of illegality.[228] The perceived ethical imperative for action, and the absence of obvious parochial political designs, would appear to exert a clear influence over the international community's reaction.[229] For example, the Indian intervention into East Pakistan was received with approbation, while the Vietnamese invasion of Cambodia was rigorously denounced.[230]

Franck has promulgated the term 'exceptional illegality' to describe this practice.[231] According to Franck, a case of humanitarian intervention will be, as a matter of protocol, deemed illegal, but the moral necessity of the mission may excuse the offending state from punishment or sanction.[232] The 'jury' of UN members will assess the moral validity of a claim of humanitarian intervention and react accordingly.[233] Such a policy may, for want of better words, be characterised as 'turning the other cheek'.

Wheeler has criticised this approach to humanitarian intervention as being unprincipled, arguing that it 'serves to highlight the normative limitations of international law'.[234] Our formulation of soft sovereignty, however, provides a rebuttal to such commentary. As we have argued previously, the content of sovereignty is still characterised by its traditional features of non-intervention and the maintenance of international stability. The developments of IHRL and R2P, while impressive, are insufficient to represent a transformation of the political order. Therefore, sovereignty, as it presently stands, suggests that humanitarian intervention should be considered illegal. However, this does not pose an imperative prohibition, and a state may decide to ignore it and hazard the anger of the international community. This, therefore, explains why instances of humanitarian intervention are typically denounced as illegal, and states refrain from invoking the concept as a defence for their actions. Equally, since sovereignty is not a strict legal rule, in moments of particular moral exigency, the international community (while still holding humanitarian intervention to be illegal) may legitimately demur on issuing statements of condemnation.

If the political environment continues to develop, and the tenets of conditional sovereignty become readily accepted between states, then sovereignty might be capable of suggesting that humanitarian intervention is lawful, and that the prohibition of force contained within the UN Charter should be amended. One can see an example of this in the works of Teson. While prematurely adopting the conditional perspective of state sovereignty, he strenuously argues in favour of the revised reading of article 2(4) discussed above. However, Teson concludes by suggesting that his comments be taken as a 'de lege ferenda' proposal.[235] Although no doubt not what the author intended, this is precisely the function conditional sovereignty could serve.

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[226] Hurd (n 214) 294.
[227] ibid 310.
[228] Greenwood (n 186) 898.
[229] ibid 899.
[230] Abiew (n 2) 69.
[231] Thomas Franck, 'Interpretation and Change in the Law of Humanitarian Intervention' in JL Holzgrefe and Robert Keohane (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003) 217.
[232] ibid 227.
[233] ibid 229.
[234] Wheeler (n 71) 41.
[235] Teson, 'The Liberal Case for Humanitarian Intervention' (n 22) 111.

The development towards conditional sovereignty may occur sooner, later, or never. It is entirely contingent on the political agreements of states, and it is not for this paper to engage in predictions of what the future of international law might hold. We can only speak for the present. In that regard, state practice does not indicate that the core values of the international community have undertaken the relevant transition. The content of soft sovereignty is still characterised by its traditional features of non-intervention and stability, and must, therefore, reject the legality of humanitarian intervention.

7 CONCLUSION

To summarise our discussion, we have seen that the doctrine of sovereignty is deeply subjective, becoming a locus for competing political agendas and philosophies. In such a form, it would be highly inappropriate to utilise sovereignty as a justification for humanitarian intervention's legality. Attempts to circumvent this criticism by allying conditional sovereignty to state practice proved to be unconvincing and fundamentally incoherent. On our final analysis, we proposed the revisionist concept of soft sovereignty. Under this model, sovereignty is recognised as a political guiding principle, and representative of the core values that characterise international society in a given age. It cannot assert definitively that humanitarian intervention is lawful, but it might be capable of suggesting that it should be. As stated above, sovereignty is yet to undertake the transition into its conditional form, and must still argue against the legality of humanitarian intervention.

While it is hoped that the understanding of sovereignty presented in this paper will help to clarify the concept, or at least provide the grounds for further research, it must be admitted that the position this discussion takes can be criticised. Most obviously, if sovereignty is recognised as a political guiding principle, then the creation of a rule of humanitarian intervention is entirely at the discretion of states. As mentioned earlier, humanitarian intervention is a particularly divisive doctrine within the international community, and it is doubtful that the necessary consensus will be arrived at in order to establish the rule any time soon. This is perhaps most powerfully demonstrated by the formulation of R2P. Despite being a soft-law instrument and enjoying no legal force, states were only able to consent to its tenets when the use of force was restricted to that authorised by the Security Council − the position under international law as it currently stands.[236]

One might, understandably, be frustrated at this, and contend that the formulation of soft sovereignty does little, if anything, to protect individuals from humanitarian catastrophes. While such a moral presentiment is admirable, it should not be taken too far. If the international community cannot reach the necessary consensus by which to establish such a rule, it should be taken as a signal that the world is not ready for it. To invoke it prematurely could potentially cause friction, hostility, and even conflict, between states.[237] De Wet makes a similar point with respect to *jus cogens* norms being able to defeat pleas of state immunity.[238] While the moral good of this development cannot be denied, the level of consensus has not yet progressed to a point where such a rule would be tenable. If individual nations suddenly began to indict and seize the leaders of other states, the effect on interstate relations could be dangerously destabilising.[239] One would be well served to recollect the warnings offered by Weil, that in creating and implementing the 'law of tomorrow's international society', it will fail the community of today.[240]

Before concluding, there may be a deeper issue at play in this debate that is worth reflecting upon. Our conception of soft sovereignty could be criticised for placing states in front of notions of humanity and morality. One can recount Koskenniemi's descending arguments that would denounce such suggestions as unacceptably reducing law to the political desires of states − a mere apology for law than anything else. State practice may indeed allow political designs to shape the progress of law but perhaps in asserting the supremacy of descending arguments, we are merely simply substituting the political desires of states for the political desires of academics. Commentators

[236] Alex Bellamy, 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 22 Ethics and International Affairs 143, 152.
[237] Cassese (n 193) 26.
[238] Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law' (2004) 15 EJIL 97, 120.
[239] ibid 121.
[240] Weil (n 70) 442.

frequently discuss the biases of states and international organisations, and the methods by which they work towards their own ends. However, Mayer questions whether 'international lawyers are not also pushed by a sort of class instinct to pursue our own interests'.[241] D'Aspremont answers this in the affirmative. He identifies a strong vein of hubris amongst current commentators that holds that 'scholarship makes law and no longer the law that makes scholarship'.[242] Perhaps the institutional bias of international lawyers is an inflated belief in our ability to shape the world, and a desire to do so. With the employment of normative tools, shaped by notions of political philosophy, scholars can, in effect, dictate legality and what the law should be.

Such suppositions, whether true or not, are a fantasy, and scholars must recognise their own limitations of affecting social change and engineering a better international community. The desire to prevent humanitarian disasters is entirely commendable, but scholars cannot succumb to impatience in the face of state inertia and concoct ways in which humanitarian intervention can be considered lawful. As Weiss[243] and Schreuer[244] assert, states remain the dominant centres of power in the world, and monopolise the international stage. For law to be meaningful it must be tied to that power.[245] We can devise ingenious new dynamics of sovereignty and theoretical paradigms and insist that they are the law, but if the powers of the world ignore such contrivances then they are little better than meaningless.[246] This is not to say that scholars should be 'handmaidens' to states.[247] They can still be a voice for change. However, as Karl Marx once commented, 'words cannot change the old order, but only the ideas of the old order'.[248] We can work towards changing the ideas of states, but the task falls to them to actually change the world.

[241] Mayer (n 160) 547.
[242] Jean D'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 EJIL 1075, 1083.
[243] Thomas Weiss, *Humanitarian Intervention* (3rd edn, Polity Press 2007) 39.
[244] Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm For International Law?' (1993) 4 EJIL 447, 453.
[245] Jose Alvarez, 'State Sovereignty is Not Withering Away: A Few Lessons for the Future' in Antonio Cassese (ed), *Realising Utopia: The Future of International Law* (OUP 2012) 34.
[246] Colin Warbrick, 'The Sovereign Equality of States' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge 1994) 222.
[247] Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 LJIL 477, 503.
[248] Gareth Jones, *Karl Marx: Greatness and Illusion* (Penguin 2017) 14.

WEBER'S LEGITIMACY, BELIEF AND LEGALITY; A FOUCAULDIAN AFFIRMATION

Samuel Bendit[*]

1 INTRODUCTION

Weber's sociological and careful empirical study of authority led him to conclude that the most widely prominent form of legitimacy in modern times is the belief in legality. His careful differentiation between 'authority' and 'legitimacy' and his observation that the former depended upon the latter was not only a perspicacious observation in Weber's own time, but it prophetically foresaw what would be the prominent form of legitimacy even to the present day.

I seek here to show that Weber's assertion that the most widely prominent form of legitimacy is the belief in legality holds good, from the point of view of a more modern analysis of legitimacy and authority; that of Foucault. Foucault's 'disciplinary society' adds to the Weberian forms of legitimacy by showing how, as belief in legality weakens in post-modernity, the State has had recourse to new means to buttress its authority, relying upon a belief in legality to do so. This paradox of weakening legality combined with strengthening discipline and punishment by force of the authority to which it gives rise only serves to emphasise Weber's basic thesis.

2 WEBER'S LEGAL RATIONAL AUTHORITY

Max Weber's pioneering sociology and his political economy accompanied his close interest in how society functions and order is maintained within it. One of his great contributions to politico-legal thought were his three forms of authority, each of them 'ideals'. Traditional authority, he said, was derived from the Monarch (often God); and charismatic authority (e.g. Napoleon, the memory of whom was still fresh in the Weberian era) from the leader's endowments. Weber's third form was legal rational authority. He regarded this as the most prominent form and the one which during his era had achieved domination (*Herrschaft*) over society.[1] Domination holds the characteristics of what the most prominent form of legitimacy ought to possess. In Weber's terms, it may be derived from voluntary, 'diverse motives of compliance'[2] as long as the result is a 'belief in its legitimacy.'[3]

Weber's thinking was heavily influenced by the Enlightenment thinking of the century preceding his birth, and the rationalism, secularisation and growth of capitalism that ensued.[4] He argued the most prominent form of legitimacy, or the dominating force, had become legal rational authority.[5] This form, unlike the 'traditional' or 'charismatic', did not derive from the monarch or from a prophet, but from following an impersonal order of 'abstract rules'[6] on the grounds of their 'expediency'[7] or their instrumental 'rationality'[8] possessing characteristics popular amongst those contemporaries who espoused Neo-Kantian principles. The 'law, like God was simply given.'[9] Legitimacy no longer relied upon a substantive value judgment: it could be drawn from the positive nature of law. The influence of Frederick Nietzsche is also apparent in Weber's observations of society. Nietzsche's suggestion that 'God is Dead … and we have killed

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[1] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (first published 1922, Guenther Roth and Claus Wittich tr, University of California Press 1978) 53.

[2] ibid 212.

[3] ibid.

[4] Anthony Kronman, *Max Weber* (Stanford University Press 1983) 72.

[5] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Scribners 1976) 182.

[6] Weber, *Economy and Society* (n 1) 217.

[7] ibid.

[8] Jurgen Habermas, *Legitimation Crisis* (Blackwell Publishers 1992) 99.

[9] Terry Eagleton, *The Trouble with Strangers: A Study of Ethics* (Wiley-Blackwell 2009) 104.

him'[10] correlates accordingly with Weber's view of the world as 'institutionalised'.[11]

Weber seems to have derived his legal rational authority in large from an examination of the historical factors which led to its subsistence. The drafting of the Weimar Constitution (a drafting committee for which Weber advised) signalled movement towards a belief in legality derived from a monistic legal code. The Westphalian[12] concept of national sovereignty was at its pinnacle.[13] Religious attitudes also played a part. The demise of a polytheistic structure of religion in the 18th century, Weber considered, left a strong Protestant ethic embedded in society and the notion that homage is paid to God through hard work, discipline and obedience.[14]

The spirit of capitalism had a most profound effect on the manner in which legitimacy was derived. The family model of business had almost collapsed and jobs had become systematised and menial.[15] A consequence was the exponential growth of factory workers who understood little of the monolithic, impersonal system of which they were unconsciously a part.

Weber was not alone in observing a decline in traditional forms of work accompanied by the rise of the capitalist entity. Marx criticised the newly discovered 'logic of the institutions'.[16] Weber however, while maintaining that this impersonal order derived legitimacy from legality, did not take this theory of rationalism as far as did Marx towards a socialist state bureaucracy. He remained convinced, unlike Marx, that the capitalist machine had the potential to, in essence, run itself. The 'bureaucratisation of controls, ultimately backed up by the state … guarantees the right to work', he said.[17] The crucial effect of this was that society was subjugated to 'the technical and economic conditions of machine production which today determine the lives of all the individuals who are born into this mechanism'.[18] Society had, in effect become institutionalised, reliant upon structures created by increasingly internalised governance. Individuals subsequently became subservient to a system they understood little of, yet paradoxically relied heavily upon. Legal norms dictated the method by which people lived their lives. As a natural consequence of this, Weber's central thesis focussed on the rise of the bureaucratic State.

This embodied characteristics of instrumental rationalisation (*zweckrationale*)[19] which sought to rely on bureaucratic institutions to establish 'conditions'[20] or means for the attainment of the actor's own calculated ends. The centralised nature of establishing social and legal norms was derived purely through positive legal mechanisms and as a result required the state to be organised as a bureaucracy in order to best achieve its aims. Such a bureaucracy is characterised by a clear hierarchy, the pinnacle of which was not an individual but the impersonal order itself.

The logic with which these new institutions found themselves imbued, (Weber's focus being on the factory and the military) sought to bring together rationality, individualism and freedom 'in the large scale disciplinary enterprise of capitalism … and the modern therapeutic state'.[21] The disciplinary exercise which is capitalism links neatly with Michel Foucault's notion of the disciplinary society. Weber referred to this new disciplinary society as a part of 'the tremendous cosmos of the modern economic order';[22] an order which believes it has attained a level of civilisation never before achieved.'[23] This prophesises an order which bears striking resemblance to Foucault's concept of the role of legality in post-modernity. A decline in traditional legality has been

[10] Lezek Kolokowski, *Why is There Something Rather than Nothing* (Penguin Books) 230.
[11] Habermas (n 8) 97.
[12] The Treaty of Westphalia 1648.
[13] Rolf Schwarz and Oliver Jittersonke, 'Divisible Sovereignty and the Reconstruction of Iraq' (2005) 26 TWQ 649, 661.
[14] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (T Parsons tr, Geroge Allen & Unwin 1930) 43.
[15] John O'Neill, 'The Disciplinary Society: Weber to Foucault' (1986) 37 British Journal of Sociology 42, 47.
[16] ibid 43.
[17] ibid 43.
[18] Weber, *The Protestant Ethic* (n 5) 181.
[19] Weber, *Economy and Society* (n 1) 26.
[20] Weber, *The Protestant Ethic* (n 5) 18.
[21] O'Neil (n 15) 43.
[22] Weber, *The Protestant Ethic* (n 5) 82.
[23] ibid 182.

met with the continued rise of the disciplinary society reinforcing legality's role.

3 EVOLUTION OF FORMS OF LEGITIMACY: A WEAKENING BELIEF IN LEGALITY?

The belief in legality in the late 19th century and first half of the 20th century (in Weber's life) was not strong. Foucault acknowledges as much, suggesting that society now functions 'as one historically contingent expression of much more complex networks of power relations'.[24] Consequently, traditional concepts of power have become 'durable … frequently compromised'[25] with the result that an 'understanding of sovereign legitimacy requires a more nuanced approach than in any proceeding century.'[26]

Such can be seen in the work of A V Dicey who, in his early work, famously dismissed the suggestion that Parliamentary sovereignty (i.e. the absolute legal power of Parliament) lacks any form of limitations from a legal perspective. 'Any Act of Parliament', he said 'will be obeyed by the courts [and] there is no person or body of persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament, or which ... will be enforced by the Courts in contravention of an Act of Parliament.'[27] However, Dicey's views subsequently appeared in stark contrast to his earlier observation of legality's place, suggesting a 'decline in reverence for the rule of law.'[28] This manifested itself through regular additions to statute which Dicey argued, did not possess the moral requirement law ought to have.[29] This led to what Dicey regarded as a 'new doctrine of lawlessness' where 'respectable persons' could justifiably break the law in order to pursue some end which to him may seem just, regardless of the legal doctrine.[30]

Even Dicey, perhaps the most fervent of the believers in legality, conceded the decline. The political sphere has witnessed similar transgression throughout this period. Barber goes beyond Dicey, suggesting that after the decision in *Factortame*[31] Parliamentary sovereignty is not merely damaged, but fictional.[32] Devolution of centralised authority to Scotland in 1998 and in 2004, and numerous recent referendums, including that concerning the withdrawal of the United Kingdom from the European Union, suggests a deterioration of traditional beliefs and obedience to a monistic structure of governance.

Dicey is by no means alone in his observations. Charles Taylor similarly suggests that 'some important decline has occurred [and] the whole modern era from the seventeenth century is frequently seen as the time frame of decline.'[33] Taylor argues that this occurred as a result of the growth of instrumental rationality (or *zweckrational* as suggested by Weber)[34] and was evidenced by a progressive detachment from 'older moral horizons' such as legal order possessing substantive quality.[35] Indeed Hobbes' *Leviathan*[36] appears a distant memory from a Weberian analysis of authority. Such belief has led to a discrediting of those rituals and norms which possessed more than merely instrumental significance.[37] Cost benefit analysis and the drive to maximise output economically has 'eclipsed'[38] our previous beliefs in a grounded order, which instead are 'up for grabs'.[39] As Marx forewarned, 'all that is solid melts into air.'[40]

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[24] Charles Barbour and George Pavlich, *After Sovereignty: On the Question of Political Beginnings* (Routledge 2010) 6.
[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 Barbour and Pavlich, *After Sovereignty* (n 24) 97.
[27] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan & Co 1889) 38.
[28] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics 1982) lvff.
[29] ibid lvff.
[30] ibid lix.
[31] *R v Secretary of State for Transport ex Parte Factortame Ltd (No 2)* [1991] 1 AC 603 (HL).
[32] Nicholas Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 ICON 152.
[33] Charles Taylor, *Sources of the Self* (CUP 1991) 64. See also Charles Taylor, A Secular Age (3rd edn, Harvard University Press 2007).
[34] Weber, *Economy and Society* (n 1) 26.
[35] Taylor (n 33).
[36] Thomas Hobbes, *Leviathan* (first published 1651, OUP 1909).
[37] Taylor (n 33) 5.
[38] ibid.
[39] ibid.
[40] Karl Marx & Friedrich Engels, *The Communist Manifesto* (first published 1848, Penguin 2015) ch 1.

Weber appears to have correctly prophesised the effect legal rational authority, and in turn the self-executing nature of instrumental rationality would have on society. That it would 'drain life of its enchantment'.[41] Taylor warns that 'once society no longer has a sacred structure … modes of action are no longer grounded in the order of things.'[42] Further rationalisation brought with it a disregard for orders and structures beyond those which helped achieve the most expeditious response. Further enlargement of such a project, Taylor warns, 'threatens to take over our lives.'[43] Such a premonition accords with the dystopian accounts of Nietzsche, Fukuyama and indeed Hegel, who suggest that these 'last men'[44] on the march towards the end of rationalisation would bring about the end of history, the 'entire historical process culminating in the realisation of freedom in concrete political and social institutions.'[45]

A symptom of this is a diminished belief in legality's immanent nature. Foucault observes that 'the normal has overtaken the ancestral'.[46] Those rules which require a rational validity claim that can be tested and criticised independently have been replaced by a reliance on those rules which possess instrumental rationality.[47] Habermas suggests accordingly that our belief in legitimacy, has 'shrunk into that of legality'.[48]

The belief in a law, derived purely from instrumental value possesses limitations which have become apparent over the last century. It has lost a claim to substantive validity, with the contemporary shell of the legal system today possessing purely 'psychological significance',[49] 'masking' the true ordering of society.[50] Weber referred to this as akin to an 'Iron Cage',[51] the beaurocratisation of control as the 'polar night of icy darkness.'[52] While this mask has been shaken over the previous two centuries, it protects a belief in legality which cannot be taken off. Behind it no longer lies the traditional substantive forms of legitimacy, but a much more coercive force.

4 LEGITIMACY THROUGH COERCION

Michel Foucault (1926–1984) wrote almost a century after Weber, in a post-Nazi world and in the wake of the two world wars. In this sense, the context in which these two men wrote could not have been more different. The important events which occurred between the times in which they lived saw a significant movement away from traditional structures of authority. It will be shown, however, that a belief in legality remains, albeit enforced through different mechanisms.

Foucault acknowledged that the concept of legality had suffered a severe decline,[53] the period since the 18th century being one of 'juridical retreat.'[54] However, the space which occupied this gap was not necessarily one lacking in legal qualities.[55] A paradox in Foucault's approach is that while he seeks to displace legality, his disciplinary society, with all its legal measures directed at controlling individuals and their interactions, paradoxically drew heavily on a belief in legality to achieve these means. Foucault appears to build on Weber's assessment of 'disciplinary qualities [being] coterminous with a proliferation of legality'.[56] Foucault achieves this by tracing what he sees as control over the citizen having been internalised, obedience today being derived through abiding by a set of normalising judgements.[57] While today these need not always possess legal form, they remain sanctioned by the state and its legal

[41] Weber, *The Protestant Ethic* (n 5) 182.
[42] Taylor (n 33) 5.
[43] ibid.
[44] Frederick Nietzsche, *Thus Spoke Zarathustra* (Wordsworth 1997) 5.
[45] Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992) 60.
[46] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Vintage Books 1979) 193.
[47] Habermas (n 8) 98.
[48] ibid 98.
[49] ibid 97.
[50] ibid 98.
[51] Weber, *The Protestant Ethic and the Spirit of Capitalism* (n 14) 181.
[52] Max Weber, *Political Writings* (Ronald Speirs tr, CUP 1994) xvi.
[53] Tom Frost, 'Agamben's Sovereign Legalization of Foucault' (2010) 30 OJLS 545, 549.
[54] ibid 551.
[55] Francois Ewald and Marjorie Beale, 'Norms, Discipline and the Law' in Robert Post, *Law and the Order of Culture* (University of California Press 1991) 138.
[56] Frost (n 53) 551.
[57] Michel Foucault, *The History of Sexuality, Volume One: An Introduction* (Robert Hurley tr, Penguin 1978) 144.

apparatus, themselves products in part at least of a belief in legality.

Foucault's principal work on this topic, *Discipline and Punish: The Birth of the Prison* (1975) shows the change from the state's punishment against the physical body (i.e capital and corporal punishment) to assume a psychological form.[58] Part of this has involved, Foucault observes, punishment having become internalised, the 'gloomy spectacle of punishment dying out' and instead incorporated into the system of governance.[59] The focus of Foucault's analysis is control; to punish less, perhaps, but certainly to punish better. His work resonates with many of the powerful themes in Anthony Burgess' *A Clockwork Orange*,[60] published just 13 years earlier, and especially the behaviour modification technique it portrays and its ultimate failure.

Foucault's analysis of the development of discipline accords with Weber's rise of the bureaucratic state. It highlights the strength of the historical belief in legality and with its decline, offers insight into the state's reliance upon legality to fill the gap by increasing its control. Discipline of this organised kind requires a bureaucratic apparatus effectively to impose and maintain control. Well-directed punishment requires organisation and careful administration. It does not involve 'mere' public flogging or execution, but large, complex and hierarchal institutions with elaborate means of inflicting punishment: 'surveillance, rather than ceremony'.[61] The examination (of students in schools, of patients in hospitals and so forth, all of which Foucault gave attention to) is a type of control that combines 'normalising judgment' with 'hierarchical observation'.[62]

Foucault's concept of legitimacy necessarily goes beyond one derived purely from traditional sovereign authority. Primarily, it secures belief through the involvement of the individual in the political process. Foucault referred to this as 'Biopower'.[63] As Weberian legal rational authority continued to expand beyond the 'threshold of modernity',[64] it incorporated 'life into its political calculations.'[65] It brought with it mechanisms responsible for regulating life, beyond the factory which Weber initially described.[66] Beyond general observations as to growth in the documentation of the population, regulation of public health and population dynamics, the product of this shift was the growing importance of the societal 'norm'. While not providing the base from which legality is derived today, the norm established standards by which society was expected to abide. The norm 'partitioned an area the laws left empty' and filled them with hierarchised, homogenised standards by which to exclude those who did not achieve them.[67] The demise of traditional sovereign authority meant discipline was administered in less intrusive, less spectacular ways than in previous centuries, through setting standards to be achieved. While normalising judgement does not necessarily possess legal characteristics, it provides a means by which a belief in legality is maintained.[68]

A secondary disciplinary method which relies on normalising judgement is 'hierarchical observation'. The bureaucratic structure depends not on mere force, or indeed on charismatic or traditional forms of authority, but on legality achieved through observation. Such is apparent in much of Foucault's work on the disciplinary state, echoing that of Weber, when attention is turned to the institutions where a belief in legality appears most evident. Weber's observations focussed heavily on the changing disciplinary structure of the factory during the rise of legal rational authority, which relied on mechanisms akin to Foucault. It saw the 'division [and supervision] of labour … fines; bells and clocks; money incentives; preaching and schoolings … new labour habits were formed, and a new discipline was imposed.'[69] Foucault

[58] Foucault, *Discipline and Punish* (n 46).
[59] ibid 8.
[60] Anthony Burgess, *A Clockwork Orange* (Heinemann 1962).
[61] ibid 193.
[62] ibid 170.
[63] Michel Foucault, *Society Must be Defended, Lectures at the College De France* (David Macey tr, Penguin Books 2003) 242–3.
[64] Foucault, *The History of Sexuality* (n 57) 143.
[65] Frost (n 53) 547.
[66] Foucault, *Discipline and Punish* (n 46) 242.
[67] ibid 178.
[68] Frost (n 53) 547.
[69] EP Thompson, 'Time, Work, Discipline and Industrial Capitalism' (1967) 38 Past & Present 90.

subsequently uses the example of the prison which depends upon a legislative structure to authorise the administration of punishment and the detention of inmates. Foucault's panopticon best highlights this.[70] So too the school system requires curricula supported by law, school districts and a hierarchy devised by legislative or executive arrangements, and systems of testing and discipline that are regularised and which meet legal standards. *Isle of Wight Council v Platt* exemplifies the extent to which legal norms provide the basis for setting standards in educational establishments, even regarding trivial matters such as term time holidays.[71] Even if we turn to Foucault's example of the hospital, it too operates within a structure that necessarily depends upon a system characterised by legal arrangements: the privileges and credentials of doctors, the regulation of the medical profession, the discipline of health professionals who step outside the rules, and the laws for the administration of therapeutic substances. Foucault's studies therefore appear to 'complement Weber's formal-rational concept of bureaucracy and legal domination.'[72]

When Foucault proclaimed the death of legality, he was not proclaiming the demise of the same thing that Weber described. When we unpack Foucault's approach, we see one that it very heavily depends upon a belief in legality in order to support the heavy apparatus that authorises modern discipline and punishment.

5 CONCLUSION

Weber was correct in his time to observe a strong belief in legality as underlying legitimacy. Michel Foucault, often seen as a challenger to Weber's approach (and coming almost a century later) in many ways strengthens Weber's claim. As belief in legality has weakened, it has been used to deploy more effective punishment and discipline against citizens. This has buttressed the state's authority, and, paradoxically, drawn upon a belief in legality to effect its goals. Just as a belief in legality is thought to have weakened, it has been challenged to deliver support for yet greater measures by the state to bolster its authority and legitimacy. The belief in legality has met that challenge, and in doing so proved its enduring strength.

[70] Foucault, *Discipline and Punish* (n 46) 195.
[71] *Isle of Wight Council v Platt* [2017] UKSC 28, [2017] 1 WLR 1441.
[72] O'Neil (n 15) 45.